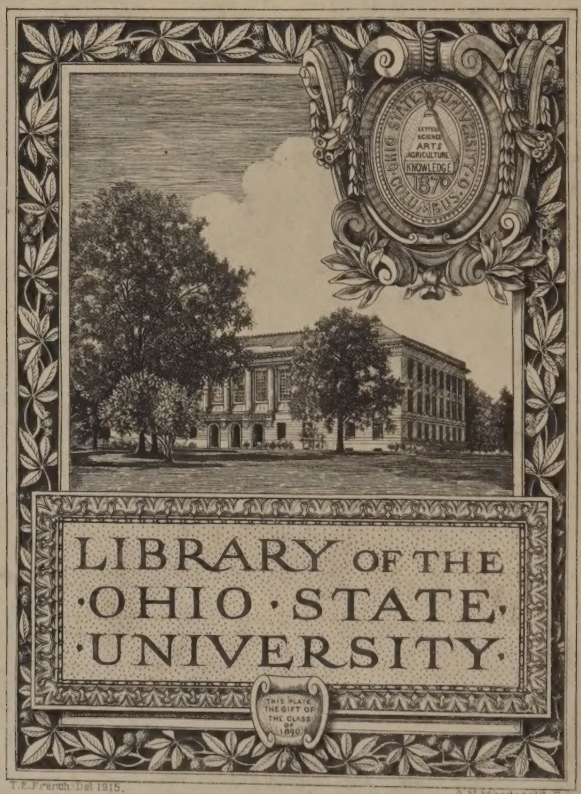

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A.N. Macdonald Sc

THE MUNICIPAL CODE OF OHIO

INCLUDING

All sections of the General Code of Ohio relating to Municipal Corporations, with all Amendments and Supplements thereto, together with complete Annotations of Decisions and all Necessary Forms.

BY

WADE H. ELLIS, LL. D.

SEVENTH EDITION

BY

EDGAR L. WEINLAND

Of the Columbus Bar

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PREFACE TO THE SEVENTH EDITION

Since the publication of the last edition of this work many amendments and supplements to the General Code, relating to municipalities, have been enacted by the Legislature. Likewise a great many decisions have been rendered affecting the municipal law of Ohio.

As in the last preceding edition, Part I embraces those sections of the General Code in Title XII, Part First, entitled "Municipal Corporations"; Part II consists of the laws relating to municipal corporations, but not contained in Title XII, Part First, arranged according to the subjects to which they relate, and as far as possible in the order in which such subjects are treated in Part I. Part III contains those provisions of the Constitution which relate directly to municipalities, with special reference to the provisions for "Home Rule".

The forms and orders of procedure have been revised and new forms added, particular attention being given to those relating to the adoption of special charters. References to the opinions of the Attorney General have also been added to the annotations.

EDGAR L. WEINLAND.

Columbus, Ohio, March 1, 1924.

258796

PREFACE TO THE FIRST EDITION

(By WADE H. ELLIS.)

The purpose of this publication is to present in convenient form all the laws of Ohio affecting municipal corporations, together with annotations of the decisions thereon, compiled to April 1st, 1903, and all forms of ordinances, resolutions and procedure in conformity with the statutes as they exist since the enactment of the new municipal code.

Part I. consists of the new code proper, and all sections of the Revised Statutes re-enacted by it, incorporated at the places where such statutes should appear if made a part of the code itself. The sections of the new code are double leaded and those of the old statutes are set in solid type. The sectional numbers at the top of each page in Part I. refer to the sections of the new code.

Part II. consists of all related statutes on the subject of municipal corporations not incorporated in the new code, nor expressly repealed by it. Many of these are doubtless repealed by implication; many others are unconstitutional, being of special application, but they are nevertheless contained herein in order that the entire body of statutes affecting the municipalities of the state may be found together.

The desirability of presenting this work for such service as it may render to the new city and village officials and to the bar of the state, at or before the time when the new municipal code goes into effect, has necessitated much haste in its preparation, and this fact is relied upon to secure a pardon for errors and imperfections.

In compiling this work the editor has been assisted by Mr. Ellis G. Kinkead and Mr. Challen B. Ellis, of the Cincinnati bar.

ABBREVIATIONS.

B. .....Weekly Law Bulletin, Ohio Law Bulletin.
C. C.....Ohio Circuit Court Reports.
C. C. (N. S.).....Ohio Circuit Court Reports (New Series).
C. D.....Ohio Circuit Decisions.
Clev. .....Cleveland Law Reporter.
C. S. C. R.....Cincinnati Superior Court Reporter.
D. .....Disney's Cincinnati Superior Court Reports.
Dayton .....Dayton Term Reports Digested.
Dec. .....Ohio Decisions Nisi Prius.
Dec. (Re).....Ohio Decisions (Reprint).
Fed. .....Federal Reporter.
H. .....Handy's Cincinnati Superior Court Reports.
Gaz. .....Weekly Law Gazette.
Goebel.....Goebel's Probate Reports.
N. P.....Ohio Nisi Prius Reports.
N. P. (N. S.).....Ohio Nisi Prius Reports (New Series).
O. .....Ohio Reports.
O. C. A.....Ohio Courts of Appeals.
O. C. C.....Ohio Circuit Decisions.
Oh. App.....Ohio Appellate Reports.
O. F. D.....Ohio Federal Decisions.
O. L. R.....Ohio Law Reporter.
O. S.....Ohio State Reports.
O. S. C. D.....Ohio Supreme Court Decisions, Unreported.
Rec. .....American Law Record.
Tappan .....Tappan's Reports.
U. S.....United States Reports.
W. L. J.....Western Law Journal.
W. L. M.....Western Law Monthly.
Wright .....Wright's Ohio Supreme Court Reports.

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WEINLAND'S EDITION OF

ELLIS' ANNOTATED OHIO MUNICIPAL CODE.

PART I.

THE MUNICIPAL CODE

CONTAINING ALL SECTIONS OF TITLE XII,
PART FIRST, OF THE GENERAL CODE.

THE MUNICIPAL CODE.

DIVISION I.

CLASSIFICATION AND CREATION.

CHAPTER 1.

CLASSIFICATION.

Sec. 3497. [Classification.][1] Municipal corporations, which at the last federal census, had a population of five thousand or more, shall be cities. All other municipal corporations shall be villages. Cities, which, at any future federal census, have a population of less than five thousand shall become villages. Villages, which at any future federal census, have a population of five thousand or more, shall become cities.[2] [96 v. 20, § 1.]

(1) **Constitutional provisions.**—The provisions of the eighteenth article of the Constitution as amended in September, 1912, continue in force the general laws for the government of cities and villages until the 15th day of November following and thereafter until changed in one of the three modes following: (1) By the enactment of general laws for their amendment, (2) by additional laws to be ratified by the electors of the municipality to be affected thereby, (3) by the adoption of a charter by the electors of a municipality in the mode pointed out in the article. State ex rel. v. Lynch, 88 O. S. 71.

Sec. 1, Art. XVIII of the Constitution, as to classification of municipal corporations, is not self-executing and the provisions of Sec. 3497 govern its execution. Murray v. State, 91 O. S. 220.

(2) **Old and new section numbers.**—Before the enactment of the Municipal Code of 1902, the laws relating to municipal corporations, including the various special governmental acts, were incorporated in Part First, Title XII, of the Revised Statutes, (§§ 1536 to 2729-11, inclusive). In the act embodying the Municipal Code of 1902, (96 Ohio Laws 20-106), most of these sections were repealed and there were substituted for them the sections of the Municipal Code numbered from 1 to 231. A large number of sections in the former Title XII, however, were not repealed, nor were corresponding sections of the new code substituted, but, instead, the sections thus left unrepealed were incorporated into the new code by reference, which specifically retained such sections in force. A few unimportant sections in former

Title XII, mostly inconsistent with the code provisions, were neither repealed nor incorporated by reference.

Amendments to the Municipal Code were made from time to time, either by amending particular sections of the act of 1902, or by amending the sections of the Revised Statutes incorporated by reference in the act of 1902.

Prior to the enactment of the present General Code, therefore, the Municipal Code proper consisted of the 231 sections of the act of 1902 with their amendments and supplements and those sections of the Revised Statutes which had been specifically retained in force by that act.

In the early editions of this work, Part I, entitled "The New Code Proper," consisted of all the Municipal Code sections and all sections of the Revised Statutes specifically re-enacted by that code, incorporated at the places where such statutes should appear if made a part of the act itself.

In the edition of Bates' Revised Statutes, issued subsequent to the act of 1902, the Municipal Code sections, with all sections of former Title XII, which had not been repealed by the new code, (and the amendments and supplements to both), were renumbered by the editor and designated as §§1536-1 to 1536-1008, inclusive.

In the decisions of the courts where the code or its re-enacted sections are considered, the sections cited are referred to sometimes by the number of the code section or the number of the re-enacted section of the Revised Statutes, and sometimes by the new number given by the editor of Bates' Revised Statutes.

In the General Code, the laws relating directly to municipal corporations form Title XII of Part First and consist of §§ 3497 to 4678, inclusive. These sections embrace practically all the provisions of the 231 sections of the Municipal Code with their amendments and supplements, and such provisions of the Revised Statutes re-enacted in the Municipal Code as were contained in Title XII of the Revised Statutes and not repealed by the code, together with such other provisions directly relating to municipal corporations, though not formerly contained in Title XII or the Municipal Code, which the Codifying Commission considered should be grouped under the title "Municipal Corporations."

In the present edition of this work, Part I consists of those sections of the General Code (with all amendments) which are contained in Title XII, G. C.

There is indicated at the end of each section the former statute, the provisions of which have been substantially embodied in the General Code section. Where the previous provision was contained in a section of the Revised Statutes, this is indicated by the number and the letters "R. S.;" where the former provision was contained in a section of the Municipal Code, this is indicated by a reference to the page and section of the act in 96 Ohio Laws, (the original Municipal Code) and if the Municipal Code section was subsequently amended or supplemented, this is indicated also by a reference to the page and number of the volume of the laws subsequent to

that of the session of 1902, where such amendment or supplement was made. In the case of those sections of the General Code which embody provisions of former *Municipal Code sections*, there are further indicated, in *notes*, the old repealed statutes from which the Municipal Code sections were themselves taken.

Title.—The act of October 22, 1902, was entitled "An act to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent the abuse of such powers, as required by the Constitution of Ohio, and to repeal all sections of the Revised Statutes inconsistent herewith." This title adopted the language of § 6, Art. 13, Const. of Ohio. In Parsons v. Columbus, 50 O. S., 460, it is held that the duty imposed by this section of the Constitution with respect to restrictions upon municipalities is addressed to the conscience and judgment of the legislature, and is not the subject of judicial correction.

Title as aid in construction.—The title of an act may be considered to explain its object and remove ambiguities. Burgett v. Burgett, 1 O. 469, 480; Steamboat Monarch v. Finley, 10 O. 384, 387; State v. G. A. Society, 11 O. 1, 10; L. B. Society v. Lewis, 7 O., 1st part, 80, 86; Hogg v. Zanesville C. & M. Co., 5 O. 410, 415; Burgunder v. Weil, 60 O. S. 234, 242; Hall v. Siegrist, 13 Dec. 46; State v. Muhlhern, 74 O. S. 363.

Validity of Act.—The municipal code of 1902 was held to be constitutional and to have been properly and regularly passed in Zumstein, a taxpayer on behalf of the City of Cincinnati v. Mullen *et al.*, 48 B., 117; 67 O. S. 382.

Validity of Sec. 3497.—This section is not in conflict with Sec. 1 of Art. XVIII of the Constitution, but provides the method of transition thereunder. Murray v. State, 91 O. S. 220.

Classification.—*Present and former.*—The division of all municipal corporations into cities and villages marked a new departure in the municipal law of Ohio, under the Constitution of 1851. The Municipal Code of 1852 (50 O. L. 223-237) divided municipal corporations into four classes, viz., cities of the first class, cities of the second class, incorporated villages and incorporated villages for special purposes. The Municipal Code of 1869 (66 O. L. 149) provided the same classification as that of 1852. The establishment of grades within the two classes of cities, the division of grades into first, second, third, etc., and the subdivision of particular grades have been matters of gradual growth. The most recent statute governing classification, previous to the enactment of the new code, was passed in 1898 (§ 1546 R. S., 93 O. L. 601) and divided municipal corporations into 14 classes, viz., cities, villages and hamlets; cities being divided into two classes first and second, the first class being divided into three grades, first, second and third, with provision for a future fourth; and the second class into eight grades, first, second, third, third a, third b, third c, fourth and fourth a. Villages had previously been divided into a first and second class (§ 1549 R. S., 89 O. L. 302.) There were never any *towns* in Ohio,

established by the legislature under the Const. of 1851, although § 30 of Art. II and § 6 of Art. VIII recognize a class of municipal corporations to be so designated.

Decisions on classification.—Until the decisions of June, 1902, which brought about the extraordinary session of the Ohio legislature and the enactment of the new Municipal Code, the Supreme Court had uniformly upheld the classification of cities for purposes of organization and distribution of powers. State ex. rel. Atty. Gen. v. Covington, 29 O. S. 102; State v. Brewster, 39 O. S. 653; State v. Pugh, 43 O. S. 98; State ex. rel. v. Hawkins, 44 O. S. 98; State ex rel. v. Hudson, 44 O. S. 137; Marmet v. State, 45 O. S. 63; State ex rel. v. Cincinnati, 52 O. S. 419; State ex rel. v. Rattermann, 58 O. S. 731. Acts relating to particular grades and classes of cities were, when attacked on constitutional grounds, subjected to the requirements of § 26 of Art. 2, ordaining that all laws of a general nature shall have uniform operation throughout the state, and § 1 of Art. 13, forbidding the General Assembly to pass any special act conferring corporate powers. If the subject matter of an act was one of general interest and concern, and the act was restricted in operation to a class or grade of cities it was void. Cincinnati v. Steinkamp, 54 O. S. 284; State ex rel. v. Ketter, 45 B. 443; State ex rel. v. Cowles, 64 O. S. 162. Even though an act conferred corporate power, however, and was special in the sense that it operated in but one city of the state, it was upheld if it operated uniformly within the grade and class to which it was made to apply. State ex rel. v. Baker, 55 O. S. 1; Alter v. Cincinnati, 56 O. S. 47; State v. Toledo, 48 O. S. 112; State ex rel. v. Cowles, 64 O. S. 162. But the classification was required to be reasonable and not illusory or arbitrary. Costello v. Wyoming, 49 O. S. 202; Bronson v. Oberlin, 41 O. S. 476. The later decisions, preceding those in the Cleveland and Toledo cases in June, 1902, discredited the doctrine of classification for any purpose by refusing to extend it, and prepared the way for its final overthrow. Geier v. Cincinnati, 63 O. S. 568; Cincinnati v. Trustees of Hospital, 66 O. S. 440; Cincinnati v. Willen, 66 O. S. 633; State ex rel. v. Cowles, *supra.* In the Cleveland and Toledo cases (State ex rel. Atty. Gen. v. Beacom, 66 O. S. 491, and State ex rel. Knisely v. Jones, 66 O. S. 453) the acts in controversy provided a different organization or agency for exercising municipal powers in the one city from that provided elsewhere in the state. Similar acts had been upheld in earlier cases cited above. But the court now declared that classification as it had developed in Ohio, had become "isolation," and had ceased to have any basis in differences of population or local requirements, and refused to recognize such classification as effectual to designate recipients of municipal powers, whether in the strict sense such powers are governmental or corporate. It seems unquestionable that the effect of these decisions is to hold unconstitutional for any and all purposes the classification of municipalities in this state as the same was in force immediately prior to the passage of the Code of 1902.

Classification no longer permissible.—Whether the exclusive classification of municipal corporations into cities and villages, provided for in § 3497, is the only one that would be permissible under the Constitution was not until recently expressly decided by the Supreme Court. In the Toledo case (66 O. S. 453), the court distinctly announces that the question whether the provisions of § 6, Art. XIII, of the Const. of Ohio, ordaining that the legislature "shall provide for the organization of *cities and villages* by general laws," mean to prohibit any other classification, is not decided. The question was also left open in C. L. & A. Ry. Co. v. North Bend, 70 O. S. 46. The extraordinary session of the General Assembly, in 1902, adopted a resolution, submitting to the electors of Ohio, at the November election, 1903, a proposed amendment to the Constitution, which would have empowered the legislature to divide the cities of the state into three classes, based upon population (see 96 O. L. 117). This amendment was lost by a decisive vote.

In the case of Elyria v. Vandemark, 100 O. S. 365,the court held that the constitution, by Art. XVIII, Sec. 1, having classified municipalities on a basis of population, the legislature is without authority to make further classification thereof for the purpose of legislation affecting municipal government. In its opinion, the court says: "It is to be observed that the constitutional convention not only did not confer any power whatever upon the legislature to make any classification of municipalities, but it denied the legislature such authority by retaining and exercising that jurisdiction itself. It thereby withheld that subject absolutely and entirely from legislative control and permitted it to be no longer a matter of statutory jurisdiction."

Status of Hamlets.—The municipal code of 1902 did not recognize hamlets except as it did not specifically repeal those sections of the Revised Statutes relating to their creation, government and powers and except as § 100 of the Code reenacted the "Longworth act," as passed by the regular session of the 75th General Assembly, April 29, 1902, (95 O. L., 318), which then authorized the issue of bonds for public improvements by "cities, villages, hamlets and townships." Hamlets were included in former classifications. (§ 1546 R. S., 93 O. L. 601, repealed.) They were recognized by the statutes as municipal corporations (§ 1550 R. S., repealed) and held to be such in Annexation of Newburgh, 15 C. C. 78, and State ex rel. v. Wagar, 19 C. C. 149, 151. Section 1549 R. S., repealed by the Code, seems to have made hamlets of all municipal corporations having less than 200 inhabitants.

The session of the legislature in 1906 amended the Longworth Act and left out all reference to hamlets. On the other hand, the same session amended one of the sections relating to hamlets so as to make it conform to the act relating to street commissioners and road supervisors. But notwithstanding the amendment referred to and the failure to repeal the hamlet statutes, it would seem that the new code abolished hamlets and made them villages instead. See C. L. and A.

St. Ry. Co. v. North Bend, 70 O. S. 46.

In the General Code all the statutes relating to hamlets have been omitted. See as to status of hamlets prior to code of 1902, Billington v. Hoverman, 18 C. C. 637; State ex rel. v. Wagar, 19 C. C. 149; annexation of Newburgh, 15 C. C. 78; Carey v. State, 70 O. S. 121.

Construction of Code.—"A code of statutes relating to one subject is presumed to be governed by one spirit and policy and intended to be consistent and harmonious, and all of the several sections are to be considered in order to arrive at the meaning of any part, unless a contrary intent is clearly manifest." Cincinnati v. Guckenberger, 60 O. S. 353.

Effect of Codification and Revision.—The revision of all statutes on a particular subject presumably does not change the construction of the original, although the language has been changed. State ex rel. v. Shelby Co., 36 O. S. 326; Allen v. Russell, 39 O. S. 336; State ex rel. v. Auditor, 43 O. S. 311, 315; State ex rel. v. Stockley, 45 O. S. 304, 308. But a clause added in a revision which qualifies the former operation of a statute must be given effect. Collins v. Millen, 57 O. S. 289. See also Giffin v. Brooks, 3 C. C. 110.

Mere change in phraseology in a revision does not change former construction unless evidently intended. Ash v. Ash, 9 O. S. 383; Tyler v. Winslow, 15 O. S. 364, 368; Hamilton v. Stbt. R. B. Hamilton, 16 O. S. 429, 432; Stannard v. Case, 40 O. S. 211, 214; Conger v. Barker, 11 O. S. 1; Boley v. Ohio L. Ins. and Trust Co., 12 O. S. 139, 144; Dutoit v. Doyle, 16 O. S. 400, 405; Brower v. Hunt, 18 O. S. 311, 338.

Former law invoked to remove doubt.—State ex rel. v. Brewster, 44 O. S. 249, 252; Heck v. State, 44 O. S. 536, 538.

Repeals by implication.—Where a law revises the entire subject matter of a former act and is evidently a substitute for it, the earlier act must be regarded as repealed by implication. Shelby Co. v. Frego, 26 O. S. 488, 491; Lorain Plank Road v. Cotton, 12 O. S. 263; Moore v. Vance, 1 O. 1, 10.

And where a later statute flatly contradicts an earlier one, the earlier one is repealed by implication. Work v. Massie, 6 O. 503.

But where the two statutes can well stand together there can be no repeal by implication. See State v. Davis, 23 O. S. 434.

De facto governments of municipalities prior to first Monday in May, 1903, see Citizens' Light & Heat Co. v. Springfield, 47 B. 710; Friedman v. Cincinnati, 13 Dec. 404; Columbus v. Federal Gas & Fuel Co., 14 Dec. 261 (aff'd Cir. Ct. Mch. 20, 1904).

Muncipal corporations not recreated.—The Code of 1852 was held not to have annihilated and recreated pre-existing municipal corporations of the State, but to have re-organized and continued them, leaving their corporate identity unaffected. Fosdick v. Perrysburg, 14 O. S. 472.

Under the present constitution the legislature can neither create a corporation by special act nor confer additional corporate power by special act on those already existing any more than it can do these things in respect to private corporations.

State v. Cincinnati, 20 O. S. 18; State v. Cincinnati, 23 O. S. 445; State v. Mitchell, 31 O. S. 592.

Ordinances continuing in force—The Municipal Code of 1902 contained the provision that "all by-laws, ordinances and resolutions heretofore lawfully passed or adopted by the council, board of legislation or other legislative body in any municipal corporation, and not inconsistent with this act, shall remain in force until duly altered or repealed."

Only such ordinances in force at the time of the adoption of the Municipal Code of 1902, would continue in force, as, if passed under the code, would be authorized by its provisions. See Neff v. Bates, 25 O. S. 169; Hubbard v. Norton, 28 O. S. 116.

On the other hand, an ordinance formerly passed but not authorized by the laws then in force would not be valid, even though authorized by the new code, notwithstanding the provision in the Municipal Code continuing in force all former ordinances not inconsistent with the new code. Cotter v. Doty, 5 O. 393, 398.

An ordinance that was unconstitutional would, of course, not be continued in force. See Zanesville v. Auditor, 5 O. S. 589.

An ordinance fixing a salary would continue in force, if the authority passing the ordinance has the power under the code and the salary does not exceed the maximum therein provided, even though the law under which the ordinance was passed is repealed by the Code. Moore v. Cincinnati, 26 O. S. 582.

An ordinance providing for the annexation of contiguous territory, not inconsistent with the new code, was held to continue in force, under a provision such as that in the above section. Croll v. Franklin, 40 O. S. 340.

Judicial notice.—The courts take judicial notice of the statutory law of the state and of the population of its cities. DeMuth v. State ex rel., 27 O. C. A. 585; 7 Oh. App. 245; aff'd. 96 O. S. 519.

Sec. 3498. [Population, proclamation of by secretary of state.] [1] When the result of any future federal census is officially made known to the secretary of state, he forthwith shall issue a proclamation, stating the names of all municipal corporations having a population of five thousand or more, and the names of all municipal corporations having a population of less than five thousand, together with the population of all such corporations. A copy of the proclamation shall forthwith be sent to the mayor of each municipal corporation, which copy shall be forthwith transmitted to council, read therein and made a part of the records thereof. From and after thirty days after the issuance of such proclamation each municipal corporation shall be a city or village, in accordance with the provisions of this title. [96 v. 20, § 2.]

(1) **Old Sections.**—Compare §§ 1617-1622 R. S., repealed, relating to the duties of certain state officers to determine what municipalities were to be advanced or reduced in grade or class.

Validity and effect.—This section and §§ 3497 and 3499 are not inconsistent with Sec. I, Art. XVIII, of the constitution, and their provisions regulate the method of transition from one class to the other. Murray v. State ex rel., 91 O. S. 220.

A municipal corporation which had a population of less than five thousand at the last federal census did not advance to a city when it was made to appear by an official census taken by the municipal corporation subsequently thereto that it had a population of more than five thousand. *Ib.*

Sec. 3499. [Officers of, when advanced or reduced.] [1] Officers of a village advanced to a city, or of a city reduced to a village, shall continue in office until succeeded by the proper officers of the new corporation at the next regular election, and the ordinances thereof not inconsistent with the laws relating to the new corporation shall continue in force until changed or repealed.[2] [96 v. 20, § 2.]

(1) **Old Sections.**—Compare §§ 1581 and 1588 R. S., repealed, relating to officers continuing in office and ordinances remaining in force pending advancement of hamlets, villages and cities.

Validity and effect.—This section and §§ 3497 and 3498 are not inconsistent with Sec. I, Art. XVIII, of the constitution, and their provisions regulate the method of transition from one class to the other. Murray v. State ex rel., 91 O. S. 220.

(2) **Officers holding over.**—Where officer is authorized to hold his office after expiration of term until a successor qualifies, there is no vacancy during such period, and incumbent holding over is a *de jure* officer. State ex rel. v. Howe, 25 O. S. 588.

Where officer legally holds over until a successor qualifies, he holds on as of his old term. State ex rel. v. Killits, 8 C. C. 30.

Whether sureties on officer's bond can be held for such extended term, *quere. Ib.*

Officer does not hold over unless a successor is provided for. McHugh v. Cincinnati, 1 C. S. C. R. 145.

Officer removed for misconduct cannot hold over under law authorizing incumbent to continue in office until his successor is elected or appointed. State ex rel. v. Hawkins, 44 O. S. 98, 117.

Where a new code provided for one officer who was to perform the duties theretofore performed by three under the previous act, the office of the three was held abolished. McHugh v. Cincinnati, 1 C. S. C. R. 145.

Where a new code created a new office, but made no provision for filling it, it was held there was a vacancy until the next annual election, and the person elected to the office held only until the next annual election. State ex rel. v. Cook, 20 O. S. 252.

The constitutional provision against affecting the salary of an officer during his existing term, does not apply to an officer holding over until his successor is elected and qualified. Woehler v. Toledo, 6 B. 282.

Where an office is abolished by a new law, if the duties of the office were specific and limited and not continuous during the year, the annual salary must be apportioned, not by the time of service, but by the duties actually performed, and therefore may be wholly earned at the time of abolishment of the office. *Ex parte* Lawrence, 1 O. S. 431. Mandamus will not lie at the suit of one claiming succession to an office unless the act under which he claims is valid, and this is true, although defendant's title may also be invalid. State ex rel. v. Jones, 66 O. S. 453.

Veto power of Mayor.—Upon advancement of a village to a city as provided by law, village officers become city officers and the mayor, in such case, has the power to veto. Wise v. Barberton, 20 C. C. (N. S.), 390 (aff'd. 88 O. S. 595).

Ordinances continuing in force.—Only such ordinances would continue in force, as, if passed under the new code, would be authorized by its provisions. See Neff v. Bates, 25 O. S. 169.

On the other hand, an ordinance formerly passed but not authorized by the laws then in force would not be valid, even though authorized by the new laws, notwithstanding the provision continuing in force all former ordinances not inconsistent with the new laws. Cotter v. Doty, 5 O. 393, 398.

An ordinance that was unconstitutional would, of course, not be continued in force. See Zanesville v. Auditor, 5 O. S. 590.

Compensation of Councilmen.—Where there is no valid ordinance fixing the compensation of councilmen, upon the induction into office of the first council elected after the advancement of a village to a city, such council can fix the compensation of its own members. Wise v. Barberton, 20 C. C. (N. S.) 390, (aff'd. 88 O. S. 595).

Sec. 3500. [Reduction by action of citizens.] A city from which territory has been detached since the last federal census, may surrender its corporate rights as such city and be reduced to a village in the manner hereinafter specified. [99 v. 392 § 1.]

Sec. 3501. [Petition, what to specify.] A petition for the purpose signed by at least one hundred citizens of the city shall be presented to the council setting forth that by reason of the detachment of territory the population of the city has been reduced to less than five thousand, that a majority of the citizens thereof desire to surrender its corporate rights and

that it be reduced to a village, and containing a prayer that the council authorize the taking of a census in the city for the purpose of ascertaining its population. [99 v. 392 § 2.]

Sec. 3502. [Resolution of council to take census.] Upon presentation of such petition, the council by resolution at its next regular meeting shall authorize the city auditor to cause a census of the city to be taken and report the result thereof to the city council. It shall be necessary to read the resolution but once and it shall be published as other resolutions of a general or permanent nature. [99 v. 393 § 3.]

Sec. 3503. [Enumerators; appointment, oath and compensation.] Within five days from the time he is authorized to cause such census to be taken, the city auditor shall appoint five persons to take the enumeration, who shall each be allowed by the auditor out of his contingent fund three dollars per day as compensation for services. Each person so appointed shall take an oath or affirmation to make such enumeration accurately and truly to the best of his skill and ability. For the purpose of taking such census, each enumerator shall be provided with a book in which he shall record correctly the name of each resident of the city with the name of the street and the number of the house in which he lives. [99 v. 393 § 4.]

Sec. 3504. [Return of enumeration shall be certified.] With the return of the enumeration to the auditor, each enumerator shall return the book containing the list of the names and addresses, and duly certify with his affidavit that he has taken and returned the census accurately and truly to the best of his knowledge and belief, and that such lists contain the names of all persons so enumerated and none others. The auditor of the city or any officer authorized to administer oaths may administer such oath or affirmation, and take and certify such affidavit. [99 v. 393, § 4.]

Sec. 3505. [Resolution of surrender.] Within ten days from the date of their appointment, the enumerators shall complete the enumeration and return their books to the auditor, whereupon the auditor shall make an abstract of the enumera-

tion and transmit it to the council at its next regular meeting after the report of the enumerators to the city auditor. If the result of the census shows that the population of such city is less than five thousand, the council by resolution shall declare the corporate rights of the city surrendered and that such city is reduced to a village. [99 v. 393, § 5.]

Sec. 3506. [Procedure if council or auditor fail to act.] If the council fails to authorize the city auditor to take the census of such city, or the auditor fails to proceed under authority properly given, upon the presentation of a copy of such original petition of one hundred citizens to the commissioners of the county in which the city is situated, the commissioners shall forthwith appoint five enumerators resident electors of such city who shall perform all and singular the duties imposed upon enumerators appointed by the city auditor as hereinbefore provided, after having taken an oath or affirmation to take the census of the city accurately and truly to the best of their skill and ability. [99 v. 393, § 6.]

Sec. 3507. [Transcript to be transmitted to council.] Within ten days from the date of their appointment, the enumerators provided for in the preceding section shall complete their work of enumerating and return their books duly verified to the county commissioners, whereupon the commissioners shall canvass the result of the census so taken, and the county auditor shall make a transcript thereof and transmit a certified copy of such transcript to the council of the city for which the enumeration was taken. A copy of such transcript shall be spread upon the journal of the council and if the census so taken shows the population of such city to be less than five thousand, the council shall pass a resolution as herein provided and the city shall forthwith become a village. [99 v. 394, § 7.]

Sec. 3508. [Record of resolution; copy to secretary of state.] The auditor shall thereupon cause two certified transcripts of the resolution to be made, one of which shall forthwith be delivered to the recorder of the county in which the city is situated, who shall record it in the proper records in

his office, and the auditor shall forward the other to the secretary of state. [99 v. 394, § 8.]

Sec. 3509. [Effect of surrender of corporate rights.] The surrender of corporate rights as herein provided for shall not affect rights accrued or liabilities incurred by such city or the power to settle claims, dispose of property or levy and collect taxes to discharge liabilities incurred, but shall remain in force and effect as also the corporate character of such municipal corporation in respect thereto as though no surrender had been made. After the presentation of such petition, such city or the council thereof shall not incur or create any new debt or liability or enter into any new contract or increase the debts and liabilities of such city in any manner during the pendency thereof until the result of the census is declared, except that current expenses may be paid or provided for. [99 v. 394, § 9.]

Sec. 3510. [Collection and disbursement of taxes.] Taxes which at the time of the surrender remained due and unpaid shall be collected and, with all moneys in the treasury of the city, shall be applied to the objects for which they were raised. Moneys which remain on hand after the debts and liabilities of the city are discharged shall be paid into the treasury of the village and all property owned by the city at the time of the surrender shall become the property of, and the title thereto vest in, the village. [99 v. 394, § 10.]

Sec. 3511. [Payment of expenses incurred by the commissioners.] When such census is taken pursuant to the order of the board of county commissioners, the necessary expenses thereof shall be paid from the county treasury as other county expenses, but shall be charged against the municipal corporation in which the census was taken and the amount so paid by the county shall be retained by the county auditor from funds due such municipal corporation at the time of making the next semi-annual distribution of taxes. [99 v. 394, § 11.]

Sec. 3512. [When boundaries of municipality become identical with those of township.] [1] When the corporate limits of

a city or village become identical with those of a township, all township offices shall be abolished, and the duties thereof shall thereafter be performed by the corresponding officers of the city or village, except that justices of the peace and constables shall continue the exercise of their functions under municipal ordinances providing offices, regulating the disposition of their fees, their compensation, clerks and other officers and employes. Such justices and constables shall be elected at municipal elections. All property, moneys, credits, books, records and documents of such township shall be delivered to the council of such city or village. All rights, interests or claims in favor of or against the township may be enforced by or against the corporation.[2] [96 v. 20, § 3.]

(1) See old §§ 1623, 1625, 1627 R. S., repealed.

(2) **Extent of merger.**—Under the act of March 7th, 1872, which contained a provision excepting justices of the peace and constables from the operation of the merger law, similar to the one in the present section, it was held that the act preserved the corporate existence of such township for the sole purpose of electing justices of the peace and constables, evidently to meet the constitutional requirement that justices of the peace shall be elected by townships, but that for all other purposes the township organization in this class of cities and villages was abolished. McGill v. State, 34 O. S. 228, 251.

Effect of merger.—Under the former statutes it was held that where a township is merged into a city, the directors of a county infirmary may maintain a suit against the corporation for the costs of temporary relief furnished a pauper; and such action may be prosecuted either in the county of plaintiff or directors or in that in which the city is situated. Directors, etc., v. Toledo, 15 O. S. 409.

It was also held under the former statutes that where the corporate limits of a city or village became identical with those of a township and the office of township clerk was thereby abolished, the office of the clerk of such city or village became a depository for chattel mortgages. Curtiss v. McDougal, 26 O. S. 66.

Municipality is part of township.—Where the boundaries of a city are not coterminus with those of a township the territory within such city does not cease to be part of the township or townships within the limits of which it is situated, for election purposes. State v. Ward, 17 O. S. 543.

Justice of the peace residing in territory annexed to city of Toledo may hold court therein. State ex rel. v. Morse, 94 O. S. 435. See also Op. Atty. Gen. (1919), p. 977.

Sec. 3513. [How villages may surrender their corporate

powers.][1] Villages may surrender their corporate powers upon petition to council of at least forty per cent[2] of the electors thereof, to be determined by the number voting at the last municipal election, and an affirmative vote of a majority of such electors at a special election which shall be provided for by council, and conducted, canvassed, and the result certified and made known as regular municipal elections within the corporation. If the result of the election is in favor of such surrender, the clerk of the village shall certify the result to the secretary of state and the recorder of the county, who shall record it in their respective offices, and thereupon the corporate powers of such village shall cease. [96 v. 21, § 4.]

(1) **Old Sections.**—See old sections 1633-1647 R. S. inclusive, repealed. The sections (1633-1642 R. S.) allowing cities to surrender corporate powers and be reduced to villages, are repealed, without any corresponding provisions being made in the code. It is no longer optional with a municipality to be a city or village. Municipalities over 5,000 population at the last federal census, are necessarily cities, unless changed by the next federal census. But when cities have been reduced in size by detachment of territory, provision is now made for their reduction to villages; see §§ 3500-3511 *ante*.

(2) **Number of Petitioners.**—Under former law it was held that in mandamus in Common Pleas Court to compel the council of a village to order an election on the question of surrender of corporate powers, the issue of whether the requisite number had signed the petition was not one of right triable by a jury, and that either party might appeal to Circuit Court. Dutten v. Hanover, 42 O. S. 215.

It was held to be the duty of council before taking action upon such a petition to satisfy itself that the petition contained the requisite number of qualified petitioners, and for this purpose, council might refer the petition to a committee to make examination. Ib.

Signers of such a petition might withdraw their names at any time before final action thereon by council, and if the number of names is reduced below the requisite amount, council must refuse to order an election. *Ib.*

FORM OF PETITION TO COUNCIL FOR SURRENDER OF CORPORATE POWERS.

To the Council of the Village of....., State of Ohio:

The undersigned, being forty per cent. of the electors of the village of ....., respectfully represent that it is their desire that the corporate powers of said village be surrendered, and that the said village become a part of the township organization within the territorial limits of which it is

situated, and they therefore pray you to cause an election to be held in said village in the manner provided by law to determine the sense of the electors thereof upon that subject.

(This petition must be signed by 40 per cent. of the electors of the village.)

FORM OF ORDINANCE ORDERING ELECTION.

Ordinance No.....

Ordering election on question of surrendering corporate powers.

Be it ordained by the council of the village of....., State of Ohio:

Sec. (1) That upon the.....day of....., 19...., there be held a special election in the village of....., State of Ohio, at..... (here insert place of holding election) by the qualified voters of said village to vote upon the question of surrendering the corporate powers of said village and of reducing said village to be a part of the township organization within the territorial limits of which it is situated.

Sec. (2). The ballots cast at such election shall contain the words, "For Surrender" or "Against Surrender" and such election shall be held and conducted as regular municipal elections within the corporation.

Sec. (3). This ordinance shall take effect and be in force from and after the earliest period allowed by law.

Passed this.....day of....., 19....

.....

Attest: President of Council.

.....

Clerk.

FORM OF CLERK'S CERTIFICATE.

To the Honorable, the Secretary of State of the State of Ohio, [or Recorder of the county of.....]:

This is to certify that at a special election duly provided by the council and held in the viillage of....., State of Ohio, on the.....day of ....., 19...., a majority of the electors of said village voted in favor of the surrender of the corporate powers of said village.

Given under my hand and official seal, this.....day of....., 19....

.....

Clerk.

Sec. 3514. [Rights and liabilities not affected.] Such surrender of corporate powers shall not affect vested rights or accrued liabilities of such village or the power to settle claims, dispose of property, or levy and collect taxes to pay existing obligations, but after the presentation of such petition, council shall not create any new liability until the result of the election

is declared, nor thereafter, if such result is in favor of the surrender of corporate powers. Due and unpaid taxes may thereafter be collected, and all moneys or property remaining after such surrender shall belong to the school district embracing such village.[1] [96 v. 21, § 4.]

(1) Under former statutes it was held that officers of a municipality, after its corporate rights had been extinguished, cannot by resignation avoid the duty of levying and collecting the taxes to pay its debts. Gorgas v. Blackburn, 14 O. 252.

Sec. 3515. [Judicial notice of classification.] All courts shall take judicial notice of the classification of municipal corporations, and their advancement, reduction and surrender of powers.[1] [96 v. 21, § 4.]

(1) Under the classification of cities which had obtained before the enactment of the Municipal Code of 1902, courts were not bound to take judicial notice of the grades and classes of municipal corporations. Bolton v. Cleveland, 35 O. S. 319; Massa v. State, 3 C. C. 9; but see State v. Constantine, 42 O. S. 437.

OPTIONAL PLANS OF GOVERNMENT.

ARTICLE 1. ADOPTION OF PLAN.

Sec. 3515-1. § 1. [Petition for submission of question of organizing municipality under specific plan.] Whenever electors of any municipality, equal in number to ten per centum of those who voted at the last regular municipal election, shall file a petition with the board of deputy state supervisors of elections or board of deputy state supervisors and inspectors of election, as the case may be, of the county in which such municipality is situated, asking that the question of organizing the municipality under any one of the plans of government provided in this act be submitted to the electors thereof, said board shall at once certify that fact to the council of the municipality and the council shall, within thirty days, provide for submitting such question at a special election to be held not less than sixty nor more than ninety days after the filing of such petition. Any such election shall be conducted in accordance with the general election laws of the state except as otherwise provided in this

act and the council of any municipality holding such an election shall appropriate whatever money may be necessary for the proper conduct thereof. [103 v. 767, Art. I, § 1.]

[Sec. 3515-2.][1] § 2. [Petition for submission of question of choosing commission to frame charter.] The proposition to adopt a plan of government provided in this act shall not be submitted to the electors of any municipality less than ninety days before a regular municipal election. If in any municipality, a sufficient petition is filed, requiring that the question of choosing a commission to frame a charter be submitted to the electors thereof, the proposition to adopt a plan of government provided in this act shall not be submitted in that municipality as long as the question of choosing such commission or adopting a charter framed thereby is pending therein. In any municipality while the proposition of adopting any one of the three forms of government herein provided for is pending, then no other proposition herein provided for shall be submitted until said pending proposition is adopted or rejected. [103 v. 767, Art. I, § 2.]

(1) **Section numbering.**—This and following sections are numbered in accordance with the plan adopted in Page & Adams General Code. Those sections which were not numbered either by the Legislature or the Attorney General have been given sub-section numbers enclosed in brackets.

[Sec. 3515-3.] § 3. [Form of ballot in submitting question of organizing under plan.] In submitting the question of organizing under any one of the plans of government provided in this act to the electors of any municipality the board of deputy state supervisors of elections or board of deputy state supervisors and inspectors of elections, as the case may be, shall cause to be printed on the ballots the following question, "Shall the (name and plan) plan of government, as provided in chapter ..... section ..... of the General Code of Ohio be adopted? Immediately following such question there shall be printed on the ballots the following propositions in the order here set forth:

"For the adoption of the (.....) plan."

"Against the adoption of the (.....) plan."

When the question is on the adoption of the federal plan of government there shall also be submitted the question, "For councilmen-at-large," and "For councilmen-by-wards."

There shall also be printed on the ballots at any such election the following supplementary proposition:

"For the adoption of the recall.

"Against the adoption of the recall.

Immediately to the left of each of the propositions shall be placed a square in which the electors by making a cross (X) mark may vote for or against any such propositions.

[Mailing copies of plan to electors; filing arguments for and against.] At least thirty days prior to any such election the deputy state supervisors of elections or board of deputy state supervisors and inspectors of elections, as the case may be, of the county shall mail a copy of the proposed plan of government and the supplementary propositions as specified in this act to each elector of the municipality whose name appears on the poll or registration books of the last regular general election, and each such copy shall contain on the front cover thereof a fac-simile ballot and the date and hours of the election. Any elector may, at least forty days prior to such election file, with said board a written argument of not more than three hundred words for or against any proposed plan of government or for or against any other proposition submitted and, upon payment of the cost of printing, said board shall cause the same to be printed and a copy thereof mailed with the copy of the proposed plan to each elector or otherwise distributed to every voter as far as practicable. [103 v. 767, Art. I, § 3.]

[Sec. 3515-4.] § 4. **[Result of adoption.]** If, when submitted in any municipality the proposition of adopting a plan of government provided in this act is approved by a majority of those voting thereon, such plan, together with any of the supplementary propositions that may have been approved by a majority of the electors voting thereon, shall become the charter of such municipality. When so adopted, this act shall go into effect immediately, in so far as it applies to the nomination and election of officers provided for herein and

in all other respects it shall go into effect upon the first day of January following the next regular municipal election. All officers of any plan of government superseded by the adoption of any plan provided in this act, except members of the commission or council, shall continue in office and in the performance of their duties until the commission or council elected hereunder shall have provided by ordinances for the performance of the duties of such officers, whereupon the terms of all such officers shall expire and their offices be deemed abolished. [103 v. 767, Art. I, § 4.]

[Sec. 3515-5.] § 5. [Submission of supplementary propositions.] In any municipality where a plan of government provided in this act has been adopted any of the supplementary propositions, not previously adopted, may be independently submitted to the electors at any municipal election in the manner provided for submitting the question of adopting such plan of government. If the proposition to adopt a plan of government provided in this act is rejected by the electors of a municipality, it shall not again be submitted in that municipality within one year thereafter. [103 v. 767, Art. I, § 5.]

Sec. 3515-6. § 6. [Board shall file certificate of results of election.] Immediately after an election upon the adoption of any plan of government or proposition provided herein the board of deputy state supervisors of elections or board of deputy state supervisors and inspectors of elections, as the case may be, of the county in which such election is held shall file with the secretary of state a certificate of the results thereof. [103 v. 767, Art. I, § 6.]

ARTICLE II. ELECTION PROVISIONS.

[Sec. 3515-7.] § 1. [Applicable to each plan.] The sections of this article shall apply to and be a part of each of the plans of government provided in this act. [103 v. 767, Art. II, § 1.]

[Sec. 3515-8.] § 2. [Nominations and elections.] Regular municipal elections shall be held on the first Tuesday after

the first Monday in November in the odd numbered years, and shall be conducted and the results canvassed and announced by the regular election authorities. Candidates to be voted for at the regular municipal elections shall be nominated as provided by law. [103 v. 767, Art. II, § 2.]

[Sec. 3515-9.] § 3. [Ballots.] The ballots used in all elections provided for in this act shall be without party marks or designations. The names of candidates on such ballots shall be printed in rotation as follows: The ballots shall be printed in as many series as there are candidates for the office for which there is the greatest number of candidates. The whole number of ballots to be printed shall be divided by the number of series and the quotient so obtained shall be the number of ballots in each series. In printing the first series of ballots the names of candidates for each office shall be arranged in alphabetical order under the title thereof. After printing the first series the first name in each list of candidates for the various offices shall be placed last in such list and the next series printed, and the process shall be so repeated until each name in the largest list of candidates shall have been printed first an equal number of times. The ballots so printed shall then be combined in tablets, so as to have the fewest possible ballots having the same order of names printed thereon together in the same tablet. The ballots shall in all other respects conform as nearly as may be to the ballots prescribed by the general election laws of the state. [103 v. 767, Art. II, § 3.]

[Sec. 3515-10.] § 4. [Regular election.] The candidates at the regular municipal election, equal in number to the places to be filled in each office, who received the highest number of votes, shall be declared elected. In case it cannot be determined which of two or more candidates shall be declared elected, by reason of the fact that they have received the same number of votes, the election authorities shall determine by lot which of said candidates shall be declared elected. [103 v. 767, Art. II, § 4.]

ARTICLE III. COMMISSION PLAN.

[Sec. 3515-11.] § 1. [Form of government.] The form of municipal government provided for in this article shall be known as the commission plan. In municipalities organized hereunder the only elective officers shall be the members of the municipal commission provided for in this act. Three commissioners shall be chosen in municipalities having not more than 10,000 inhabitants according to the last preceding federal census and five commissioners in all other municipalities. All such commissioners shall be elected from the municipality at large. [103 v. 767, Art. III, § 1.]

[Sec. 3515-12.] § 2. [Election; term; vacancies.] At the first election held after the adoption of the commission plan the entire number of commissioners shall be chosen. In municipalities having three commissioners the candidate having the highest number of votes at such first election shall hold office for four years and the remaining commissioners for two years. In municipalities choosing five commissioners the two candidates receiving the highest number of votes at such first election shall serve for four years and the remaining commissioners for two years. At all subsequent elections except where a commissioner is chosen to fill out an unexpired term, commissioners shall be chosen for a term of four years. Vacancies in the commission shall be filled by the commission for the remainder of the unexpired term. If the term of a commissioner whose place becomes vacant does not expire on the first day of January following the next regular municipal election, then such person chosen by the commissioners shall serve only until such regular election, at which time a commissioner shall be elected to fill the remainder of the unexpired term. When a vacancy occurs as the result of a recall election such vacancy shall be filled in the manner provided for such cases. [103 v. 767, Art. III, § 2.]

[Sec. 3515-13.] § 3. [Meetings of commission.] At ten o'clock a. m. on the first day of January following a regular municipal election the commission shall meet at the regular place for holding such meetings, at which time the newly elected commissioners shall assume the duties of their office.

Thereafter the commission shall meet in legislative session at least twice each month and in administrative session at least once each week, at such times as may be prescribed by ordinance or resolution, but no legislative business shall be considered or acted upon at administrative sessions. Upon written request of the chairman or any two members special legislative sessions of the commission shall be called by the clerk. Any such request shall state the subjects to be considered at such special meeting and no other subject shall be there considered. [103 v. 767, Art. III, § 3.]

[Sec. 3515-14.] § 4. [Signing of ordinances.] Every ordinance or resolution passed by the commission shall be signed by the chairman or two members, filed with the clerk within two days and by him recorded. [103 v. 767, Art. III, § 4.]

[Sec. 3515-15.] § 5. [Powers of the commission.] The powers conferred upon municipalities by the constitution of Ohio, and any additional powers which have been or may be conferred upon municipalities by the general assembly, shall be exercised by the commission or under its direction, unless the exercise of such powers shall have been expressly conferred upon some other authority of the municipality or reserved to the people thereof. [103 v. 767, Art. III, § 5.]

[Sec. 3515-16.] § 6. [Administrative officers.] The commission shall appoint a clerk, treasurer, auditor and solicitor; but provision may be made by ordinance for the performance of the duties of clerk and treasurer by the same person. [103 v. 767, Art. III, § 6.]

[Sec. 3515-17.] § 7. [Creation and discontinuance of offices.] Subject to the provisions of this act the commission shall have authority to create and discontinue departments, offices, and employments; to appoint or provide for the appointment of all officers and employes of the municipality; to remove any such officers or employe by a majority vote of all members and by ordinance or resolution to prescribe, limit or change the compensation of such officers and employes. [103 v. 767, Art. III, § 7.]

[Sec. 3515-18.] § 8. [Supervision by commissioners.] The commission may, at its discretion, assign the direction or supervision of particular departments or branches of the government to individual commissioners; but such action shall in no manner release the commission as a whole from responsibility or the condition of any department or branch of government so assigned. [103 v. 767, Art. III, § 8.]

ARTICLE IV. CITY MANAGER PLAN.

[Sec. 3515-19.] § 1. [General description.] The form of government provided in this article, to be known as the "City manager plan," shall consist of a council of five or more citizens, according to the population of the municipality as determined by the last preceding census, who shall be elected at large. The council shall constitute the governing body of such city with power to pass ordinances, adopt regulations, appoint a chief administrative officer, to be known as the city manager, approve all appointments made by the city manager, except as otherwise provided in this act, fix all salaries, appoint a civil service commission and all boards or commissioners created by ordinance. [103 v. 767, Art. IV, § 1.]

[Sec. 3515-20.] § 2. [Size and term of council; vacancies.] The number of councilmen shall be in proportion to the population of the municipality, as determined by the last preceding federal census, as follows: A municipality having not more than ten thousand inhabitants, five; more than ten thousand and not more than twenty-five thousand inhabitants, seven; more than twenty-five thousand inhabitants, nine. All councilmen shall serve for a term of four years and until their successors are elected and have qualified. Except that at the first election in municipalities having five councilmen, the candidates having the three highest number of votes shall serve for four years, the other two councilmen shall serve for two years, and in municipalities having more than five councilmen the majority of councilmen having the highest number of votes shall serve for a period of four years and the others for a period of two years. Vacancies in the council shall be filled by the council for the remainder of the unex-

pired term, but any vacancy resulting from a recall election shall be filled in the manner provided for in such cases. [103 v. 767, Art. IV, § 2.]

[Sec. 3515-21.] § 3. [Meetings of council.] The council shall meet at the usual place for holding such meetings, at ten o'clock a. m. on the first day of January after its election, at which time the newly elected councilmen shall assume the duties of their office. Thereafter the council shall meet in regular session at least twice each month at such times and places as shall be fixed by ordinance. The clerk shall call special sessions of the council upon written request of the chairman or of any two members. Any such requests shall state the subjects to be considered at such special meeting and no other subject shall be there considered. [103 v. 767, Art. IV, § 3.]

[Sec. 3515-22.] § 4. [Signing of ordinances.] Every ordinance or resolution passed by the council shall be signed by the chairman or two members, filed with the clerk within two days and by him recorded. [103 v. 767, Art. IV, § 4.]

Sec. 3515-23. [Powers exercised by council.] The powers conferred upon municipalities by the constitution of Ohio, and any additional powers which may have been or may be conferred upon municipalities by the general assembly, shall be exercised by the council unless the exercise of such powers shall have been expressly conferred upon some other authority of the municipality or reserved to the people thereof.

[Police justice; appointment, term, jurisdiction, records, etc.] The council may appoint some justice of the peace, resident of the municipality, to be police justice for the term of two years, who shall during the term, unless removed by a two-third vote of the members of the council, have jurisdiction of all violations of the ordinances of the municipality, with full power to hear and determine the same, and shall have the same power, be entitled to the same fees, perform the same duties, be subject to the same responsibilities as the mayors of cities. Said police justice shall charge and receive the same fees as are allowed by law to justices of the peace,

and shall retain the same for his services, shall turn over to the treasurer of the municipality all fines collected by him as such police justice. Such justice of the peace so appointed shall be styled "police justice", and in such style he shall sign all process and records during the time he shall serve. He shall keep a docket in which he shall enter, as is provided by law, all cases brought before him. Such docket shall be provided by and be the property of the municipality. At the end of each month such police justice shall make a report to the council of all cases brought before him as such police justice. [108 v. 1186; 103 v. 767, Art. IV, § 5.]

Sec. 3515-24. [Council may provide for officers; prescribe their duties and salaries.] The council shall appoint a clerk, treasurer, auditor and solicitor; but provisions may be made by ordinance for the performance of the duties of clerk and treasurer, or clerk and auditor, by the same person. Council may provide that the treasurer or auditor may be employed as cashier in the electric light or water department,[1] or both, of such city, and as clerk to the city manager and as clerk to the civil service commission of such municipality. Council may provide that a part of the salary of the auditor shall be paid from the income of any publicly owned utility or cemetery, operated by such municipality; such part of the auditor's salary so to be paid shall be fixed by the council with reference to the proportion of the auditor's services devoted to such utility or cemetery. Council may also provide that the treasurer or auditor may be employed as cashier of any such utility or cemetery or both, and as clerk to the city manager and as clerk to the civil service commission of such municipality; and any auditor or treasurer who is employed as such cashier may be paid for such services from the funds of such utility or cemetery, in addition to his salary as auditor or treasurer. [110 v. 78; 108 v. 1186; 103 v. 767, Art. IV, § 6.]

(1) Auditor who is employed as cashier in the water works or electric light department may be paid from the funds of the departments in addition to his salary as City Auditor in cities operating under the city manager plan. Op. Atty Gen. (1920), p. 582.

[Sec. 3515-25.] § 7. [Creation and discontinuance of of-

fices.] Subject to the provisions of this act, the council shall have authority to create and discontinue departments, offices and employments; to appoint or provide for the appointment of all officers and employes of the municipality; to remove any such officer or employe by a majority vote of all members and by ordinance or resolution to prescribe, limit or change the compensation of such officers and employes. [103 v. 767, Art. IV, § 7.]

[Sec. 3515-26.] § 8. **[City manager.]** The council shall appoint a city manager who shall be the administrative head of the municipal government under the direction and supervision of the council and who shall hold office at the pleasure of the council. [103 v. 767, Art. IV, § 8.]

Sec. 3515-27. [Duties city manager.] The duties of the city manager shall be: (a) to see that the laws and ordinances are faithfully executed; (b) to attend all meetings of the council at which his attendance may be required by that body; (c) to recommend for adoption to the council such measures as he may deem necessary or expedient; (d) to appoint all officers and employes in the classified service of the municipality, subject to the provisions of this act and the civil service law; (e) to prepare and submit to the council such report as may be required by that body, or as he may deem advisable to submit; (f) to keep the council fully advised of the financial condition of the municipality and its future needs; (g) to prepare and submit to the council a tentative budget for the next fiscal year; (h) and to perform such other duties as the council may determine by ordinance or resolution; (i) and to sign all contracts and bonds for and on behalf of the municipality. [110 v. 78, 79; 103 v. 767, Art. IV, § 9.]

Sec. 3515-28. [Salary, oath, bond, seal.] The city manager shall receive such salary as may be fixed by the council, council may provide that such part of the salary of the city managers as it deems proper shall be paid from the income of any publicly owned utility operated by such municipality, or from any public cemetery; said part of the salary of the city manager so paid out of the income of such public utility

or cemetery shall be fixed by the council with reference to the proportion of the city manager's time devoted to such utility. Before entering upon the duties of his office, the city manager shall take the official oath required by this act and shall execute a bond in favor of the municipality for the faithful performance of his duties in such sum as may be fixed by the council. The city manager shall be furnished with the corporate seal of the corporation, in the center of which shall be engraved the coat of arms of the state, as described in the General Code, and around the edge of which shall be the words, "Manager of the city of ————————," or, "Manager of the village of ————————, state of Ohio," as the case may be. [110 v. 78, 79; 108 v. 1186, 1187; 103 v. 767, Art. IV, § 10.]

ARTICLE V. FEDERAL PLAN.

[Sec. 3515-29.] § 1. [Form of government.] The form of government provided for in this article shall be known as the federal plan. In municipalities adopting this plan the only elective officers shall be mayor and members of council as provided for in this act. The mayor, the auditor, and heads of departments appointed by the mayor, shall constitute a board of control as hereinafter provided. [103 v. 767, Art. V, § 1.]

[Sec. 3515-30.] § 2. [Council; term and number of members.] All legislative power of the municipality shall be vested in a council consisting of not less than five (5) nor more than fifteen (15) members. In municipalities of less than ten thousand population members of the council shall be elected at large; in all others they shall be elected from wards or at large, as determined by the vote provided for in article 1, section 3 hereof. The term of office shall be two years when the council is elected by wards and four years when the council is elected at large. Except that at the first election in municipalities where the council is elected at large, and having three councilmen, the candidates having the two highest number of votes shall serve for four years, the other councilman shall serve for two years, and in such municipalities having more than three councilmen the majority of coun-

cilmen having the highest number of votes shall serve for a period of four years and the others for a period of two years. When the council is elected by wards the number of councilmen shall be in proportion to the population of the municipality, as determined by the last preceding federal census, as follows: A municipality having not more than ten thousand inhabitants, five councilmen; more than ten thousand and not more twenty-five thousand, seven councilmen; more than twenty-five thousand and not more than fifty thousand, nine councilmen; and for each twenty-five thousand inhabitants in excess of fifty thousand, the number shall be increased by one; but the total number of councilmen shall not exceed fifteen. When the council is elected at large the number of councilmen shall be in proportion to the population of the municipality as determined by the last preceding federal census, as follows: A municipality not having more than ten thousand inhabitants, three councilmen; more than ten thousand and not more than twenty-five thousand, five councilmen; more than twenty-five thousand and not more than fifty thousand, seven councilmen, and for each twenty-five thousand inhabitants in excess of fifty thousand the number shall be increased by one, but the total number of councilmen shall not exceed nine. [103 v. 767, Art. V, § 2.]

[Sec. 3515-31.] § 3. [Wards; when cities have a council elected by wards.] For the first election of members of the council after the adoption of the federal plan, in any municipality having ten thousand inhabitants or more, the municipality shall be divided into wards by the legislative authority existing under the plan of government to be superseded. Immediately after the proclamation by the secretary of state as to the population of the municipalities of Ohio, as determined by the federal census decennially taken, the council shall have power to re-divide the municipality into wards upon the basis of its population; the object and purpose being that the wards of any municipality as fixed hereunder shall be as nearly equal in population as may be and composed of contiguous and compact territory, bounded by natural boundaries or street lines. Any member of the council elected from wards, who, at any time for his election was a

resident of the ward which he represents shall forfeit his office if he removes from such ward, and the council shall fill the vacancy for the unexpired term. [103 v. 767, Art. V, § 3.]

[Sec. 3515-32.] § 4. [Meeting of council] At ten o'clock a. m. on the first day of January following a regular municipal election the council shall meet at the usual place for holding such meetings, at which time the newly elected councilmen shall assume the duties of their office. Thereafter the council shall meet at such times as may be prescribed by ordinance or resolution; but it shall meet at least twice each month. Special sessions of the council shall be called by the clerk upon written request of the mayor, the chairman, or any two members. Any such report shall state the subjects to be considered at the meeting and no other subjects shall be there considered. [103 v. 767, Art. V, § 4.]

[Sec. 3515-33.] § 5. [Mayor's veto.] Any ordinance or resolution passed by the council shall be signed by the chairman or two members and presented to the mayor. If the mayor approves such ordinance or resolution he shall sign it, but if he does not approve it, he shall return the same to the council with his objections within ten days thereafter, or if the council be not then in session at the next regular meeting thereof, which objections the council shall cause to be entered in full on its journal. If the mayor does not return an ordinance or resolution within the time specified it shall take effect in the same manner as if he had signed it. The mayor may approve or disapprove the whole or any item or part of any ordinance or resolution appropriating money. When the mayor refuses to sign any ordinance or resolution or part thereof and returns it to the council with his objections, the council shall, after the expiration of not less than one week, proceed to reconsider it, and if upon reconsideration the resolution or ordinance or part; or item thereof disapproved by the mayor is approved by the vote of two-thirds of all the members elected to the council it shall then take effect as if it had received the signature of the mayor. In all such cases the votes shall be taken by "yeas" and "nays" and entered on the journal. [103 v. 767, Art. V, § 5.]

[Sec. 3515-34.] § 6. [Creation and discontinuance of officers.] The council shall have authority to create and discontinue departments and offices other than those provided for in this act, and to provide for the appointment of all such officers, but the functions and number of subdepartments, and the number and salaries of subordinates and employes shall be fixed by the executive heads of the various departments, all of which provisions, however, shall be subject to the rules and regulations of the civil service commission as authorized by law. [103 v. 767, Art. V, § 6.]

[Sec. 3515-35.] § 7. [The executive power.] The executive power of the municipality shall be vested in the mayor, the heads of the departments hereinafter named, and such other executive officers as are provided for herein or as shall be provided for by ordinance. [103 v. 767, Art. V, § 7.]

[Sec. 3515-36.] § 8. [The mayor.] The mayor shall be elected at the regular municipal election for a term of four years and shall assume office on the first day of January next following his election. He shall appoint a director of public service, a director of public safety, a solicitor, and a treasurer. The council may provide by ordinances for combining the offices and duties of the directors of public service and public safety. The mayor and heads of departments shall not hold any other federal, state, county or municipal office, except that of notary public or member of the state militia, nor be an employe in any such office. [103 v. 767, Art. V, § 8.]

[Sec. 3515-37.] § 9. [Powers and duties of mayor.] The duties of the mayor shall be (a) to see that the laws and ordinances are enforced; (b) to recommend to the council for adoption, such measure as he may deem necessary or expedient; (c) to keep the council fully advised of the financial condition and future needs of the municipality; (d) to prepare and submit to the council such reports as may be required by that body; (e) to appoint, whenever he deems it necessary competent, distinterested persons not exceeding three in number, to examine without notice the affairs of any department, officer, or employe, and the result of such exami-

nation shall be reported to his office, and also transmitted to him by the council without delay; (f) to perform such other duties as the council may determine by ordinance or resolution, not in conflict with the provisions of this article. Any person or persons appointed by the mayor to examine the affairs of any department, officer, or employe, shall have the same power to compel the attendance of witnesses and to compel the production of books, papers and other evidence and to punish for contempt, as is conferred upon the council or committee thereof, by this act. [103 v. 767, Art. V, § 9.]

[Sec. 3515-38.] § 10. [Appointment and removal of officers.] Subject to the provisions of this act, all officers, clerks and employes of the several departments and subdivisions thereof, shall be appointed, employed, suspended or removed by the head of the department. The mayor may, without assignment of reason, remove any department head appointed by him. [103 v. 767, Art. V, § 10.]

[Sec. 3515-39.] § 11. [Acting mayor.] If the mayor be temporarily absent from the municipality, or become temporarily disabled by sickness, accident, or for any other cause, the heads of the departments named in this act shall during such absence or disability perform the duties of the mayor under the designation of the acting mayor in the following order: solicitor, director of public service, director of public safety, auditor, treasurer. If the mayor shall die or remove his residence from the municipality during the term of his office, the succession to the office of mayor shall be from the heads of the departments in the same order as aforesaid, and such successor shall become the mayor of the municipality for the unexpired term. In the event of any temporary disability or absence on the part of any director or head of department hereinbefore provided for, the mayor may in writing designate some suitable person to perform his duties until he resumes his office. [103 v. 767, Art. V, § 11.]

[Sec. 3515-40.] § 12. [Director of public service.] The department of public service shall be under the charge of a director to be appointed by the mayor as hereinbefore provided. He shall have the care, management, construction and im-

provement of all utilities owned or operated by the municipality; of all public ways, grounds, cemeteries, buildings, sewers and structures of every kind, except buildings and structures used in connection with the work to be performed under the direction of the director of public safety as hereinafter provided; of the making and preserving of survey maps, plans, drawings and estimates relating to the public work under the charge of the department: and of all matters and things in any way relative to or affecting the highways, footways, waterways, harbors, wharves and docks, within the municipality, and he shall exercise the powers heretofore vested in the trustee of waterworks, park commissions, platting commissions, street commissions, city engineers, or other board of officers relating to the work herein committed to the care and management of the director of public service. [103 v. 767, Art. V, § 12.]

[Sec. 3515-41.] § 13. [Director of public safety.] The department of public safety shall be under the charge of a director to be appointed by the mayor as hereinbefore provided. The director of public safety shall have charge of the police, fire, health, charities and corrections, and building inspection of the municipality, and all powers and authority by any general law heretofore vested in boards or officers having authority over police, fire, health, charity and corrections, and building inspection shall be, and are hereby vested in the director of public safety. He shall have charge of the administration of all infirmaries, charitable, correction and penal institutions. He shall make such rules and regulations as are necessary and proper for the employment, discipline, instruction, education, reformation, and the conditional release and return of all prisoners confined in any penal institution under his control. [103 v. 767, Art. V, § 13.]

[Sec. 3515-42.] § 14. [Board of control.] There shall be a board of control composed of the mayor, who shall be the president thereof, the auditor, and the heads of the departments appointed by the mayor. The board of control shall have stated meetings at least twice a week; shall keep a record of its proceedings; shall cause its votes to be taken by yeas and nays, and entered on the record and a majority of

all the members of the board shall be necessary to adopt any motion, or order. No ordinance or resolution involving any expenditure of money for public improvements shall be passed until the same shall have been approved by the board of control, except upon a two-thirds vote of the council. [103 v. 767, Art. V, § 14.]

[Sec. 3515-43.] § 15. [Seats in council.] The mayor and the heads of the several departments shall have seats in the council. The mayor shall be entitled to introduce ordinances and take part in its proceedings and deliberations on all questions, and the heads of departments shall be entitled to take part in its proceedings and deliberations on all questions relating to their respective departments, subject to such rules as the council shall from time to time prescribe, but without the right to vote. [103 v. 767, Art. V, § 15.]

[Sec. 3515-44.] § 16. [Powers of municipality.] In municipalities adopting the federal plan, the powers conferred upon municipalities by the constitution of Ohio, and any additional powers which have been or may be conferred upon municipalities by the general assembly shall be exercised by the officers and authorities provided for in this article unless the exercise of such powers shall have been expressly conferred upon some other authority of the municipality or reserved to the people thereof. [103 v. 767, Art. V, § 16.]

ARTICLE VI. GENERAL PROVISIONS—APPLICABLE TO EACH PLAN.

[Sec. 3515-45.] § 1. [Applicable to each plan.] The sections of this article shall apply to and be a part of each plan of government provided in this act. The powers conferred upon municipalities by the municipal code so far as applicable shall govern unless otherwise provided by law. Such provisions may be proposed by the legislative authority of any municipality, or by the electors of such municipality by petition in the manner prescribed by law for the submission of initiative petitions. Such provisions shall take effect and be in force when approved by the majority of the electors voting thereon. In municipalities adopting the commission plan of government provided in this act, the term "council"

as used in this article and in article VII, shall be held to refer to the commission. [103 v. 767, Art. VI, § 1.]

[Sec. 3515-46.] § 2. [Treasurer.] The treasurer shall be the custodian of all moneys of the municipality, and shall keep and preserve the same in such manner and in such place or places as shall be determined by the council. He shall pay out money only on warrants issued by the auditor. [103 v. 767, Art. VI, § 2.]

[Sec. 3515-47.] § 3. [The auditor.] The council shall choose an auditor whose duty it shall be to keep an accurate account of all taxes and assessments, of all money due to and all receipts and disbursements by the municipality, of all assets and liabilities of the municipality, and of all appropriations made by the council. He shall at the end of each fiscal year, and oftener if required by the council, audit the accounts of the several departments and officers, and shall audit all other accounts in which the municipality is interested. He may prescribe the form of reports to be rendered to his department, and the method of keeping accounts by all other departments, and he shall require daily reports to be made to him by each department showing the receipt of all moneys by such department and the disposition thereof. The auditor shall upon the death, resignation, removal, or expiration of the term of any officer, audit the accounts of such officer, and if such officer shall be found indebted to the municipality he shall immediately give notice thereof to the council and the solicitor, and the latter shall forthwith proceed to collect the same. [103 v. 767, Art. VI, § 3.]

[Sec. 3515-48.] § 4. [Payment of claims.] No warrant for the payment of any claim shall be issued by the auditor until such claim shall have been approved by the head of the department for which the indebtedness was incurred, and each head of department and his surety shall be liable to the municipality for all loss or damage sustained by the municipality by reason of the negligence or corrupt approval of any claim against the municipality in his department. Whenever any claim shall be presented to the auditor he shall have power to require evidence that the amount claimed is

justly due and is in conformity to law and ordinance, and for that purpose he may summon before him any officer, agent, or employe, or any department of the municipality, or any other person, and examine him upon oath or affirmation relative thereto, which oath or affirmation he may administer. [103 v. 767, Art. VI, § 4.]

[Sec. 3515-49.] § 5. **[Clerk.]** The council shall choose a clerk and such other officers and employes of its own body as may be deemed necessary. The clerk shall keep the records of the council and perform such other duties as may be required by ordinance or resolution. All officers and employes chosen by the council shall serve during the pleasure thereof. [103 v. 767, Art. VI, § 5.]

[Sec. 3515-50.] § 6. **[Solicitor.]** The solicitor shall act as the legal adviser to and attorney and counsel for the municipality, and for all officers in matters relating to their official duties. He shall prepare all contracts, bonds, and other instruments in writing in which the municipality is concerned, and shall endorse on each his approval of the form and correctness thereof, and no contract with such municipality shall take effect until the approval of the solicitor is endorsed thereon. He or his assistants shall be the prosecutor or prosecutors in any police or municipal court, and shall perform such other duties and have such assistants and clerks as may be required or provided. [103 v. 767, Art. VI, § 6.]

[Sec. 3515-51.] § 7. **[Qualifications of councilmen.]** Members of the council shall be electors of the municipality. They shall not hold any other public office or employment except that of notary public or member of the state militia, and shall not be interested in the profits or emoluments of any contract, job, work or service for the municipality. Any members who shall cease to possess any of the qualifications herein required shall forthwith forfeit his office and any such contract in which any member is or may become interested may be declared void by the council. [103 v. 767, Art. VI, § 7.]

[Sec. 3515-52.] § 8. **[Salaries and attendance of councilmen.]** The council shall by ordinance fix the salary of its

members which shall be paid in equal monthly installments. For each absence from regular meetings of the council, unless authorized by a two-thirds vote of all members thereof, there shall be deducted a sum equal to two per cent. of such annual salary. Absence for ten successive regular meetings shall operate to vacate the seat of a member unless such absence is authorized by council. [103 v. 767, Art. VI, § 8.]

[Sec. 3515-53.] § 9. [Chairman of council.] At the first meeting following each regular municipal election, the council shall elect one of its members chairman, who shall preside at meetings of the council and perform such duties as may be imposed upon him as presiding officer, by the council. [103 v. 767, Art. VI, § 9.]

Sec. 3515-54. [Legislative procedure.] A majority of all members of the council shall constitute a quorum to do business, but a smaller number may adjourn from day to day and compel the attendance of absent members. The affirmative vote of a majority of the members of the council shall be necessary to adopt any motion, or ordinance or resolution and on the passage of every ordinance or resolution the vote shall be taken by "yeas" and "nays" and entered upon the journal. Each proposed ordinance or resolution shall be in written or printed form, and shall not contain more than one subject which shall be clearly stated in the title; provided, however, that general appropriation ordinances may contain the various subjects and accounts for which moneys are appropriated. No ordinance, unless it be declared an emergency measure, shall be passed until it has been read on three separate days, the first and second reading of which may be by title only and in case said measure shall be printed and a copy thereof placed on the desk of each member then said third reading may be by title only, provided that the rule requiring every ordinance to be read on three separate days may be suspended by a three-fourths vote of all members elected or appointed to council, taken by "yeas" and "nays" on each ordinance, and entered on the journal. [110 v. 78, 79; 103 v. 767, Art. VI, § 10.]

[Sec. 3515-55.] § 11. [Publication of ordinances.] All ordinances or resolutions shall be in effect from and after thirty days from the date of their passage except as otherwise provided in this act. Ordinances of a general nature, or providing for public improvements, or assessing property shall, upon passage, be promptly published one time in not more than two newspapers of general circulation in the municipality. Such ordinances shall be printed in the body type of the paper under head lines in eighteen point type, which shall specify the nature of such legislation. For the publication of ordinances no newspaper shall be paid any higher price than its maximum bona fide commercial rate. [103 v. 767, Art. VI, § 11.]

[Sec. 3515-56.] § 12. [Annual tax ordinances.] An annual tax ordinance to determine the amount of the tax levy shall be prepared by the mayor, the chairman of the commission, or the city manager, as the case may be, under the direction of the council. For the purpose of preparing such ordinances the mayor, the chairman of the commission, or the city manager, as the case may be, shall require from the head of each office or department for which appropriations are made, a detailed statement, upon uniform blanks furnished by the mayor, the chairman of the commission, or the city manager, as the case may be, of the expenses of such office or department for the previous year or years and the estimated expense for the next year. The tax ordinance prepared by the mayor, the chairman of the commission, or the city manager, as the case may be, shall set forth in detail the probable revenues of the municipality from every source, in such form as to indicate the means by which it is proposed to provide for the estimated expenditure set forth in such ordinance, and shall also include detailed statements of the contemplated expenditures of the municipality and of each office, department and functional division thereof. After the tax ordinance is prepared by the mayor, the chairman of the commission, or the city manager, as the case may be, opportunity shall be given, after at least one week's notice, for public hearings thereon. The ordinance shall then be submitted to the council and by them to the county budget com-

mission which shall fix the total maximum tax levy permitted to the municipality for the ensuing year. The council shall then fix the actual tax levy for the ensuing year, but such levy shall not be higher than the estimate submitted by the mayor, the chairman of the commission, or the city manager, as the case may be, or exceed the limit fixed by the county budget commission. Such levy shall not be higher than the maximum now provided for by law. [103 v. 767, Art. VI, § 12.]

[Sec. 3515-57.] § 13. [Annual appropriation ordinance.] An annual appropriation ordinance shall be prepared by the council from estimates submitted by the mayor, the chairman of the commission, or the city manager, as the case may be, in the same manner as herein provided for the annual tax ordinance. The annual appropriation ordinance shall be submitted to the council at its first meeting in January and the total of any appropriation ordinance passed by the council shall not exceed the total balances carried over from the previous year, plus the estimated revenue of the current year. Supplemental appropriations shall not be made during the current year except from a contingent fund regularly set aside by the council in the annual appropriation ordinance or unless by an ordinance passed as an emergency measure. [103 v. 767, Art. VI, § 13.]

[Sec. 3515-58.] § 14. [Limitation on appropriations.] No money shall be drawn from the treasury of the municipality except in pursuance of appropriations made by the council, and whenever an appropriation is so made the clerk shall forthwith give notice to the auditor and treasurer. Appropriations may be made in furtherance of improvements or other objects or work of the municipality which will not be completed within the current year. At the end of each year all unexpended balances of appropriations shall revert to the respective funds from which the same were appropriated and shall then be subject to future appropriations. [103 v. 767, Art. VI, § 14.]

[Sec. 3515-59.] § 15. [Investigations by council.] The council or any commission thereof authorized by it so to do

shall have power to compel the attendance of witnesses and the production of books, papers and other evidence, at any meeting of the council, or any committee thereof, and for that purpose may issue subpoenas or attachments in any case of injury or investigation, to be signed by the presiding officer of the council, or chairman of such committee as the case may be, which shall be served and executed by any officer authorized by law to serve subpoenas and other processes, and if any witness shall refuse to testify to any acts within his knowledge, or to produce any papers or books in his possession, or under his control, relating to the matter under inquiry, before the council or any such committee, the council shall have power to commit the witness to prison for contempt. No witness shall be excused from testifying touching his knowledge or the matter under investigation in any such inquiry, but such testimony shall not be used against him in any criminal prosecution except for perjury. [103 v. 767, Art. VI, § 15.]

[Sec. 3515-60.] § 16. [Reports of council—publicity.] At the end of each year the council shall have printed an annual report, in pamphlet form, giving the classified statement of all receipts, expenditures, assets and liabilities of the municipality; a detailed comparison of such receipts and expenditures with those of year preceding; a summary of the council proceedings and a summary of the operations of the administrative departments for the previous twelve months. A copy of this report shall be furnished to the state bureau of accounting, the municipal library and to any citizen of the municipality who shall apply therefor at the office of the clerk. Similar reports may be printed quarterly at the discretion of the council. All meetings of the council or committees thereof shall be public and any citizen of the municipality shall have access to the minutes and records thereof at all reasonable times. [103 v. 767, Art. VI, § 16.]

[Sec. 3515-61.] § 17. [Civil service commission.] Within ten days after the first officers assume their duties, in any city adopting a plan of government provided in this act, the commission in cities adopting the commission plan, the coun-

cil in cities adopting the city manager plan and the mayor in cities adopting the federal plan, shall appoint three persons who shall constitute the municipal civil service commission. Not more than two of such persons shall be of the same political party and they shall serve, one for two years, one for four years and one for six years and until their successors are appointed and have qualified. Upon the expiration of their respective terms of office, the appointing authority shall appoint their successors to hold office for a term of six years and until their successors are appointed and have qualified. Any vacancy in the civil service commission shall be filled by the appointing authority for the unexpired term. The appointing authority may at any time remove any of said civil service commissioners for misconduct, neglect of duty or malfeasance in office, first having given such commissioner an opportunity of being publicly heard in person or by counsel in his own defense. The commission or council shall provide suitable rooms and all necessary supplies and equipment for the proper conduct of the duties of the civil service commission. [103 v. 767, Art. VI, § 17.]

[Sec. 3515-62.] § 18. [Salaries and duties.] The salaries of the civil service commissioners and of their assistants shall be determined by ordinance. The duties of the civil service commission shall be to enforce the provisions of the civil service law with respect to all offices and place of employment in such city. The civil service commission shall make such rules for the proper performance of its duties as it shall find necessary and expedient, and as are not inconsistent with the civil service law. [103 v. 767, Art. VI, § 18.]

[Sec. 3515-63.] § 19. [Compensation.] The salary of an elective officer shall not be changed during the term for which such officer was elected. All fees and perquisites authorized by law or ordinance appertaining to any office or officer in the municipal government shall be paid into the treasury, and unless otherwise provided shall be credited to the general fund, and no officer or employe of the municipality shall receive otherwise than as the representative of the municipality and for the purpose of paying same into

the treasury any fee, present, gift, or emolument, or share therein, for official services, other than his regular salary or compensation, and any officer violating this prohibition shall thereby forfeit his office. No member of the council or other officer or employe thereof shall receive compensation for services rendered in any other department of the city government, nor shall they, nor any other officer, clerk, or employe of the municipality, act as agent or attorney for any person, company, or corporation, in relation to any matter to be affected by action of the legislative or any other department of the municipality, or by the action of any officer of the municipality. The violation of this prohibition shall be cause for removal. [103 v. 767, Art. VI, § 19.]

[Sec. 3515-64.] § 20. **[Duties of officers.]** The duties of all officers and employees shall be those prescribed by this act or by ordinance or resolution of the council. [103 v. 767, Art. VI, § 20.]

[Sec. 3515-65.] § 21. **[Bonds.]**. The treasurer, auditor and such other officers or employes of the municipality as the council may direct, shall give a bond to the municipality for the faithful performance of their duties in the sum as the council may fix by ordinance or resolution. Premiums on official bonds may be paid by the municipality. [103 v. 767, Art. VI, § 21.]

[Sec. 3515-66.] § 22. **[Oath of office.]** Every officer of the municipality and every employe holding a position upon annual salary before entering upon the duties of his office shall take and subscribe to an oath or affirmation, to be filed and kept in the office of the clerk, that he will support the constitution of the United States and the State of Ohio, and the charter and ordinances of the municipality; that he will not be influenced by any consideration except that of merit and fitness in the appointment or discharge of employes; that he will not make or authorize the expenditure of public money otherwise than for adequate consideration and efficient service to the municipality; that he will in all other respects faithfully discharge the duties of his position or office. [103 v. 767, Art. VI, § 22.]

[Sec. 3515-67.] § 23. [Existing offices abolished.] All offices, boards or commissions, except boards in charge of educational institutions, sinking fund and depository commissions, are hereby abolished; the title to any property controlled by such officers, boards or commissions is vested in the municipality; and their powers and duties shall be exercised and performed as provided in this act. [103 v. 767, Art. VI, § 23.]

[Sec. 3515-68.] § 24. [Schedule.] The powers which are conferred and the duties which are imposed upon any office or department of the municipality under the laws of the state, or any ordinance which is in force at the time of the taking effect of this act, shall, if such office or department is abolished in pursuance of the provisions of this act, be thereafter exercised and discharged by the officer, board or department upon whom is imposed corresponding functions, powers and duties under the provisions of this act. Nothing herein contained shall impair or effect the validity of any contract or bond executed or authorized prior to the adoption by any municipality of one of the plans provided for in this act. When any such contract or bond contains provisions that the same be enforced by some officer, board or department therein named and where by the adoption of any plan provided for in this act such office, board or department is abolished, the powers conferred and the duties imposed with reference to the same upon the officer, board or department which has been abolished shall thereafter be exercised and discharged by the officer, board or department upon whom is conferred or imposed like powers, functions or duties under the provisions of this act. [103 v. 767, Art. VI, § 24.]

[Sec. 3515-69.] § 29. [Abandonment of plan.][1] Any municipality which shall have operated for five years under any plan provided in this act may abandon such organization, and may adopt any organization or form of government provided by this act and designated in the petition by proceeding as follows: Upon the filing of a petition with the board of deputy state supervisors of elections or board of deputy state supervisors and inspectors of elections, as the case may be,

containing the names of not less than ten per cent. of the electors of such municipality, a special election shall be called by the council at which the following proposition shall be submitted: "Shall the municipality of (.....) abandon the (.....) plan and adopt the (name) plan as provided in article (.....) chapter (.....) of the General Code?" If a majority of the votes cast at such special election be in favor of such proposition, the officers elected at the next succeeding regular municipal election shall be those prescribed by the statutes designated in the petition and upon the qualification of such officers such municipality shall be and become organized under the statutes designated; but such change shall not affect the property, right or ability of any nature of such municipality, but shall extend merely to such change in its form of government. The election for such change shall be ordered and conducted, and the results declared as provided in section 2 of article I of this act, and in the general election laws of the state. [103 v. 767, Art. VI, § 29.]

(1) **No application to charter cities or villages.**—The constitutional provisions in § 9, Art. XVIII of the constitution are exclusive as to amendment of charters, and the above section of the General Code has no application. Switzer v. State, ex rel., 103 O. S. 306.

ARTICLE VII. INITIATIVE, REFERENDUM AND RECALL.

[Sec. 3515-70.] § 1. [Adoption.] All laws pertaining to the initiative and referendum in municipalities shall apply to and become a part of each plan of government provided for in this act. The provisions of section 2 of this article shall be submitted to the electors of the municipality as prescribed in article I, section 3 hereof, with each and every plan of government, provided herein. Section 2 of this article shall form a part of any such plan of government and go into effect in such municipality only to the extent to which the provisions have been adopted as provided in article I, section 3 hereof. [103 v. 767, Art. VII, § 1.]

[Sec. 3515-71.] § 2. [The recall.] Any elective officer of any municipality may be removed from office by the quali-

fied voters of such municipality. The procedure to effect such removal shall be as follows:

(1). A petition signed by qualified electors equal in number to at least fifteen per cent. of the total votes cast at the last preceding general municipal election, and demanding the election of a successor to the person sought to be removed, shall be filed with the deputy state supervisors of elections or board of deputy state supervisors and inspectors of elections, as the case may be, which petition shall contain a general statement in not more than two hundred words of the grounds upon which the removal is sought. The form, sufficiency and regularity of any such petition shall be determined as provided in the general election laws.

(2). If the petition shall be sufficient, and if the person or persons whose removal is sought shall not resign within five days after the sufficiency of the petition has been determined, the council shall thereupon order and fix a day for holding an election to determine the question of his removal, and for the selection of a successor to each officer named in said petition, which election shall be held not less than thirty nor more than forty days from the finding of the sufficiency of the petition. The election authorities shall cause publication of notice and all arrangements to be made for holding such election, and the same shall be conducted and the result thereof returned and declared in all respects as are the results of general municipal elections.

(3). The nomination of candidates to succeed each officer sought to be removed shall be made without the intervention of a primary election by filing with the election authorities at least twenty days prior to such special election, a petition proposing a person for each such office, signed by electors equal in number to ten per cent. of the total votes cast at the last preceding general municipal election for the head of the ticket.

(4). The ballots at such recall election shall conform to the following requirements; with respect to each person whose removal is sought, the question shall be submitted: "Shall (name of person) be removed from the office of (name of office) by recall?" Immediately following each

such question, there shall be printed on the ballots, the two propositions in the order set forth:

"For the recall of (name of person)".

"Against the recall of (name of person)".

Immediately to the left of the proposition shall be placed a square in which the electors, by making a cross (X) mark, may vote for either of such propositions. Under each of said questions shall be placed the names of candidates to fill the vacancy. The name of the officer whose removal is sought shall not appear on the ballot as a candidate to succeed himself.

(5). In any such election, if a majority of the votes cast on the question of removal are affirmative, the person whose removal is sought shall thereupon be deemed removed from office upon the announcement of the official canvass of that election, and the candidate receiving the plurality of the votes cast for candidates for that office shall be declared elected. The successor of any person so removed shall hold office during the unexpired term of his predecessor. The question of the removal of any officer shall not be submitted to the electors until he shall have served for at least one year of the term during which he is sought to be recalled. The method of removal herein provided is in addition to such other methods as may be provided by law. If, at any such recall election, the incumbent whose removal is sought is not recalled, he shall be repaid from the city treasury his actual and legitimate expenses for such election, but such sum shall not exceed fifty per cent. of the sum which he is by law permitted to expend as a candidate at any regular municipal election. [103 v. 767, Art. VII, § 2.]

Constitutional provisions as to "Home Rule."—For provisions of the constitution which confer home rule upon municipal corporations and provide for the election of a commission to frame a charter and for its adoption, and for notes on "home rule" and forms and order of procedure, see Part III, *post*.

Home rule charters.—For special charters adopted by various Ohio municipalities, see General Code, Page's Comp. Ed., following Sec. 3515-71.

CHAPTER 2.

INCORPORATION.[1]

Sec. 3516. [Incorporation of villages.] Villages may be created and incorporated in the manner provided in this title. [96 v. 21, § 5.]

(1) In the former Revised Statutes, the provisions of this Chapter were contained in Chapter 2, Division 2, Title XII, R. S.

Sec. 3517. [Who may obtain incorporation.] The inhabitants of any territory laid off into village lots, a plat of which territory has been acknowledged and recorded as is provided with respect to deeds, or the inhabitants of any territory which has been laid off into such lots and surveyed and platted by an engineer or surveyor who certified thereon, under oath, to its correctness, and which is recorded as is provided with respect to deeds, or the inhabitants of any island or adjacent islands, or parts thereof, or of such island or islands or parts thereof, and adjacent territory, may obtain the organization of a village in the manner provided in this title. When such village is organized upon any island or islands, it may be done without reference to the number of permanent inhabitants embraced within such territory, and without such plat having been first made. No corporation under this chapter shall embrace within its limits the grounds or improvements of any county or city infirmary.[1] [R. S. Sec. 1533; 92 v. 26; 76 v. 116; 73 v. 165.]

(1) **Suit to test right.**—Whether a suit in quo warranto will lie to test the right of the people of a certain locality to be a municipal corporation, *quere*. State ex rel. v. Newark, 57 O. S. 430.

Construction of provisions.—The provisions of this chapter are to be construed in connection with Chap. 3, and both are to be construed as one act. Shugars v. Williams, 50 O. S. 297.

Incorporation of class of territory described in § 3517 must be accomplished by petition to county commissioners; the provisions of § 3526 *et. seq.*, apply to a class of territory not embraced within § 3517. Schorr v. Braun, 17 Dec. 478; 4 N. P. (N. S.) 561; Hall v. Siegrist, 13 Dec. 46.

The two methods provided under the laws of Ohio for the incorporation of villages are not exclusive

each of the other, but are cumulative. Either method may be pursued as to allotted or platted lands, but as to unplatted lands, §§ 3526—3531 alone apply. Libby v. Paul, 17 N. P. (N. S.) 433.

Sec. 3518. [How application made.] Application for such purpose shall be made by petition, which, except as provided in the last preceding section, shall be signed by not less than thirty electors, residing within the proposed corporate limits, and addressed to the county commissioners, accompanied by an accurate map of the territory.[1] [R. S. Sec. 1554; 71 v. 65; 66 v. 150.]

(1) **Title of Petition.**—A paper filed as a petition and treated as such, although styled "Amended Petition" is a sufficient compliance with the statute. The character and contents of the paper should be looked at, to ascertain what it is, and not merely its title. Turpin v. Hagerty, 12 Dec. 161, (aff'd 69 O. S. 534).

Sec. 3519. [What petition shall contain.] The petition shall contain: 1. An accurate description[1] of the territory embraced within the proposed corporation, and it may contain adjacent territory not laid off into lots; 2. The supposed number of inhabitants residing in the proposed corporation; 3. The name proposed; 4. The name of a person to act as agent for the petitioners, and more than one agent may be named therein. [R. S. Sec. 1555; 66 v. 150.]

(1) **Description.**—A map and description taken from the public records as they had stood for years, is sufficient to comply with the requirement of an accurate description, even though actual measurements reveal some discrepancies in the map. Turpin v. Hagerty, 12 Dec. 161 (aff'd 69 O. S. 534). See also Wright v. Oberlin, 23 C. C. 509.

Map showing lines bounding and dividing the properties, is sufficient, notwithstanding it does not show the entire territory platted into lots. Schorr v. Braun, 17 Dec. 478; 4 N. P. (N. S.) 561.

FORM OF PETITION FOR INCORPORATION OF VILLAGES.

To the Board of Commissioners of the County of.....,
State of Ohio:

The undersigned, being thirty [*or* more] electors residing within the following described territory, situated in.....County, State of Ohio, to wit:

(Here give an accurate description of territory embraced within the pro-

posed corporation); an accurate map of which territory is attached hereto; respectfully represent:

That all [*or* a part] of said territory has been laid off in village lots; a plat of which territory so laid off, has been acknowledged and recorded as is provided with respect to deeds [*or* which territory has been surveyed and platted by an engineer who has certified theron, under oath that the same is correct];

That the territory above described does not embrace within its limits the grounds or improvements of any county or city infirmary;

That the number of inhabitants now residing in said territory is about .....;

And respectfully petition your honorable body that said territory may be organized into a village, in the manner provided by law, to be named the "Village of....."; and ..... and ..... are hereby designated as agents for the undersigned to act for them in all matters before your honorable body relative to the petition and to the organization of the said territory into the said village.

(This must be signed by at least 30 electors residing in the territory to be organized into a village.)

(A map of the territory described marked "Map of territory to be organized into the village of.....," should be attached to the petition.)

(The form given may be adapted to a petition for the incorporation of territory on an island or islands. In such case no map need accompany the petition, and the reference to the number of inhabitants may be omitted.)

Sec. 3520. [Presentation to commissioners; time of hearing; notice.] The petition shall be presented to the board of commissioners at a regular session thereof, and when so presented the board shall cause it to be filed in the office of the county auditor,[1] where it shall be subject to the inspection of any person interested. The commissioners shall then fix, and communicate to the agent of the petitioners, the time and place for hearing the petition, which time shall be not less than sixty days after such filing. Thereupon the agent shall cause a notice containing the substance of the petition, and the time and place where it will be heard, to be published in a newspaper printed and of general circulation in the county, for the period of six consecutive weeks, and cause a copy of the notice to be posted in a conspicuous place within the limits of the proposed corporation, not less than six weeks prior to the time fixed for the hearing.[2] [R. S. Sec. 1556; 66 v. 150.]

(1) **Filing with county auditor.**—Purpose of provision requiring petition to be filed in office of county auditor was to provide a safe place for deposit and not as additional notice of the hearing, and a failure so to file the petition, does not deprive the board of jurisdiction to proceed. Pollock v. Toland, 25 C. C. 75; 1 C. C. (N. S.) 315.

(2) **Posting of notice.**—The notice here required when made applicable to the annexation of territory to a village on its application, must be posted on the territory to be annexed. Franklin v. Croll, 31 O. S. 647. See § 3549.

Adjourned meetings of commissioners.—Adjourned meetings of the county commissioners are continuations of the regular sessions, in so far as the requirements of this section are concerned. Turpin v. Hagerty, 12 Dec. 161, (aff'd 69 O. S. 534).

FORM OF NOTICE OF PETITION.

LEGAL NOTICE.

Notice is hereby given that on.....19...., there was presented to the Board of Commissioners of the County of ....., State of Ohio, a petition signed by thirty [*or* more] electors residing within the following described territory in the County of....., State of Ohio, to-wit:

(Here copy description of territory given in the petition), and representing that (here copy the representations in the petition); and praying therein that said territory may be organized into a village to be named the "Village of..... .....," which petition is now on file in the office of the auditor of.....County; and designating the undersigned to act as the agents of the petitioners, as required by law.

The said Board of Commissioners has fixed.....19...., at.... o'clock.....M., as the time for hearing said petition (not less than sixty day after petition is filed) at the office of the commissioners in..... (here insert place).

(To be signed by the designated agent or agents.)

(This notice should be published in some paper printed and of general circulation in the county, or if none such, then in some paper of general circulation in the county (see § 4676) for six consecutive weeks prior to the time set for hearing, and should also be posted for the same length of time at some conspicuous place within the limits of the proposed corporation.)

Sec. 3521. [Hearing before the commissioners.] [1] The hearing shall be public, and may be adjourned from time to time, and from place to place, according to the discretion of the commissioners. Any person interested may appear, in person or by attorney, and contest the granting of the prayer of the petition, and affidavits presented in support of or against the

prayer of the petition shall be considered by the commissioners, and the petition may be amended by their leave. If any amendment is permitted, whereby territory not before embraced is added, the commissioners shall appoint another time for the hearing, of which notice shall be given, as specified in the last preceding section. [R. S. Sec. 1557; 66 v. 151.]

(1) **Applies to annexation proceedings.**—This section applies to the procedure in case of annexation of territory to a village as well as to the case of organization of a village. Shugars v. Williams, 50 O. S. 297. See § 3549 *infra*.

Amendment to cure error in description which merely corrects omission of one course in boundary may be made without additional notice. Pollock v. Toland, 1 C. C. (N. S.) 315; 25 C. C. 75.

Sec. 3522. [Order for organization.] Upon such hearing, if the commissioners find that the petition contains all the matters required, that its statements are true, that the name proposed is appropriate, that the limits of the proposed corporation are accurately described and are not unreasonably large or small, that the map or plat is accurate, that the persons whose names are subscribed to the petition are electors residing on the territory, that notice has been given as required, that there is the requisite population for the proposed corporation, and if it seems to the commissioners right that the prayer of the petition be granted, they shall cause an order to be entered on their journal to the effect that the corporation may be organized. [R. S. Sec. 1558; 66 v. 151.]

FORM OF ORDER OF ORGANIZATION.

. The Board of Commissioners of the County of..... proceeding this day to hear the matter of the petition of.....and others to obtain the organization of the territory in their petition described, into a village, in accordance with law, and having in open meeting, heard all persons desiring to be heard for or against the granting of said petition, and considered the affidavits presented with reference thereto, and being fully advised, find that said petition contains all the matter required by law; that its statements are true; that the name of said proposed village, which is given in the petition, is appropriate; that the limits of the proposed corporation are accurately described and are not unreasonably large or small; that the map of the same, filed with the petition, is accurate; that a sufficient number as required by law of the persons whose names

are subscribed to the petition, are electors residing within the territory described in the petition; that the required legal notice of the petition has been given, and that the population of said proposed corporation is ....., which is a sufficient number;

And it further appearing to the Board that it is right and proper that said petition should be granted, it is hereby ordered that the prayer of said petition be granted, and that the territory described in said petition may be organized into a village to be known as the "Village of....," as prayed for in the petition, and that a certified transcript signed by a majority of this board of all the orders and proceedings of this board relative to said petition and hearing thereon, together with said petition, and map attached thereto, and all papers on file relating to said matter, be transmitted at once to the recorder of the county.

(If the petition is rejected the form may be adapted to suit this contingency.)

Sec. 3523. [What shall be entered on journal; papers filed with recorder.] The commissioners shall cause to be entered on their journal all their orders and proceedings[1] in relation to such incorporation, and they shall cause a certified transcript thereof, signed by a majority of them, to be delivered, together with the petition, map and all other papers on file relating to the matter, to the recorder of the county, at the earliest time practicable. [R. S. Sec. 1559; 66 v. 151, §§ 15, 19.]

(1) **Not subject to review.**—Proceedings had by county commissioners with respect to the incorporation of a village are political in their nature and not judicial, and are therefore not subject to review on petition in error. Bring et al. v. Hollis et al., 21 C. C. (N. S.) 52; 4 Oh. App. 45.

Sec. 3524. [When recorder to make record.] The recorder shall file the transcript and other papers in his office, and at the expiration of sixty days thereafter, unless enjoined as hereinafter provided, he shall make a record of the petition, transcript, and map in the proper book of records and preserve in his office the original papers delivered to him by the commissioners, certifying thereon that the transcript, petition, and map are properly recorded. [R. S. Sec. 1560; 66 v. 151.]

Sec. 3525. [When deemed organized.] When the record is made, the corporation shall be deemed the village of ————, to be organized and governed under the provisions of this title. Thereupon the recorder shall make, and certify under his

official seal, two transcripts of the record, one of which he shall forward to the secretary of state, and, on demand, deliver the other to the agent of the petitioners, with a certificate thereon that the duplicate has been forwarded to the sceretary of state. When a municipal corporation is organized by the election of its officers, notice of its existence shall be taken in all judicial proceedings. [R. S. Sec. 1561; 66 v. 152, §§ 17, 18.]

Sec. 3526. [Petition to township trustees for incorporation.] When the inhabitants of any territory or portion thereof desire that such territory shall be incorporated into a village, they shall make application, by petition, to the trustees[1] of the township in which the territory is located, or, if the territory is located in more than one township, to the trustees of the township in which the majority of such inhabitants reside. Such petition shall be signed by at least thirty electors of the territory, a majority of whom shall be freeholders, and shall be accompanied by an accurate map[2] of the territory, and shall contain in addition to the matter hereinbefore required to be set forth in petitions to incorporate territory laid off into village lots, the request of the petitioners that an election be held to obtain the sense of the electors upon such incorporation. Such petition may be presented at a regular or special meeting of the township trustees. [R. S. Sec. 1561a; 94 v. 18; 92 v. 333.]

(1) **Filing petition.**—The clerk of the township is the clerk of its board of trustees and the petition and map are sufficiently filed and presented to the township trustees, if filed with the township clerk. State ex rel. v. Mitchell, 22 C. C. 208.

The fact that the petition and map were, after being filed, returned to the person filing as a matter of convenience in carrying it to the board meeting, would not invalidate the filing. *Ib.*

Time to consider petition, must be allowed trustees, and mandamus, before a week has elapsed, will not lie to compel action. State ex rel. v. Trustees, 19 C. C. 742.

Rival petitions.—Where two legal petitions are filed the trustees must act on the one filed first, and no further action can be taken until that petition is disposed of; and mandamus will lie in such case to compel the trustees to act on the first petition. State ex rel. v. Mitchell, 22 C. C. 208.

Purpose of the section.—The purpose of the statute was to allow a part of a township to be formed into a municipal corporation, and it

is against public policy to form the entire township into such corporation in order to defeat this purpose. State ex rel. v. Mitchell, 22 C. C. 208.

See note to § 3516.

(2) **Defective Map.**—If the map filed is not accurate it may be supplemented by a more perfect one, before action is taken by the trustees. State ex rel. v. Mitchell, 22 C. C. 208.

FORM OF PETITION TO TOWNSHIP TRUSTEES FOR INCORPORATION OF VILLAGE.

To the Trustees of the Township of....., State of Ohio:

The undersigned, being thirty [*or* more] electors, a majority of whom are freeholders and all of whom reside within the following described territory situated within the County of ....., State of Ohio, to-wit:

(Here insert accurate description of territory embraced within the proposed corporation); an accurate map of which territory is attached hereto, respectfully represent that the number of inhabitants residing within said territory is.....and respectfully petition your honorable body that said territory may be organized into a village in the manner provided by law, and that the name of said village may be the "Village of.....," and hereby designate..... and..... their agents to act for them in all matters relating to the hearing upon this petition and in other matters relating to the incorporation of said territory into a village; and further petition your honorable body that an election may be ordered to obtain the sense of the electors of said territory upon the question of its incorporation into a village as prayed for in this petition.

(This petition must be signed by at least thirty electors residing in the territory to be organized into a village, a majority of whom must be freeholders.)

(A map of the territory described, marked "Map of territory to be organized in the village of.....," should be attached to the petition.)

Sec. 3527. [Procedure upon receipt of petition.] When the township trustees receive the petition, with the proof that the persons who signed it are electors, and reside within the limits of the proposed incorporation, and that a majority of them are freeholders, they shall make and order that such territory shall, with the assent of the qualified voters thereof as hereinafter provided, be an incorporated village by the name specified in the petition. They shall also include in such order, a notice for the election by the qualified voters residents in the territory, at a convenient place therein to be by them named, on a day within fifteen days thereafter, to determine whether such territory shall be incorporated. The

township trustees shall give ten days' notice[1] of such election by publication in a newspaper of general circulation in such territory, and cause written or printed notices thereof, to be posted in three or more public places in such territory proposed to be incorporated. [R. S. Sec. 1561b; 92 v. 333.]

(1) **Defect in notice.**—Failure to publish notice of an election as to a proposed incorporation for the full ten days required by statute will be treated as an irregularity only, where there is no showing that the result of the vote would have been in any way changed had publication been made for the full time. Libby v. Paul, 17 N. P. (N. S.) 433.

FORM OF FINDING AND ORDER OF TRUSTEES.

WHEREAS, A petition has been presented to the trustees of the township of....., County of....., signed by.....and others, praying that the following described territory: (Here copy description of territory given in the petition), may be incorporated into a village as provided by law; and

WHEREAS, Said trustees after hearing all evidence submitted are fully satisfied that the persons who signed the said petition are electors residing within the territory proposed to be incorporated into a village and that a majority of them are freeholders therein;

Now therefore be it Resolved: Sec. 1. That the said territory be, and the same is hereby made and ordered to be an incorporated village by the name of the "Village of .....," with the assent of the qualified voters thereof.

Sec. 2. That an election be held on the.....day of..... 19.... (this date must be within fifteen days after the date of the resolution), to obtain the sense of the electors of said territory on the question of incorporation of said territory into the village of.....and that such election be held at (here insert place of holding election).

Sec. 3. That notice of the time and place of holding such election be given by publication in....., a newspaper of general circulation in said territory and by posting written [*or* printed] notices thereof in three or more public places in said territory proposed to be incorporated. (The notice must be for a period of ten days.)

Passed this.....day of.....19.... (To be signed by the Trustees of the Township. Attested by Clerk.)

FORM OF NOTICE OF ELECTION.

LEGAL NOTICE.

Notice is hereby given that on the.....day of.....at..... (here insert place of holding election), in the township of..... County of....., an election will be held to determine whether the following described territory shall be incorporated into a village to be

known as the "Village of....," to-wit: (Here copy description of territory given in the petition.)

By order of the trustees of the township of..... (to be signed by the trustees of the township, and attested by the clerk).

Sec. 3528. [Election; form of ballot.] The township trustees shall be judges of the election, and the township clerk shall be clerk thereof. As far as practicable, the election shall be conducted in the manner prescribed for the election of township officers, and the ballot shall contain the words "For incorporation" and "Against incorporation." If a majority of the ballots cast at such election shall contain thereon the words "Against incorporation," the voters of such territory shall be deemed not to have assented to the incorporation thereof, and no further proceedings shall be had in relation thereto, but this shall not be a bar to other proceedings for the same purpose. [R. S. Sec. 1561c; 92 v. 334.]

Sec. 3529. [Proceedings if result is affirmative.] If a majority so cast have thereon the words, "For incorporation," the township trustees shall cause to be entered on their journal, a minute of all their proceedings, the number of votes cast at the election, the number of votes cast for incorporation, and the number cast against incorporation, and they shall then declare that such territory shall from that time be deemed an incorporated village, and shall make an order declaring that such village has been incorporated by the name adopted.[1] [R. S. § 1561c; 92 v. 334.]

(1) **Injunction against election.**—In view of the statutory remedies provided in § 3531, by which the right to petition the Court of Common Pleas for review of proceedings had for incorporation is given, an injunction to restrain the election by the voters of the territory to be incorporated ordered by the township trustees can not be granted. Lawrence v. Mitchell, 8 N. P. 8. See State v. Mitchell, 22 C. C. 208.

Constitutionality.—Sections authorizing incorporations under proceedings before township trustees held not unconstitutional as a delegation of power by the Legislature. Lawrence v. Mitchell, 8 N. P. 8.

FORM OF DECLARATION AND ORDER OF TRUSTEES.

WHEREAS, An election was held in the township of ....., County of....., State of Ohio, on the.....day of.....19...., to determine whether the following described territory shall be incorporated into a village to be known as the "Village of .....," to-wit: (Here copy description of territory given in the petition and election notice); and

WHEREAS, At said election ..... votes were cast, ... of which were in favor of said incorporation and.....of which were against the same, a majority being in favor of said incorporation.

Now therefore, it is hereby ordered and declared that said territory shall henceforth be deemed an incorporated village, and

It is further ordered and declared that such village has been incorporated by the name of the "Village of.....," and a certified transcript of the journal entries of all the proceedings of this board in this matter, together with the original petition and plat, shall be delivered to the Recorder of the County of.....

(This should be signed by the trustees and attested by the clerk.)

Sec. 3530. [Transcript and record.][1] The trustees shall make a certified transcript of the journal entries of all their proceedings and a majority of them having signed it, with the original petition and plat, they shall deliver it to the county recorder, who shall forthwith make a record of the petition, transcript and plat or map, in the public book of records, and preserve in his office the original papers delivered to him by the trustees, and certify thereon that the transcribed petition and map are properly recorded. When the recorder has so made such record, he shall certify and forward to the secretary of state a transcript thereof. [R. S. § 1561c; 92 v. 334.]

(1) **Transcript, requirements of.**— Proof that persons who signed the petition for incorporation are electors, and reside within the limits of the proposed incorporation, and a majority of them are freeholders, need not be set out in the transcript filed with the recorder. Libby v. Paul, 17 N. P. (N. S.) 433.

Sec. 3531. [When becomes a village; proceedings to enjoin.] The corporation shall then be a village under the name adopted in the petition with all powers and authorities given to villages by this title, but no injunction shall be brought, as herein provided in case of filing the transcript with the county commissioners, unless the action be instituted within ten days from the filing of the papers by the trustees with the

county recorder, but the right of petition to the court of common pleas for error shall exist as provided in the following sections of this chapter.[1] [R. S. § 1561c; 92 v. 334.]

(1) **Scope of review** by common pleas court, see Wells v. Brill, 8 N. P. (N. S.) 454.

Sec. 3532. [Injunction against recorder.] Within sixty days from the filing of the papers by the county commissioners with the recorder, any person interested may make application by petition to the court of common pleas, or, if during vacation, to a judge thereof, setting forth the errors complained of, or the inaccuracy of the boundaries, or that the limits of the proposed corporation are unreasonably large or small, or that it is not right, just, or equitable that the prayer of the petition presented to the board of commissioners be granted, or containing any or all of such averments, and praying an injunction restraining the recorder from so making the record and certifying the transcript.[1] [R. S. Sec. 1562; 92 v. 196; 66 v. 152.]

(1) **Scope of injunction.**—In an injunction under this section, the case made before the commissioners cannot be retried upon its merits and an injunction cannot be allowed except for errors or irregularity in the proceedings or any inaccuracy in the description of territory sought to be incorporated. Hulbert v. Mason, 29 O. S. 562.

Unreasonably large territory.—A proposed incorporation of three thousand acres is not unreasonably large, where there is a population of six hundred, and the allotments cover six hundred acres, and the character of the property is rapidly changing; nor is ground afforded for refusing a prayer for incorporation because some of those owning farm lands will be inconvenienced by reason of the fact that they do their shopping in a neighboring village and their social relations are maintained there. Libby v. Paul, 17 N. P. (N. S.) 433.

No appeal.—No appeal lies from the judgment of the court or judge, allowing or refusing the injunction. The application to the court is not in the nature of a bill in equity or of a civil action, but of a proceeding in error. Hulbert v. Mason, 29 O. S. 562.

Contents of petition.—Petition should set forth specifically the errors complained of, and should not state merely that errors were committed. Hulbert v. Mason, 29 O. S. 562.

Interest required.—It is not necessary that plaintiff should have a direct, pecuniary interest in property within the proposed corporation to constitute a "person interested," and one residing and owning property two miles distant therefrom whose taxes will be increased.

has such an interest. Hall v. Siegrist, 13 Dec., 46.

Collateral attack.—The order of the county commisioners though subject to review by the courts, is not void, and cannot be collaterally impeached. Blanchard v. Bissell, 11 O. S. 96.

FORM OF PETITION FOR INJUNCTION.

Court of Common Pleas, ...County, Ohio.

..... Plaintiff, vs. ..... Recorder of the County of..... Defendant.	PETITION.

Plaintiff says that certain territory within the County of..... [*or* the township of....., in the County of.....], is sought to be organized into an incorporated village under the name of the "Village of.....";

A certified transcript of the proceedings of the County Commissioners [*or* of the township trustees] in relation thereto, together with the petition for such incorporation, and all maps and papers relating thereto are now in the hands of the Recorder of this County for record.

Plaintiff further says that he is a resident of the territory sought to be incorporated as aforesaid, and is interested in the matter of such incorporation.

And plaintiff further says that there is error in the said proceedings in this, to-wit: (Here state specifically the error complained of.)

Wherefore, plaintiff prays that an injunction may issue restraining the recorder from making a record of the said proceedings and certifying the transcript thereof as provided by law.

.....

[Verification.] Attorney for Plaintiff.

(If suit is brought to prevent incorporation upon petition to County Commissioners the same must be filed within sixty days from the filing of the papers with the recorder, § 3532; if to prevent incorporation upon petition to township trustees, it must be filed within ten days from the filing of the papers with recorder, § 3531).

Sec. 3533. [Proceedings in such case.] When the petition is filed, the person filing it shall give notice thereof, in writing, to the recorder and the agent of the petitioners for the corporation. On receiving such notice, the recorder shall forthwith transmit to the clerk of the court where the petition for injunction is pending, all the papers relating to the matter on file in the recorder's office, and in that event, no record

of the papers shall be made by the recorder, or transcript certified by him, as hereinbefore provided, unless he receive a certificate from the clerk of the court, showing that the injunction has been denied. [R. S. Sec. 1563; 66 v. 152.]

FORM OF NOTICES OF PETITION.

To the Recorder of the County of .....:

You are hereby notified that a petition has been filed by the undersigned, on the..... day of..... 19...., in the Court of Common Pleas, in the County of....., State of Ohio, praying therein for an injunction restraining you from making a record of the proceedings for the incorporation of the village of.....or certifying transcripts of such record.

....., Plaintiff.

To ..... and ....., agents of the petitioners for the incorporation of the village of.....:

You are hereby notified that a petition has been filed by the undersigned on the.....day of.....19...., in the Court of Common Pleas, of the County of....., State of Ohio, praying therein for an injunction restraining the Recorder of.....County from making a record of the proceedings for the incorporation of the village of..... or certifying transcripts of such record.

.....Plaintiff.

Sec. 3534. [Filing, docketing and hearing of petition.] The court or judge shall cause the petition to be filed and docketed in the office of the clerk of the courts, and shall hear the petition at such time as he shall appoint, not less than twenty days from the filing thereof. Upon such hearing the court or judge may hear evidence upon the matters and things averred in the petition. If no error is found in the proceedings before the commissioners, and no inaccuracy in the boundaries, and if the court further finds that the limits of the proposed corporation are not unreasonably large or small, and that it is right, just and equitable that the prayer of the petition presented to the commissioners be granted, the petition for such injunction shall be dismissed. Thereupon the clerk shall return the papers to the recorder, with a certified transcript of the order of the court, and the recorder shall immediately record the transcript certified by the commissioners, the petition for the corporation, the map, and the order of the court, and make, forward and deliver the transcripts as hereinbefore provided. [R. S. Sec. 1564; 92 v. 196; 66 v. 152.]

Sec. 3535. [Proceedings if error is found.] If error is found in the proceedings, or if the boundaries are found to be so inaccurately described as to render indefinite or uncertain the limits or extent of the proposed corporation, or if the court shall find that the limits of the proposed corporation are unreasonably large or small, or that it is not right, just or equitable that the prayer of the petition presented to the commissioners be granted, the court or judge shall make an order enjoining the recorder from making the record. Such order shall not be a bar to subsequent applications to the commissioners for the purpose of effecting such incorporation. The court or judge shall render such judgment as to the payment of the cost incurred in such proceeding for injunction as he deems just and equitable. [R. S. Sec. 1564; 92 v. 196; 66 v. 152.]

Sec. 3536. [Election of officers.] The first election of officers for such corporation shall be at the first municipal election after its creation, and the place of holding the election shall be fixed by the agent of the petitioners. Notice thereof, printed or plainly written, shall be posted by him in three or more public places within the limits of the corporation, at least ten days before the election. The election shall be conducted, and the officers chosen and qualified in the manner prescribed for the election of township officers, and the first election may be a special election held at any time not exceeding six months after the incorporation, and the time and place of holding it shall be fixed by such agent, and notice thereof shall be given as is required herein for the municipal election. [R. S. Sec. 1565; 73 v. 157.]

Sec. 3537. [When territory embraces parts of more than one county.] When the inhabitants residing upon adjacent portions of territory, in two or more counties, laid off into village lots, a plat or plats of which have been acknowledged and recorded, as hereinbefore required, desire the organization of such territory into a village, the petition therefor shall be made to the commissioners of the county in which the largest number of qualified voters of the proposed corporation reside, and a statement to that effect shall be set forth in the petition. The transcript of the proceedings of the commissioners, and

the map or plat accompanying it, shall be recorded in the county in which the petition is filed, at the time and in the manner provided for in other cases. Within ten days thereafter, the recorder of such county shall make a certified transcript of such record for each of the other counties in which any portion of the territory is situated, and forward it to the recorders of such counties, to be by them recorded in the manner required for original papers. [R. S. Sec. 1566; 66 v. 153.]

Sec. 3538. [Other proceedings to establish or review.] In all other respects, the proceedings to establish the corporation, or review the action of the commissioners, shall be as provided in cases where all the inhabitants residing on the territory to be organized into such corporation, reside in one county. [R. S. Sec. 1567; 66 v. 153.]

Sec. 3539. [Power of officers as in other cases.] When the jurisdiction of municipal officers is co-extensive with the county in which the corporation is situated, their jurisdiction in corporations embracing territory of more than one county shall be co-extensive with each of the counties in which any part of such territory is located.[1] [R. S. Sec. 1568; 66 v. 153.]

(1) **Jurisdiction in error proceedings.**—In a prosecution before the mayor of a village situated in two counties, prosecution of error must be in the courts of the county in which the public offices of the village are located. Theobald v. State, 12 N. P. (N. S.) 390.

Jurisdiction in liquor cases.—Under this section mayor has jurisdiction in prosecutions in each county in which any part of the territory of the municipality is located and hearing may be had in any portion of the municipality though not within the county in which the offense was committed. State v. Pape, 105 O. S. 515.

Sec. 3540. [Fees; how paid.] Each officer shall receive for the services required of him under this division, the same fees he would be entitled to for similar services in other cases. Unless such fees are paid in advance, for services under this chapter, by the agent of the petitioners, of whom demand may be made, and by some person interested for services under other chapters of this division, the officer shall not be required to perform the service. [R. S. Sec. 1569; 66 v. 153.]

Sec. 3541. [Proceedings to change name.] When it is desirable to change the name of a city or village, a petition[1] for the purpose, subscribed by at least twelve freeholders of the corporation, setting forth the reasons why such change is desirable, shall be filed in the court of common pleas of the county in which the corporation, or the larger part thereof, is situated. A notice, setting forth the object of the petitioners, and the time when and place where the petition will be heard, shall be published for thirty days previous to the hearing, in a newspaper of general circulation in the corporation. [R. S. Sec. 1570; 99 v. 475; 40 v. 28.]

(1) **Form of petition and notice.**—See Sec. 3542.

Sec. 3542. [Power of court; saving rights.] Upon being satisfied by proof that the prayer of the petitioners is just and reasonable, that notice as required in the foregoing section, has been given, that at least three-fourths of the inhabitants of such corporation desire the change, and that there is no other municipal corporation in the state having the name prayed for, the court may order such change to be made. The clerk of the court shall thereupon tax the petitioners with the costs, and record the proceedings in a book to be kept by him for the purpose. Such change shall not alter or affect any right, liability, action, or right of action, civil or criminal. [R. S. Sec. 1571; 40 v. 28.]

FORM OF PETITION TO CHANGE NAME.

Court of Common Pleas, ...County, Ohio.

In re Change of Name of the City [*or* Village] of ....., Ohio. } Petition.

The undersigned, freeholders of the City [*or* Village] of ....., Ohio, situated (or the larger part of which is situated) in said ..... County, hereby respectfully represent that it is desirable to change the name of said city [*or* village] to the "City [*or* Village] of ....." (here state name desired), for the following reasons, to-wit:

(Here state reasons for change.)

Wherefore, your petitioners pray that the court may make an order changing the name of said city [*or* village] as hereinabove stated.

(This petition must be signed by at least twelve freeholders of the corporation.)

FORM OF NOTICE OF PETITION TO CHANGE NAME.

Court of Common Pleas, ...County, Ohio.

In re Change of Name of the City [*or* Village] of ....., Ohio. } Legal Notice.

Notice is hereby given that on the ..... day of ....., 19...., a petition signed by ..... and others, freeholders of the City [*or* Village] of ....., ... County, Ohio, was duly filed in the Court of Common Pleas of said county, praying for an order changing the name of said city [*or* village] to the "City [*or* Village] of .....", for the reasons following, to wit: (here state reasons given in petition). Said petition will be for hearing before said court on the ..... . day of ....., 19...., (at least 30 days after the date of publication of notice) at ..... o'clock .... M. at the courthouse of said county in the City of .....

(This notice must be published at least two consecutive weeks in a newspaper of general circulation in the corporation. See Sec. 4229.)

FORM OF ORDER CHANGING NAME.

Court of Commom Pleas, ...County, Ohio.

In re Change of Name of the City [*or* Village] of ....., Ohio. } Entry.

This day this cause came on to be heard on the petition of ..... and others, freeholders of the City [*or* Village] of ....., in said county, praying for the changing of the name of said city [*or* village] to the "City [*or* Village] of .....", and upon the evidence, and was submitted to the court.

Whereupon, the court, being duly advised in the premises, finds that said petition is signed by at least twelve freeholders of said corporation; that notice of the filing, object and hearing of said petition has been given as required by law; that the prayer of said petition is just and reasonable; that at least three-fourths of the inhabitants of said corporation desire such change, and that there is no other municipal corporation in the state having the name prayed for.

It is accordingly ordered that the name of said City [*or* Village] of..... be, and the same is hereby changed to the "City [*or* Village] of .....".

It is further ordered that said petitioners pay the cost of this proceeding, taxed at $.....

Sec. 3543. [Error in proceedings does not render void; when.] No error, irregularity or defect in any proceeding for the creation of a municipal corporation shall render it invalid if the territory sought to be incorporated has been rec-

ognized as such corporation, and any tax levied upon it as such has been paid, or it has been subjected to the authority of the council without objection from its inhabitants. [R. S. Sec. 1571a; 80 v. 92]

Sec. 3544. [Division of funds when a village is created from township or townships.][1] When a village has been created out of a portion of a township, or portions of more than one township, a proper division of the funds for township purposes in the treasury, or in the process of collection, of the township or townships from which the territory has been taken, shall, upon application of the village to the probate court of the county in which the territory is situated, be determined and ordered paid over to the treasurer of the village. In determining the portion of such funds to which the village is entitled, the indebtedness of each township shall be taken into consideration. Ten days' notice of such hearing shall be given by the treasurer of the applicant to the treasurer of each township whose funds are sought to be divided. The findings and orders of the probate court shall be final. [R. S. Sec. 1565a; 98 v. 129.]

(1) **Validity.**—Held constitutional. Northfield v. Macedonia 22 C. C. (N. S.) 50.

FORM OF APPLICATION FOR DIVISION OF TOWNSHIP FUNDS.

Probate Court, ...County, Ohio.

In re Application of the Village of....., for division of township funds. } Application.

Now comes the village of ..... in said county and state, and represents to the court that it is a village under the laws of Ohio; that said village was created out of a portion of ..... township (*or* out of portions of ..... and ..... townships) in said ..... county, Ohio; that no apportionment of the funds of said township (*or* townships) has been made, and that said village is entitled to have the same apportioned and a proper portion thereof paid over to the treasurer of said village.

Wherefore, it prays that the court will make an order apportioning the funds aforesaid, and providing for the payment of the portion of the fund due said village to the village treasurer.

.....

Village Solicitor.

FORM OF NOTICE OF APPLICATION.

To the Treasurer of ..... Township, ... County, Ohio:

You are hereby notified that on the ..... day of ....., 19...., the village of ....., in said county and state, filed its application in the probate court of said county, praying for an order apportioning to it such portion of the funds of said township to which the said village was entitled, and that said application will be for hearing before said court on the ..... day of ....., 19.... (at least ten days after the date of service of notice).

.....
Treasurer, Village of .....

FORM OF ORDER APPORTIONING FUNDS.

Probate Court, ... County, Ohio.

In re Application of the Village of....., for division of township funds. } Entry.

This cause came on to be heard on the application of the Village of ..... for an order apportioning to it a portion of the funds of ..... township, and the court, being fully advised, finds the averments of said application to be true and that said village is entitled to such apportionment as prayed for.

It is accordingly ordered that of the funds in the treasury of said township and in process of collection, there be, and there is hereby apportioned to said village the sum of $....., which amount the treasurer of said township is hereby ordered to pay over to the treasurer of said village (time of payment to depend on whether funds are in the treasury or in process of collection).

Sec. 3545. [Incorporation of territory surrounding summer resort; election; notice.] Any territory requiring police protection and containing a population of not less than fifty persons and immediately surrounding a summer resort, park, lake or picnic ground, kept regularly for such outing and pleasure, may incorporate by setting up notices of an election in three of the most public places in the territory proposed to be included in the corporation signed by five citizens and electors of the territory. Such notices shall be posted at least ten days before the election, stating time and place where the election shall be held, and shall contain an accurate description of the territory proposed to be taken into the corporation. [R. S. Sec. 1566a; 95 v. 469.]

Sec. 3546. [Conduct of election; ballots.] The election shall as far as practicable be conducted in the manner prescribed for the election of township officers. The electors present shall choose three judges and two clerks from the electors present to act as judges and clerks of such election, and the ballots shall contain the words: "For incorporation" and "Against incorporation." If the majority of the ballots cast at such election contain the words "For incorporation," it shall be deemed that the citizens of such designated territory have assented to such incorporation. If the majority of the ballots cast at such election contain the words "Against incorporation," it shall be deemed that the people of such designated territory have not assented to the incorporation thereof. All laws governing the creation and regulation of incorporated villages shall have full force and effect insofar as they are not inconsistent and do not conflict with the provisions of this chapter. [R. S. Sec. 1566a; 95 v. 469.]

CHAPTER 3.

ANNEXATION AND DETACHMENT OF TERRITORY.

Sec. 3547. [Annexation and detachment of territory.] Territory may be annexed to, or detached from, municipal corporations, in the manner provided in this chapter. [96 v. 21, § 6.]

ANNEXATION ON APPLICATION OF CITIZENS.

Sec. 3548. [Annexation of adjacent territory; petition.] The inhabitants residing on territory adjacent[1] to a municipality may, at their own option, cause such territory to be annexed thereto, in the manner hereinafter provided.[2] Application shall be by petition, addressed to the commissioners of the county in which the territory is located, signed by a majority of the adult freeholders residing on such territory, and shall contain the name of a person authorized to act as the agent[3] of the petitioners in securing such annexation, and a full description of the territory, and be accompanied by an accurate map, or plat thereof.[4] [R. S. Sec. 1589; 66 v. 264, §§ 679, 680.]

(1) **Adjacent territory.**—Territory on the other side of a navigable stream would be contiguous or adjacent territory, which might be annexed. Blanchard v. Bissell, 11 O. S. 96.

(2) **Constitutionality.**—Annexation of territory to a municipality is not unconstitutional though private property in the annexed territory is thereby made liable for taxes to pay prior debts of the municipality and though the owner of the property so taxed might not have been qualified to vote on the question of annexation, because a non-resident. Powers v. Wood Co., 8 O. S. 285; Blanchard v. Bissell, 11 O. S. 96.

Consent of inhabitants of territory to be annexed is not necessary unless required by statute and their remonstrance will not invalidate the annexation. Blanchard v. Bissell, 11 O. S. 96.

(3) **Agent.**—This provision held not applicable to annexation on application of a corporation. Pollock v. Toland, 25 C. C. 75; 1 C. C. (N. S.) 315.

(4) **Effect of annexation.**—*School district.*—A school district is not divided because a part of it is annexed to a city or village.

State v. Raine, 4 C. C. 72 (aff'd 29 B. 108.) See Hamlin v. State, 22 B. 279.

Roads.—Public roads in the territory annexed become public highways of the city or village, without being "accepted and confirmed by ordinance." Steubenville v. King, 23 O. S. 610.

Part of a county road coming within a city by annexation is subject to the city's control and improvement. R. R. Co. v. Defiance, 10 C. C. 27; and city may assess for its improvement. Ridenour v. Saffin, 1 H. 464; county commissioners can not sue for obstruction of part of road brought within a city or village. R. R. v. Comm'rs, 35 O. S. 1; but turnpike company's rights are not extinguished without appropriation. Tp. Co. v. Cincinnati, 4 Rec. 325; though a toll gate cannot lawfully be maintained on territory brought into a municipality by annexation. Turnpike Co. v. Kelley, 41 O. S. 144.

Justice of the Peace.—See Reed v. Maxfield, 32 B. 50; State v. Davies, 12 C. C. 218; Pfeiffer v. Green, 3 N. P. 156.

Taxation.—When the boundaries of a municipality are extended prior to the date of the certification of the levy of municipal taxes, no special provision is necessary to authorize the levy of taxes on the annexed property, and the county auditor may be compelled by mandamus on relation of the municipality to levy on the annexed property the municipal instead of the township tax. State ex rel. v. Craig, 21 C. C. 13.

When annexation complete.—On the passage and legal publication of the municipal ordinance, accepting the application for annexation of adjacent territory, such territory becomes a part of the municipality, although the map, transcript and other papers are not filed until a later date. State ex rel. v. Craig, 21 C. C. 13.

FORM OF PETITION BY INHABITANTS FOR ANNEXATION.

To the Commissioners of.....County, State of Ohio:

The undersigned, being a majority of the adult freeholders residing on the following described territory situated in the County of ....., and adjacent to the city [*or* village] of ....., to-wit:

(Here insert accurate description of territory to be annexed.)

An accurate map of which territory is hereto attached;

Respectfully petition that the said above described territory may be annexed to the city [*or* village] of.....

And..... is hereby authorized to act as agent of the petitioners in securing such annexation. (To be signed by a majority of the adult freeholders residing in the territory to be annexed.)

A map marked "Map of territory to be annexed to the city [*or* village] of.....," should be attached to the petition.

Sec. 3549. [Petition to be presented to commissioners; proceedings.] The petition shall be presented to the board of commissioners at a regular session thereof, and when so pre-

sented the same proceedings shall be had as far as applicable, and the same duties in respect thereto shall be performed by the commissioners and other officers, as required in case of an application to be organized into a village under the provisions of this division.[1] The final transcript of the commissioners, and the accompanying map or plat and petition, shall be deposited with the auditor or clerk of the municipality to which annexation is proposed to be made, who shall file them in his office.[2] [R. S. Sec. 1590; 66 v. 265, § 681.]

(1) **Section referred to.**—This refers to §§ 3516-3546 inclusive, *supra.*

(2) **Construction of sections.**—All the laws relating to the general subject of creation of villages and the annexation of territory to those already created are to be treated for purposes of construction as one act. Shugars v. Williams, 50 O. S. 297.

The course of procedure at the hearing before the county commissioners directed by § 3521 is applicable also to such proceeding in the case of annexation. *Ib.*

Provisions of § 1556 R. S. (now § 3520 G. C.) requiring deposit of petition with county auditor held not applicable to the case of proceedings for the annexation of territory on the application of a corporation. Pollock v. Toland, 1 C. C. (N. S.) 315; 25 C. C. 75.

Amendment of petition.—The authority given in § 3521 to amend the petition applies also to a petition for the annexation of territory, and it is not necessary to the exercise of the discretion vested in the commissioners that an ordinance should previously have been passed authorizing the designated agents to apply for such amendment. Shugars v. Williams, 50 O. S. 297.

Discretion of commissioners.—The decision of the commissioners is final on the merits of the case presented to them, and injunction is allowed only for errors or irregularities in the proceedings. Hulbert v. Mason, 29 O. S. 562.

Posting of notice.—One of the provisions relating to the organization of villages, which is incorporated by reference here, is that relating to the posting of notice of the application. In case of annexation of territory, such notice must be posted on the territory proposed to be annexed. Franklin v. Croll, 31 O. S. 647.

Annexation of detached territory. Where a petition to detach territory from a village and erect it into a village was filed with the county commissioners before another petition to annex the greater part of said village including the territory described in the first petition was also filed, the second petition being filed two days before the council of the village gave its assent to the first petition, the second petition was entitled to be first heard. State v. McKenzie, 16 C C. (N. S.) 172.

FORM OF NOTICE OF PETITION.

LEGAL NOTICE.

Notice is hereby given that on the.....day of.....19...., there was presented to the Board of Commissioners of the County of..... State of Ohio, a petition signed by a majority of the adult freeholders residing in the following described territory situated in the County of .....and adjacent to the city [*or* village] of....., to-wit:

(Here copy description of territory contained in petition.)

Praying therein that said territory be annexed to the city [*or* village] of ....., in the manner provided by law and designating the undersigned as their agent in securing such annexation.

The said Board of Commissioners has fixed the.....day of....., 19.... (not less than sixty days after petition is filed), as the time for hearing said petition at the office of the Commissioners in.....(here state place of hearing).

.....

Agent of the Petitioners.

FORM OF ORDER OF COMMISSIONERS FOR ANNEXATION.

The Commissioners of the County of....., State of Ohio, proceeding this day to hear the petition of.....and others to obtain the annexation of the territory in their petition described to the city [*or* village] of....., and having in open meeting heard all the persons desiring to be heard for or against the granting of said petition and considered the affidavits presented with reference thereto, and being fully advised find that said petition contains all the matters required by law, that its statements are true, that the territory sought to be annexed is adjacent to the said city [*or* village] of.....; that the petition contains a full description of said territory; that the map of said territory attached to the petition is accurate; that said petition is signed by a majority of the adult freeholders residing on the territory sought to be annexed; that the required legal notice of the petition has been given, and that it is right and proper that said petition should be granted.

It is hereby ordered that the prayer of said petition be granted, and that the territory described in said petition may be annexed to the city [*or* village] of..... in accordance with law, and that a certified transcript signed by a majority of this Board of all the orders and proceedings of this Board relative to said petition and hearing thereon, together with said petition and map attached thereto, and all the papers on file relating to said matter be deposited at once with the auditor of the said city [*or* clerk of village].

Sec. 3550. [Duties of clerk and council.] At the next regular session of the council of the municipality, after the expiration of sixty days from the date of such filing, the auditor

or clerk shall lay the transcript and the accompanying map or plat and petition before the council. Thereupon the council, by resolution or ordinance, shall accept or reject the application for annexation. [R. S. Sec. 1591; 66 v. 265, § 682.]

FORM OF ORDINANCE ACCEPTING APPLICATION FOR ANNEXATION.

Ordinance No.....

Accepting application for annexation of territory.

Be it ordained by the council of the city [*or* village] of....., State of Ohio:

Sec. 1. That the application of.....and others for the annexation of the following described territory in the County of..... and adjacent to the city [*or* village] of ....., to-wit:

(Here copy description of territory contained in the petition.)

An accurate map of which territory, together with the petition for its annexation, and other papers relating thereto, and a certified transcript of the proceedings of the County Commissioners in relation thereto are on file with the clerk of the council of said city [*or* the clerk of said village], be and the same is hereby accepted [*or* rejected].

Sec. 2. This ordinance shall take effect and be in force from and after the earliest period allowed by law.

Passed.....19....

.....

President of Council.

Attest.....

Clerk.

Sec. 3551. [Rejection of application; effect.] If the resolution or ordinance rejects the application, no further proceedings shall be had, but such rejection shall not be a bar to application thereafter to the county commissioners on the same subject. [R. S. Sec. 1592; 66 v. 265, § 683.]

Sec. 3552. [Proceedings when application is allowed.] If the resolution or ordinance is an acceptance of such application, the auditor or clerk of the municipality shall make two copies, containing the petition, map or plat accompanying it, transcript of the proceedings of the commissioners, and resolutions and ordinances in relation to the annexation, with a certificate to each copy that it is correct, which certificate shall be signed by him in his official capacity, and be authenticated by the seal if any there be of the municipality. The auditor or clerk

shall forthwith deliver one such copy to the recorder of the county, who shall make a record thereof in the proper book of records, and file and preserve it, and the other copy shall be forwarded by the auditor or clerk to the secretary of state. [R. S. Sec. 1593; 66 v. 265, § 684.]

Sec. 3553. [Petition to enjoin the proceedings.] If, within sixty days from the filing of such transcript, map, or plat and petition in his office, the auditor or clerk receives notice from any person interested that he has presented to the court of common pleas, or a judge thereof, a petition to enjoin further proceedings, he shall not report to the council such transcript, map, or plat and petition, until after the final hearing and disposition of the petition so presented to such court or judge.[1] [R. S. Sec. 1594; 66 v. 265, § 685.]

(1) **Scope of injunction, etc.—** See notes under § 3532, *ante.*

How petition presented.—Filing petition with clerk of court is not compliance with statute, but it must be *presented* to court or judge. Ritter v. Falkinburg, 49 B. 277; Hacker v. Payne, 27 O. C. A. 449; 7. Oh. App. 25; 39 O. C. C. 424.

For form of petition see form under § 3532, *ante.*

Sec. 3554. [Proceedings when petition dismissed.] If the court or judge make an order dismissing the petition, the clerk of the court shall immediately forward a certified copy of it to the auditor or clerk of the corporation, who, at its next regular meeting, shall lay before the council such transcript, map, or plat, and the petition accompanying it, as if no petition had been so presented to the court or judge. [R. S. Sec. 1595; 66 v. 265, § 686.]

Sec. 3555. [Proceedings when injunction allowed.] If the court or judge enjoin the auditor or clerk from making such report to the council, a certified copy of the order shall be immediately forwarded by the clerk of the court to the auditor or clerk of the corporation, who shall file it with the transcript, map or plat, and petition, and preserve it in his office, and thereupon no further proceedings shall be had in the matter. The order of the court or judge shall not operate as a bar to any applications thereafter to the commissioners of the county for such purpose. [R. S. Sec. 1596; 66 v. 266, § 687.]

Sec. 3556. [Rights of inhabitants if annexation allowed.] When the resolution or ordinance, accepting such annexation, has been adopted, the territory shall be deemed a part of the municipality, and the inhabitants residing thereon shall have all the rights and privileges of the inhabitants within the original limits of the municipality. [R. S. Sec. 1597; 66 v. 266, § 688.]

Sec. 3557. [Where corporation is situated in more than one county.] If the corporation is situated in two or more counties, or the territory so to be annexed is situated in a different county from that in which the corporation or some part of it is situated, the proceedings, so far as practicable, shall be as hereinbefore directed in case of the organization of villages upon adjacent territory in two or more counties.[1] [R. S. Sec. 1598; 66 v. 266, § 689.]

(1) For forms see note to § 3532, *ante.*

ANNEXATION ON APPLICATION OF CORPORATION.

Sec. 3558. [Annexation of territory.] When the inhabitants generally[1] of a municipal corporation desire to enlarge its corporate limits by the annexation of contiguous territory,[2] it shall be done in the manner hereinafter specified.[3] [R. S. Sec. 1599; 95 v. 113; 74 v. 36, § 690.]

(1) **Desire of inhabitants.**—No mode being provided for obtaining the desire of the inhabitants, generally, the act of the council expressing it, is sufficient. Croll v. Franklin, 40 O. S. 340.

(2) **Contiguous territory.**—Territory separated from the municipality by a navigable stream is "contiguous" territory. Blanchard v. Bissell, 11 O. S. 96.

(3) **Constitutionality.**—Statute is not unconstitutional because it does not provide for submission of question of annexation to a popular vote. State v. Cincinnati, 52 O. S. 419.

What territory may be annexed.—The municipal limit may be extended over an unincorporated village. Blanchard v. Bissell, 11 O. S. 96.

Effect of annexation.—See note 4 under § 3548, *ante.*

Annexation of territory from one or more townships to a city—how funds and indebtedness of such are to be apportioned—how funds and indebtedness of school district are to be apportioned. Op. Atty. Gen. (1916) p. 918.

Sec. 3559. [Council may pass preliminary ordinance.] The council of the corporation, by a vote of not less than a majority of the members elected, shall pass an ordinance authorizing such annexation to be made, and directing the solicitor of the corporation, or some one to be named in the ordinance, to prosecute the proceedings necessary to effect it.[1] [R. S. Sec. 1600; 74 v. 36, § 691.]

(1) **Successive applications.**— The ordinance authorizes successive applications to the county commissioners until the agent succeeds or there is a final decision on the merits. Croll v. Franklin, 40 O. S. 340.

The agent appointed continues to act though the county commissioners are reversed by the courts, until final decision on the merits. *Ib.*

FORM OF ORDINANCE AUTHORIZING ANNEXATION.

Ordinance No.....

To authorize annexation of certain territory to the city [*or* village] of .....

Be it ordained by the council of the city [*or* village] of....., State of Ohio:

Sec. 1. That the annexation of the following described territory: (Here insert description of territory to be annexed), to the city [*or* village] of .....be and the same is hereby authorized.

Sec. 2. That the solicitor [or some other person named] be and he is hereby authorized to prosecute the proceedings necessary to effect such annexation.

Sec. 3. This ordinance shall take effect and be in force from and after the earliest period allowed by law.

Passed this.....day of....., 19....

.....

President of Council.

Attest.....

Clerk.

Sec. 3560. [Petition to county commissioners.] The application of the corporation to the county commissioners for such purpose shall be by petition, setting forth that, under an ordinance of the council the territory therein described was authorized to be annexed to the corporation. The petition shall contain an accurate description of the territory, and be accompanied by an accurate map or plat thereof.[1] [R. S. Sec. 1601; 74 v. 36, § 692.]

(1) **Agent.**—Where a petition is presented on behalf of a city and consented to by the solicitor, it is not necessary that such petition contain name of person authorized to act as agent of the petitioners. Section 3548 does not apply to annexation on application of a corporation. Pollock v. Toland, 1 C. C. (N. S.) 315; 25 C. C. 75.

FORM OF PETITION BY THE CORPORATION FOR ANNEXATION OF TERRITORY.

To the Commissioners of.....County, State of Ohio:

The city [*or* village] of.....respectfully represents that by an ordinance duly passed by its council on the.....day of.....19...., the following described territory (here copy description of territory contained in the ordinance) was authoried to be annexed to said city [*or* village].

An accurate map of which territory is hereto attached.

And said city [*or* village] respectfully petitions that said territory may be annexed to said city [*or* village].

City [*or* village] of.....

by.....

City [*or* village] Solicitor.

Sec. 3561. [Proceedings before commissioners.] When the petition is presented to the commissioners, like proceedings shall be had, in all respects, so far as applicable, as are required in case of annexation on application of citizens in this chapter.[1] [R. S. Sec 1602; 66 v. 266, § 693.]

(1) **Sections referred to.**—This refers to §§ 3548-3557 inclusive. And see notes under §§ 3548 and 3553, *ante.*

Transcript of proceedings must be filed with municipal auditor or clerk, as provided in § 3549. Shipbaugh v. Kimball, 19 Dec. 33, 7 N. P. (N. S.) 514.

Injunction against proceedings, see § 3532, *ante.*

Sec. 3562. [Where corporation in more than one county.] When the corporation is situated in two or more counties, or the territory to be annexed is situated in a county other than that in which the corporation or some part of it is situated, the proceedings shall be in the county in which the territory to be annexed, or some part of it, is situated. [R. S. Sec. 1603; 66 v. 267, § 694.]

Sec. 3563. [When territory lies partly in another county or counties.] When the territory sought to be annexed is partly in the county in which the corporation is situated and partly

in another county, or counties, the proceedings shall be in that county in which there is the largest number of qualified voters residing upon the territory sought to be annexed. So far as practicable, such proceedings shall be as directed in case of the organization of villages upon adjacent territory in two or more counties. [R. S. Sec. 1603a; 85 v. 224.]

Sec. 3564. [Rights when annexation complete.] When the annexation of such described territory has been completed, it shall be deemed a part of the municipal corporation, and the inhabitants residing on the territory shall have all the rights and privileges of the inhabitants residing within the original limits of the corporation.[1] [R. S. Sec. 1604; 66 v. 267, § 695.]

(1) **Effect of annexation.**—See note under § 3548, *ante.*

Taxes may be levied on the annexed teritory to pay pre-existing debts of the municipality. Powers v. Wood Co., 8 O. S. 285.

Consent of inhabitants.—The fact that the inhabitants of the annexed territory did not consent to the annexation and that it was done against their remonstrance, does not invalidate the annexation. Blanchard v. Bissell, 11 O. S. 96.

Rights of citizens in annexed portion of township. See Op. Atty. Gen. (1921) p. 759.

Jurisdiction of county commissioners over portion of a county sewer district which has been annexed, is lost. See Op. Atty Gen. (1921) p. 387.

Sec. 3565. [When errors not fatal to proceedings.] No error, irregularity or defect in such proceedings shall render them invalid, if the addition has been recognized as part of the corporation, and taxes levied upon it as such have been paid, and it has been subjected to the authority of the council, without objection from its inhabitants. [R. S. Sec. 1605; 66 v. 267, § 696.]

ANNEXATION OF ONE CORPORATION TO ANOTHER.

Sec. 3566. [Annexation of territory to contiguous municipality.] When it is proposed to annex territory of a municipal corporation to a contiguous municipality such annexation shall be effected in the manner hereinafter described.[1] [109 v. 263; R. S. Sec. 1606; 66 v. 267, § 697.]

(1) See notes under § 3558, *ante.*

Sec. 3567. [Arrangement of terms and conditions of annexation.] The council or commission of any municipal corporation may propose annexation of its corporate territory to that of any contiguous municipality and shall thereupon pass an ordinance declaring its desire so to do, and to that end shall appoint three commissioners to represent it in such negotiations and to arrange the terms and conditions of annexation. [109 v. 263; R. S. Sec. 1607; 66 v. 267, § 698.]

Sec. 3567-1. [Petition for annexation; appointment of commission.] Or, if there shall be presented to the council or commission of a municipality proposed to be annexed to an adjoining or contiguous municipality, a petition signed by resident electors, who voted at the last municipal election, numbering not less than twenty-five per cent. of the number of electors who voted in the last municipal election in the territory proposed to be annexed, representing their desire that such council or commission shall take the necessary steps to select and appoint three commissioners to represent such municipality in annexation proceedings, and such petition shall be accompanied by a certificate[1] duly verified on belief by oath from the clerk of the board of deputy state supervisors and inspectors of election of the county in which said municipality is located to the effect that the petition does contain the names of resident electors who voted at the last municipal election, of a number not less than twenty-five per cent. of those who voted at the last municipal election, the council or commission shall, within thirty days after the presentation of such petition, pass an ordinance declaring its intention to enter into negotiations with the municipal corporation with which annexation is proposed and shall appoint the three commissioners to represent it in such negotiations. [109 v. 263.]

(1) **Sufficiency of certificate.**—Certificate should state that petition contains twenty-five per cent. or more of the resident electors, and it is not sufficient if it states merely that petition contains names of twenty-five per cent. or more of the number of votes cast at the last preceding election. Norwood v. Board, 8 O. L. R. 380; see also Norwood v. Board of Elections, 13 C. C. (N. S.) 465.

Proper certificate is necessary to give council jurisdiction to proceed with ordinance to submit question to vote. *Ib.*

Where petition and certificate sufficient in form, are filed, names

cannot thereafter be lawfully withdrawn. *Ib.*

Number, how determined.—Council has the right and duty of determining whether the petition was signed by requisite number of resident electors and its decision is final, until set aside by competent tribunal. Norwood v. Board of Elections, 13 C. C. (N. S.) 465.

Withdrawal of names on petition may be made at any time before council takes action on the petition. Norwood v. Board of Elections, 13 C. C. (N. S.) 465.

FORM OF PETITION FOR ANNEXATION.

To the Council of the City [*or* Village] of ....., Ohio.

The undersigned resident electors of said city [*or* village] hereby respectfully petition your honorable body to take such action as may be required by law for the annexation of said city [*or* village] to the City [*or* Village] of ....., Ohio, and to appoint commissioners to arrange the terms and conditions of such annexation.

(This petition must be signed by twenty-five percent or more of the resident electors of the municipality proposed to be annexed.)

CERTIFICATE.

I hereby certify that the attached petition contains the names of not less than twenty-five percent of the resident electors of the City [*or* Village] of ....., Ohio, who voted at the last municipal election in said city [*or* village].

In witness whereof, I have hereunto set my hand this .... day of ....., 19....

.....

Clerk of the Board of Deputy State Supervisors and Inspectors of Election of ..... County, Ohio.

The State of Ohio, ...County, } ss.

....., being duly sworn, says that he is the duly appointed and acting clerk of the board of deputy state supervisors and inspectors of election of ..... county, Ohio, and that the facts stated in his foregoing certificate are, as he believes, true.

.....

Sworn to before me and subscribed in my presence by said ..... this ..... day of ....., 19....

.....

Notary Public, ... County, Ohio.

FORM OF ORDINANCE PROPOSING ANNEXATION TO CONTIGUOUS MUNICIPALITY.

Ordinance No.....

To provide for the annexation of the City [*or* Village] of ....., to the City [*or* Village] of .....

Whereas there has been filed with this council a petition by resident electors of the City [*or* Village] of ....., in the number required by law, and duly certified as required by law, praying that the necessary steps shall be taken to annex the territory of the City [*or* Village] of ....., to the City [*or* Village] of .....; now therefore,

Be it ordained by the council of the City [*or* Village] of ....., Ohio,

Sec. 1. That this council does hereby declare its intention to enter into negotiations with the City [*or* Village] of ..... for the annexation of the territory of said City [*or* Village] to the City [*or* Village] of .....

Sec. 2. That ....., ..., and ..... be and they are hereby appointed as commissioners to represent the said City [*or* Village] of ..... in such negotiations, and, in conjunction with like commissioners to be appointed by said City [*or* Village] of ....., to arrange the terms and conditions of such annexation and report the result of their action to this council as required by law.

Sec. 3. That the clerk of this council be and he is hereby directed to certify and transmit a copy of this ordinance to the council of the City [*or* Village] of .....

Sec. 4. That this ordinance shall take effect and be in force from and after the earliest period allowed by law.

Passed ....., 19...

.....
President of Council.

Attest, ...
Clerk.

Sec. 3568. [Designation of commissioners for negotiation.] Upon the passage of such ordinance the clerk of the council or commission passing such an ordinance shall submit a certified copy of the same to the council or commission of the municipality with which annexation is proposed, and thereupon, and within thirty days after the receipt of such certified copy, the council or commission of the municipality with which annexation is proposed may pass an ordinance designating three commissioners to represent it in such negotiations. [109 v. 263, 264; 102 v. 441; 101 v. 244; R. S. Sec. 1608; 97 v. 190; 66 v. 267.]

Sec. 3568-1. [Procedure on failure of council to designate commissioners.] If within thirty days after receipt of a certi-

fied copy of an ordinance from a municipality proposing annexation designating its three commissioners, the council or commission of the municipality with which annexation is proposed shall fail to pass an ordinance designating three commissioners to represent it in such negotiations, then, on receipt of a petition signed by resident electors of a number not less than twenty-five per cent. of the number of electors voting at the last previous municipal election of the municipality with which annexation is proposed, petitioning the council or commission to take such action as may be necessary to initiate annexation proceedings and to appoint three commissioners to represent it therein, the council or commission of said municipality shall pass an ordinance appointing these commissioners in such negotiations. [109 v. 263, 264.]

NOTE: Form of petition and ordinance may be adapted from forms given under § 3567-1.

Sec. 3569. [Arrangement of terms and conditions of annexation.] The commissioners appointed by their respective municipalities shall proceed to arrange the terms and conditions of annexation and report the result of their action to the council or commission of their respective corporations within one hundred and twenty days from the date of the appointment of the commissioners of the municipality with which annexation is proposed. If such commissioners shall be unable to agree upon the terms and conditions of annexation within said one hundred and twenty days, then the probate judge of the county in which said municipal corporations are situated shall appoint one additional commissioner who shall not be a resident of either of said corporations. Said additional commissioner shall act with the other commissioners appointed as aforesaid, in arranging terms and conditions of such annexation, and the conclusions arrived at and agreed upon by any four of said commissioners shall be the terms and conditions upon which said annexation shall be submitted to the voters of said municipalities, and the findings and conditions thus arrived at shall be reported by said commissioners to the council or commission of each of said municipal corporations. [109 v. 263, 264; 101 v. 245; R. S. Sec. 1609; 96 v. 268.]

Sec. 3570. [Submission of question of annexation.] Within thirty days after the filing of said terms and conditions of annexation with the councils or commissions of said municipalities, the councils or commissions of both such municipalities shall order the question of annexation, upon the terms and conditions contained in such report of said commissioners, to be submitted to a vote at the next regular election, whether state, county or municipal, occurring more than sixty days after the filing of such terms and conditions of annexation.

[Requisites of each ordinance.] Each ordinance shall prescribe the manner in which the submission shall be made and shall be published in its respective corporation by posters or otherwise, for the period of at least twenty days, prior to the time fixed for the election, in such manner as the council or commission deems most expedient, and a printed copy of such terms and conditions of annexation shall be mailed to each voter of each of such municipalities, as shown by the registration books. [109 v. 263, 265; 102 v. 442; 101 v. 244; R. S. Sec. 1610; 66 v. 268, § 701.]

FORM OF ORDINANCE SUBMITTING TO VOTE THE QUESTION OF ANNEXATION.

Ordinance No.....

To submit to vote the question of annexation of the City [*or* Village] of ..... to the City [*or* Village] of.....

Whereas pursuant to ordinances heretofore passed by this council and by the council of the City [*or* Village] of ....., respectively, the commissioners therein appointed have arranged the terms and conditions for the annexation of the territory of the City [*or* Village] of ..... to the City [*or* Village] of ..... and their report embodying the conclusions of said commissioners has been duly filed with this council, now therefore,

Be it ordained by the council of the City [*or* Village] of ....., Ohio,

Sec. 1. That the question of the annexation of the territory of the City [*or* Village] of ..... to the City [*or* Village] of ..... be submitted to the qualified electors of the City [*or* Village] of ..... at the regular election in ....., 19...

Sec. 2. The question whether such annexation shall be made shall be put in the form of "Shall the City [*or* Village] of ..... be annexed to the City [*or* Village] of .....," "Yes", "No", and printed on ballots, and those who are in favor of such annexation shall place a cross-mark after the word "Yes" and those who are opposed to such annexation shall place a cross mark after the word "No".

Sec. 3. Ballot boxes shall be provided and votes counted and returned and the election conducted as regular municipal elections.

Sec. 4. The clerk of council [*or* village clerk] is hereby directed to publish this ordinance in a newspaper of general circulation in this corporation at least twenty days prior to the election hereby authorized. (If no newspaper is published in the corporation the clerk should be directed to post copies of the ordinance in five of the most public places in the corporation for the same period.)

Said clerk is further directed to mail to each voter of this corporation at least twenty days before said election a printed copy of the terms and conditions of annexation as agreed to by the commissioners.

Sec. 5. This ordinance shall take effect and be in force from and after the earliest period allowed by law.

Passed....., 19...

.....
President of Council.

Attest.....
Clerk

Sec. 3571. [Election results certified.] If a majority of the electors of each corporation, voting on the question so submitted, be in favor of annexation, the election authorities shall thereupon certify the results of the election, in each corporation, to the councils or commissions, of both corporations. [110 v. 87, 88; 109 v. 263, 265; 101 v. 244; R. S. Sec. 1611; 66 v. 268, § 702.]

Sec. 3572. [Clerk of corporation to certify transcripts.] Under the direction of the corporation, to which territory is proposed to be annexed, the auditor or clerk thereof shall make and certify two transcripts of all the ordinances, abstracts of the returns of the votes, and other papers relating to annexation, one of which shall be filed in the office of the recorder of the county, who, having made a record thereof, shall file and preserve it, and the other shall be forwarded to the secretary of state. [109 v. 263, 265; R. S. Sec. 1612; 66 v. 268, § 703.]

Sec. 3573. [When annexation deemed complete, and powers become operative.] When the transcripts are so certified, and one of them is delivered to the recorder and the other forwarded to the secretary of state, the annexation shall be complete and the aforesaid terms and conditions of annexation shall thereupon become operative. The corporation to

which the annexation is made shall pass such ordinances as will carry into effect the terms and conditions of annexation in so far as they are not inconsistent with the provisions of this title and the general laws of the state of Ohio. [109 v. 263, 265; R. S. Sec. 1613; 66 v. 268, § 704.]

Sec. 3574. [How corporations to be governed; rights or liabilities not affected.] When the annexation is completed, the two former corporations shall be governed as one, embracing the territory of both, and the inhabitants of all such territory shall have equal rights and privileges, subject, however, to such terms and conditions of annexation. The annexation shall not affect any rights or liabilities existing at the time of annexation, either in favor of or against the corporations, except such as are affected by such terms and conditions of annexation and suits founded on such rights and privileges may be commenced, and pending suits prosecuted to final judgment and execution, as though the annexation had not taken place.[1] [109 v. 263, 266; R. S. Sec. 1614; 66 v. 268, § 705.]

(1) **Territory annexed pending merger of municipalities.**—If while proceedings to annex territory to a village are pending, the village is annexed to a city, the people of such territory become a part of the city, although they did not participate in the vote on the question of annexation of the village to the city; and they have no remedy against becoming part of the city. Mohn v. Collins, 32 B. 77.

Taxes on annexed municipality alone.—A tax which by agreement between a city and a village annexed to it was levied on the village property alone to pay the bonds of the village, is not void for want of uniformity. Cleveland v. Heisley, 41 O. S. 670.

The existence of the village annexed is continued only so far as to legalize the tax for its debt. *Ib.*

But such tax must not with the other taxes levied on said territory exceed the statutory limit. *Ib.*

Agreement as to grades.—An agreement in the terms of annexation stipulating that street grades should not be altered except by consent of property owners or the payment of damages is void so far as it is a contract not to legislate and has the effect merely of putting the grades on the same basis as city grades and gives abutting property owners no greater rights. Thale v. Cincinnati, 1 N. P. 427; Corry v. Cincinnati, 22 B., 194.

Rights after annexation.— A city which has annexed a village has no greater rights with respect to a street railway within the limits of the village than the village had. Cincinnati v. Street Railway, 17 B. 192.

Effect on annexed municipality.—Annexation of one municipal corporation by another does not

put an end to the corporate life and powers of the annexed municipality, but simply merges them with those of the annexing corporation, and an agreement that the firemen in the service of the former shall continue in the service of the latter is valid. State ex rel. v. Excell, 21 C. C. (N. S.) 603.

Sec. 3575. [How part of village attached to a city.] When a city and village adjoin each other, and the inhabitants of any portion of the territory constituting a part of the village desire to be detached therefrom and annexed to the city, on application of the council of the city and on the written request of two-thirds of the legal voters inhabiting the territory proposed to be annexed, the commissioners of the proper county may cause such alteration to be made, and the boundaries of the city and the village, respectively, to be established in accordance with the application and request, and such territory thereafter shall constitute a part of the city. In all such proceedings, the county commissioners, shall be governed by the provisions of proceeding on applications for the annexation of adjacent unincorporated territory to municipalities.[1] [R. S. Sec. 1615; 88 v. 39; 68 v. 85.]

(1) **What provisions applicable.**—The provisions of §§ 3548 to 3565 referred to, govern, not alone the actions and duty of the county commissioners under § 3575, but the entire procedure, including action of municipal authorities. Rost v. Glenville, 1 N. P. (N. S.) 65. So the annexation is not complete until the indebtedness has been apportioned and the municipality has by proper corporate action, accepted the annexation. *Ib.* Bach v. Goff, 24 C. C. (N. S.) 561. See, further, as to what specific provisions are applicable. Pollock v. Toland, 1 C. C. (N. S.) 315; 25 C. C. 75.

Forms.—See forms under § 3548, § 3549, and § 3550. These forms may be adapted to suit the circumstances of the case provided for in this section.

See notes to § 3574, *ante*.

Sec. 3576. [Apportionment of indebtedness.] The county commissioners shall ascertain and apportion the amount of the existing indebtedness of the village, which shall be assumed and paid by the city on the annexation of such territory. The apportionment shall be made in the proportion of the total tax duplicate for the annexed territory transferred to the city, to the total tax duplicate remaining in and for the unannexed portion of the village. They shall ascertain, adjust and divide between the city and the unannexed portion

of the village, all moneys and other credits belonging to the village, in the same proportion as is herein provided for division and apportionment of any indebtedness, and order the amounts so adjusted and divided to be paid or delivered by the parties in possession thereof to the city and unannexed portion of the village. [R. S. Sec. 1615; 88 v. 39; 68 v. 85.]

DETACHMENT FROM CORPORATIONS.

Sec. 3577. [Petition for detachment of lands, and attachment to contiguous township; may form new township; apportionment of indebtedness; proviso; record.] Upon petition of a majority of the freehold electors owning lands in any portion of the territory of a municipality, accurately described in such petition with an accurate map or plat thereof, praying to have such portion of territory detached therefrom the commissioners of the county in which such portion of territory is situated, with the assent of the council of the municipality given in an ordinance passed for that purpose shall detach such portion of the territory therefrom and attach it to any township contiguous thereto, or, if the petition so requests, they shall erect the territory into a new township, the boundaries of which need not include twenty-two square miles of territory:

Provided that the commissioners shall first ascertain and apportion the amount of existing indebtedness of the municipal corporation from which the detachment is made and which shall be assumed and paid by the township contiguous thereto and to which the territory is detached or by the new township, if a new township is erected, or by the corporate successors of such township, and such apportionment shall be made in proportion to the tax duplicate for the detached territory transferred to a contiguous township erected into a new township to the total tax duplicate for the remaining portion of the municipality from which the detachment is made; and to ascertain, adjust and divide between the contiguous township or the new township, if a new township is erected, and the remaining portion of said municipality all moneys and other credits belonging to the municipality in the same proportion as is above provided for division and apportionment of any

indebtedness, and to order the amount so adjusted and divided to be paid or delivered by the parties in possession thereof to the proper officers of the contiguous township or new township and to the remaining portion of said municipality; and

Provided further that after such apportionment is made each section of the original territory by which the indebtedness was incurred shall be primarily liable for the portion of the indebtedness so apportioned; and

Provided further that in the issuing of bonds under sections 3939 to 3954, both inclusive, of the general code, and in arriving at the limitations imposed in such sections as amended May 10th, 1910, Vol. 101, page 432, of the laws of Ohio, only the portion of the indebtedness apportioned to each section of territory shall be counted as the net indebtedness.

The petition, map, ordinance and the order of the commissioners certified by the county auditor shall be recorded in the plat book in the office of the county recorder, and as soon as the record is made the proceedings shall be complete, both as to the detaching of such territory from the municipal corporation and the annexation thereof to the township or the erection of the territory into the new township, and to the apportionment of the indebtedness; and,

Provided further that wherever territory has been detached from municipal corporation and attached to a township or created into a new township, the trustees of such township, or, where such township has become a village or city or been annexed to any village or city, the council of such corporate successor of said township made by ordinance, duly passed, contract, through its proper officers, with the municipality from which the detachment was originally made to apportion the indebtedness of the original territory in the same manner as above described; said contract shall be made by ordinance or resolution, duly passed by the council of the village or city or trustees of the township, and the effect of said contract shall be the same as if such apportionment was originally made by the county commissioners, as above described.[1] [102 v. 310; R. S. Sec. 1616; 97 v. 143; 95 v. 120; 74 v. 109.]

(1) **Forms.**—The forms given under §§ 3548, 3549 and 3550 may be adapted to suit the circumstances provided for in this section.

Sec. 3577-1. [Provisions for detachment of territory from a village.][1] The inhabitants residing within any portion of a village, such portion being contiguous to an adjoining township, and comprising not less than one thousand five hundred acres of land, may file with the board of deputy state supervisors and inspectors of elections in said county a petition requesting that an election be held to obtain the sense of the electors residing within said portion of such village upon the question of the detachment of such portion from such village, or, upon the question of the detachment of such portion from said village and the erection of such detached portion into a new township. Said petition shall contain an accurate description of the territory sought to be detached, together with an accurate map or plat thereof, and, if the erection of a new township is also sought, the name proposed for such new township; also, the name of a person to act as agent of the petitioners, and shall be signed by not less than twenty-five electors residing within the territory sought to be detached. Within ten days after the filing of said petition with the board of deputy state supervisors and inspectors of elections, said board shall determine whether said petition conforms to the requirements hereof. If it does not, no further action shall be taken thereon. If it does, said board shall order an election, as prayed for in said petition, which election shall be held at a convenient place within the territory sought to be detached on a day named by said board, which day shall be not less than ten days, nor more than twenty days, thereafter. Said board shall thereupon give ten days' notice of such election by publication in a newspaper of general circulation in said territory, and shall cause written or printed notices thereof to be posted in three or more public places therein. Said election shall be conducted as other elections are conducted, and the judges and clerks thereof shall be designated by said board of deputy state supervisors and inspectors of elections. The ballots shall contain the words "for detachment," and "against detachment." If a majority of the ballots cast at such election shall contain thereon the words "against detachment," no further proceedings shall be had in relation thereto, but this shall not be a bar to other proceedings for the same pur-

pose. If a majority of the votes cast have thereon the words "for detachment," the result of such election, together with the original petition and plat and a transcript of all the proceedings of said board of deputy state supervisors and inspectors of elections in reference thereto shall be certified by said board and delivered to the county recorder, who shall forthwith make a record of the petition, and plat, and transcript of all the proceedings of the board of deputy state supervisors and inspectors of elections, and the result of the election, in the public book of records, and preserve in his office the original papers delivered to him by said board of deputy state supervisors and inspectors of elections, and certify thereon that the transcribed petition and map are properly recorded. When the recorder has so made such record, he shall certify and forward to the secretary of state, a transcript thereof. The detachment of said territory from said village, shall thereupon be complete, and, if said petition included a request that such territory be erected into a new township, said territory shall thereupon constitute and be a new township, under the name and style specified in said petition. All expense involved in the holding of said election, and in the filing, recording and transcribing of the records herein provided for, shall be defrayed by the petitioners, and said board of deputy state supervisors and inspectors of elections, and said county recorder may require the payment thereof in advance as a condition precedent to the taking by them, or either of them, of any step herein provided for. [106 v. 301.]

(1) **Validity.**—This section and sections 3577-2 and 3577-3 held constitutional. Newburgh Heights v. French, 28 O. C. A., 586.

Sec. 3577-2. [Apportionment of property between detached territory and village.] When territory is so detached, an apportionment of the property, funds and indebtedness of said village, shall be made between said village and said detached territory upon the basis of the respective tax duplicates in said village after such detachment, and in said detached territory. All water pipes and sewers laid either in said village or in said detached territory, shall be considered as property within the meaning of that term, as herein used, in so

far as said water pipes or sewers have been paid for out of the general funds of the village. If the village authorities and the public authorities in control of said detached territory are unable to agree upon such apportionment, it shall be made by the probate court, upon application by either the authorities of the village or the authorities in control of the detached territory. [106 v. 301.]

Sec. 3577-3. [Additional method.] The method of detachment herein provided for shall be in addition to all other methods provided by law. [106 v. 301.]

Sec. 3578. [Petition for detachment and parties; five-year limitation.] The owner or owners of unplatted farm lands annexed to any municipality after the incorporation thereof may file a petition in the court of common pleas of the county in which the lands are situated, in which such owner or owners shall be named as plaintiffs, and the municipality shall be the defendant, setting forth the reasons why the land should be detached, and the relief prayed for. On the petition a summons shall issue as in other actions, and the case proceed as in other causes. Provided, however, that no such action shall be brought, or detachment ordered or decreed within five years from the time that such lands were annexed by any such municipality under the provisions of this or the preceding chapter. [102 v. 311; 95 v. 255, § 1.]

FORM OF PETITION FOR DETACHMENT OF UNPLATTED FARM LANDS FROM A MUNICIPAL CORPORATION.

Court of Common Pleas,.....County, Ohio.

..... Plaintiff. vs. The City [*or* village] of ..... Defendant.	PETITION.

Plaintiff says that he is the owner of the following described property, to-wit: (Here insert description of farm lands sought to be detached.)

Plaintiff further says that the said property above described is unplatted farm land and lies within the corporate limits of the city [*or* village]

of....., and is not within the original limits or said city [*or* village], but was annexed thereto on the ..... day of ....., 19....

Plaintiff further says that the said land should be detached from the said city [*or* village] for the reason that (here set forth the reasons why the land should be detached).

Wherefore, plaintiff prays that the said property may be detached from the city [*or* village] of ..... and be attached to the adjacent township of.....in said county of.....and for all other relief to which he may be entitled.

.....
Attorney for Plaintiff.

Sec. 3579. [Hearing; decision.] On the hearing of such cause, if the court finds that the lands are farm lands, and are not within the original corporate limits of the municipality, that by reason of the same being or remaining within the municipality the owner thereof is taxed and will continue to be taxed thereon for municipal purposes in substantial excess of the benefits conferred by reason of such lands being within the municipality, and that said lands may be detached without materially affecting the best interests or good government of such municipality or of the territory therein adjacent to that sought to be detached, an order and decree may be made by the court in its discretion and entered on the record that the lands be detached from the municipality and be attached to the most convenient adjacent township in the same county. Thereafter the lands shall not be a part of the municipality, but shall be a part of the township to which they have been so attached. The costs shall be taxed as to the court may seem right.[1] [102 v. 449; 95 v. 260, § 2.]

(1) **Validity.**—This act (§§ 3578, 3579) held constitutional. It does not confer legislative power on the court. Fairview v. Giffee, 73 O. S. 183; Grover Hill v. McClure, 27 C. C. 376; 6 C. C. (N. S.) 197 (aff'd 72 O. S. 676).

When application refused.—A petition asking that unplatted farm lands be detached from the municipality within which they are located, on the ground that they are taxed in excess of benefits conferred, will not be granted where it appears that the city is growing rapidly in the direction of these lands, and that they are suitable for building lots, and that the interests of the municipality as distinguished from those of the land owner will be best served by their retention as part of the territory comprising the municipality. Smetzer v. Elyria, 14 N. P. (N. S.) 123.

Appeal.—Proceeding to detach

farm lands from municipality is not a civil action within § 12224 and is not appealable to Circuit Court. Hicksville v. Bricker, 52 B. 101; Bay v. Sylvania, 14 C. C. (N. S.) 429.

FORM OF DECREE FOR DETACHMENT.

Court of Common Pleas, ... County, Ohio.

..... Plaintiff. vs. The City [*or* Village] of ..... Defendant.	DECREE.

This cause came on to be heard on the pleadings and the evidence, and the court being fully advised, finds that the lands in the petition described are farm lands unplatted and within the corporate limits of the City [*or* Village] of .....; that said lands are not within the original corporation of said municipality, but were annexed thereto on the ..... day of ....., 19...., being more than five years prior to the filing of the application herein; that by reason of the same being or remaining within the municipality, the owner thereof is taxed and will continue to be taxed thereon for municipal purposes in substantial excess of the profits conferred by reason of such lands being within the municipality, and that said lands may be detached from said municipality without materially affecting the best interests or good government of such municipality or of the territory therein adjacent to that sought to be detached.

Wherefore, it is ordered, adjudged and decreed that said land be detached from the said City [*or* Village] of ....., and be attached to the adjacent township of ..... in the said county of .....

CHAPTER 4.

PLATS.

ORIGINAL PLATS.

Sec. 3580. [Plat of proposed village or addition shall be made.] When a person wishes to lay out a village, or subdivision or addition to a municipal corporation, he shall cause it to be surveyed, and a plat or map of it made by a competent surveyor. The plat or map shall particularly describe and set forth the streets, alleys, commons, or public grounds, and all in-lots, out-lots and fractional lots within or adjacent to such village. The description shall include the courses, boundaries and extent.[1] [R. S. Sec. 2597; 47 v. 52; 29 v. 350.]

(1) **Plat as a dedication.**—A plat duly made and recorded according to all the requirements of the statutes constitutes a statutory dedication of the property so platted, to public use. Fulton v. Mehrenfeld, 8 O. S. 440; Wisby v. Bonte, 19 O. S. 238; Winslow v. Cincinnati, 6 N. P. 47.

When all the statutory requirements have been complied with, no other or further act of acceptance on the part of the municipality is required. Sullivan v. Columbus, 12 Dec. 650; Fulton v. Mehrenfeld, 8 O. S. 440.

A plat, to operate as a dedication, must mark out grounds for use of the public. A plat setting apart grounds marked "The A. R. R. Depot," will not be a dedication either to the public or the railroad company. Todd v. R. R. Co., 19 O. S. 514.

Condition in Dedication.—A plat marking out sidewalk lines on the street dedicated does not bind the municipality to observe these lines in constructing sidewalks, although council has by a general resolution accepted the dedication, and council can fix the sidewalk line at a different place. Cox v. Lancaster, 24 C. C. 265; 2 C. C. (N. S.) 218 (aff'd 60 O. S. 576).

Defective plat not a statutory dedication.—A plat not made according to the statutory requirements, or not acknowledged according to statute, does not operate as a statutory dedication. Stephenson v. Leesburg, 33 O. S. 475; Lockland v. Smiley, 26 O. S. 94; Doren v. Horton, I Disney, 401; Ashley v. Toledo, 13 C. C. 1; Reynolds v. Newton, 14 C. C. 433; Satchell v. Doram, 4 O. S. 542; Minton v. Seville, 23 C. C. (N. S.) 126.

Such plat may be revoked at any time. Lockland v. Smiley, *supra*.

But a defective plat, though not valid as a statutory dedication, may

show an intention to dedicate, and, if there is a proper acceptance, may go to make up a common law dedication. Daiber v. Scott, 3 C. C. 313.

Common law dedication.—See note under § 3723, *post.*

Presumption of correct plat, when municipality has been legally established, see Stephenson v. Leesburgh, 33 O. S. 475.

Scope of section.—The statute gives authority to any person to make a plat of a certain division of territory. It does not require that the territory shall be incorporated as a municipal corporation. Walworth v. Collinwood, 8 C. C. 477, 478.

This section **does not give authority** to enter upon lands to survey and plat an addition to a municipal corporation against the will of the tenant in possession. Nigh v. Keifer, 5 C. C. 1.

Rights of vendee, after plat made.—See Doren v. Horton, 1 Disney, 401; Huber v. Gazley, 18 O. 18; Reynolds v. Newton, 14 C. C. 433; Ashley v. Toledo, 13 C. C. 1 (aff'd, 59 O. S. 631); Myers v. Toledo, 18 C. C. 817.

Sec. 3581. [What plat shall contain.] The in-lots intended for sale shall be numbered in progressive numbers, or by the squares in which situated, and their precise length and width shall be stated on the plat or map. Out-lots which do not exceed ten acres in size shall in like manner be surveyed and numbered, and their precise length and width stated on the plat or map, together with any streets, alleys, or roads which divide or border on them. [R. S. § 2598; 29 v. 350.]

Sec. 3582. [Cornerstone to be planted.] At the time of surveying and laying it out, the proprietor of the village shall plant and fix, at the corner of the public ground, or a public lot, if any there be, and if there be none, then at the corner of one of the in-lots, and at the corner of each out-lot, a good and sufficient stone, of such size and dimensions, and in such manner, as the surveyor directs, for a corner from which to make future surveys, and the point or points where it may be found shall be designated on the plat or map. [R. S. § 2599; 29 v. 350.]

Sec. 3583. [Plat to be acknowledged and recorded.] After the plat or map is completed, it shall be certified by the surveyor, and acknowledged by the owner or owners before an officer authorized to take the acknowledgment of deeds, who shall certify his official act on the plat or map. If any owner is a non-resident of the state, his agent, authorized by writing,

may make the acknowledgment. Such plat or map, and if the execution is by agent, his written authority, shall thereupon be recorded in the office of the county recorder.[1] [R. S. § 2600; 29 v. 350.]

(1) **Recording plats.**—A plat operated as a dedication, though not recorded, where no statute required recording. Williams v. Presbyterian Society, 1 O. S. 478.

But now a plat not duly recorded and acknowledged cannot operate as a statutory dedication. Doren v. Horton, 1 Disney, 401; Ashley v. Toledo, 13 C. C. 1.

Sec. 3584. [Plat of sub-division; acknowledgment and record.] A proprietor of lots or grounds in a municipal corporation, who subdivides or lays them out for sale, shall cause to be made an accurate map or plat of such subdivision, describing with certainty all grounds laid out or granted for streets, alleys, ways, commons or other public uses. Lots sold, or intended for sale shall be numbered by progressive numbers, or described by the squares in which situated, and the precise length and width shall be given of each lot sold, or intended for sale. Such map or plat shall be subscribed by the proprietor, or his agent, duly authorized by writing, acknowledged before an officer authorized to take the acknowledgment of deeds, who shall certify the acknowledgment of the instrument, and recorded in the office of the recorder of the county.[1] [R. S. Sec. 2601; 73 v. 60.]

(1) **Construction of former statutes** relating to recording, etc., of plats, see Lebanon v. Warren Co., 9 O. 80; Le Clercq v. Gallipolis, 7 O. (1st pt.) 217; Crippen v. Ohio University, 12 O. 96; Huber v. Gazley, 18 O. 18; McLaughlin v. Stevens, 18 O. 94; Langley v. Gallipolis, 2 O. S. 107; Satchell v. Doram, 4 O. S. 542; Bd. of Ed. v. Edson, 18 O. S. 221; Seegar v. Harrison, 25 O. S. 14.

Plat as a dedication.—See notes under § 3580, *ante*.

Platting Commission.—A plat under this section must not interfere with a plat adopted by a municipal platting commission under § 4347 *et seq*. Wagner v. Fitz, 14 C. C. (N. S.) 561.

Sec. 3585. [Fee shall vest in municipality.] The map or plat so recorded shall thereupon be a sufficient conveyance to vest in the municipal corporation the fee of the parcel or parcels of land designated or intended for streets, alleys, ways, commons, or other public uses, to be held in the corporate

name in trust to and for the uses and purposes in the instrument set forth and expressed, designated, or intended.[1] [R. S. Sec. 2601; 73 v. 60.]

(1) **Character of municipality's title.**—The title, which a municipal corporation acquires, under § 3585, to streets dedicated by a proprietor who sub-divides lots for sale, is held for the use of the public for street purposes. Callen v. Electric Light Co., 66 O. S. 166; Keefe v. R. R. Co., 8 N. P. 466; McLean v. Electric Light Co., 9 B. 65. See notes to § 3714, *post*.

Purpose of section, has no relation to assessments. See Gibson v. Cincinnati, 8 N. P. 466.

Effect of record of plat not properly approved, see Abraham v. Cincinnati, 13 Dec. 619.

[1]Acceptance necessary to charge municipality with care of streets. See § 3723, *post*, and notes.

Sec. 3586. [Map or plat by platting commission must be approved by city engineer or council.] When there are on record plats adopted by a platting commission or board of public works, no such map or plat of any addition within the limits of a municipal corporation shall be recorded until the engineer thereof certifies that the streets, as laid down on the plats of such addition, correspond with those laid down on the recorded plats of the platting commission or board of public works. When there are streets laid down in addition to those adopted by a platting commission or board of public works, or in any municipal corporation where no platting commission is or has been in existence, no such plat shall be recorded until it has been approved by the council of the municipal corporation. [110 v. 405; former § 3586 was repealed, 110 v. 73, and here restored.]

Sec. 3586-1. [Planning commission or council must approve plat.] Whenever a city planning commission of any city shall have adopted a plan for the major streets or thoroughfares and for the parks and other open public grounds of said city or any part thereof or for the territory within three miles of the corporate limits thereof or any part thereof except a part lying within a village, then no plat of a subdivision of land within said city or part thereof or said territory or part thereof shall be recorded until it has been approved by such city planning commission

and such approval be endorsed in writing on the plat. If such land lie within three miles of more than one city, then this section shall apply to the approval of the planning commission of the city whose boundary is nearest to the land. When a village planning commission shall have adopted a plan for the major streets and thoroughfares and parks and other public grounds of such village or any part thereof, then no plat of a subdivision of land within said village or part thereof shall be recorded until it has been approved by such village commission and such approval endorsed in writing on the plat. The approval of the planning commission, platting commissioner or village council, required by this section, or the refusal to approve, shall take place within thirty days from and after the time of the submission of the plat for approval; otherwise such plat shall be deemed to have been approved, and the certificate of such planning commission, platting commissioner or of the clerk of such council as to the date of the submission of the plat for approval and the failure to take action thereon within such time, shall be issued on demand and shall be sufficient in lieu of the written endorsement or other evidence of approval herein required. The ground of refusal or approval of any plat submitted, including citation of or reference to the rule or regulation violated by the plat, shall be stated upon the record of the commission, commissioner or council. Any planning commission, platting commissioner or village council may adopt general rules and regulations governing plats and subdivisions of land falling within its jurisdiction to secure and provide for the coordination of the streets within the subdivision with existing streets and roads or with the city or village plan or plats, for the proper amount of open spaces for traffic, circulation and utilities and for the avoidance of future congestion of population detrimental to the public health or safety; but such rules and regulations shall not require the dedication to the general public of open grounds or spaces other than streets and ways, nor impose a greater minimum lot area than thirty-five hundred square feet, nor any requirement as to the minimum percentage of lot occupancy, nor as to the height, bulk, location or use of build-

ings; and minor streets shall not be required to be wider than fifty feet. Such rules and regulations shall be promulgated and published as is provided by law for the promulgation and publication of ordinances and before adoption a public hearing shall be held thereon and a copy thereof shall be certified by the commission to the county recorder of the county in which the municipality is located. Nothing herein contained shall be construed to impair, modify or postpone any power over or concerning the platting and subdivision of land or the recording of plats of subdivisions granted to a city or other planning commission by any other section of the General Code; but when a plan has been adopted as provided in this section the approval of plats provided for herein shall be in lieu of the approvals provided for by any other section or sections of the General Code, so far as territory within the approving jurisdiction of the planning commission, as provided in this section, is concerned. [110 v. 71.]

Sec. 3587. [Penalty for recording when not properly executed.] A county recorder who records such map or plat contrary to the provisions of this chapter, shall forfeit and pay not less than one hundred dollars nor more than five hundred dollars to be recovered with costs in a civil action by the prosecuting attorney in the name and for the use of the county. [R. S. Sec. 2602; 73 v. 61.]

Sec. 3588. [Penalty; civil action for recovery.] Whoever, being the owner or agent of the owner of any land within or without a municipal corporation, transfers any lot, parcel or tract of said land from or in accordance with a plat or map of the subdivision or allotment of all or a part of said land and upon which plat or map certain areas are indicated as for the use of the public for streets or other public grounds, before such plat or map has been recorded in the office of the county recorder of the county in which the land is situated, shall forfeit and pay the sum of fifty ($50.00) dollars for each lot, parcel or tract of land so sold; and the description of such lot, parcel or tract by metes and bounds in the deed or transfer shall not serve to

exempt the seller from the forfeit herein provided. If the land be within a municipal corporation, then such sum may be recovered in a civil action brought in any court of competent jurisdiction by the city solicitor or other corresponding official of the municipal corporation in the name of the municipal corporation and for the use of the street repair fund thereof. If the land be situated outside of a municipal corporation, then said sum may be recovered in a civil action brought by the prosecuting attorney of the county in which the land is situated, in the name of the county and for the use of the road repair fund thereof. This section as herein amended shall not apply to a map or plat of a subdivision from or according to which two or more lots as shown on such plat have been sold or contracted for sale previous to the taking effect of this section nor to a plat or map of a subdivision heretofore made where the proprietor has heretofore carried the improvement of the land in accordance with the plat to the point of commencing the grading of streets or other public ways as shown on the plat; nor to a map or plat of a subdivision on which all areas indicated as streets or open grounds are expressly indicated as for the exclusive use of the abutting or other owners in such subdivision and not as public streets, ways or grounds. [110 v. 71, 72; R. S. Sec. 2603; 29 v. 350.]

Sec. 3589. [Fee in county.] Such plats or maps shall be deemed in law a sufficient conveyance to vest fee simple of all such parcels of land as are therein expressed, named, or intended for public use, in the county in which the village is situated, for the uses and purposes therein named, expressed or intended, and for no other use or purpose whatever.[1] [R. S. Sec. 2604; 29 v. 350.]

(1) **Title to streets.**—The fee of streets laid out on a plat of a subdivision forming a village or addition to municipal corporation vests in the county, and the period of limitation against the title so vested is twenty-one years. Walworth v. Collinwood, 8 C. C. 477.

Sec. 3590. [Penalty for neglect to plant cornerstone.] If a person lays out a village, or addition to a municipal corporation, and neglects to plant the cornerstones therein, or causes

it to be surveyed or platted in any other manner than that prescribed in this chapter, he shall forfeit and pay one hundred dollars and costs of suit, to be recovered in a civil action, in the name of the county treasurer, for the use of the county. [R. S. Sec. 2605; 29 v. 350.]

Sec. 3591. [Penalty for disposing of lot before provisions of chapter complied with.] If a person disposes of, offers for sale, or leases for a time exceeding five years, any in-lot or out-lot, or any part of either, in a village, whether incorporated or not, or in an addition to a municipal corporation, before the requirements of this title are complied with, he shall forfeit and pay twenty-five dollars for each lot or part of lot so sold, offered for sale, or leased, to be recovered, with costs, in a civil action, in the name of the county treasurer for the use of the county.[1] [R. S. Sec. 2606; 29 v. 350.]

(1) **Contract for sale is valid,** although the village lot has not been surveyed, platted, and recorded according to terms of the statute. Strong v. Darling *et al.*, 9 O. 201.

Sec. 3592. [Directors to lay out village where county seat located; how governed; penalties.] The directors appointed by the court of common pleas, to lay out a village, where a seat of justice is situated, shall be governed by the provisions of this chapter, and liable to the same penalties for violation thereof as county recorders. [R. S. Sec. 2607; 29 v. 350.]

VACATING PLATS.[1]

Sec. 3593. [Vacation of town plat.] Upon the application of two-thirds of the proprietors thereof, the court of common pleas may alter or vacate the plat of any municipal corporation, addition thereto, or parts thereof, within the county, as hereinafter specified. [R. S. Sec. 2608; 38 v. 32.]

(1) Owner of lots may replat without first vacating former plat. Op. Atty. Gen. (1918) p. 1191.

Sec. 3594. [Application for vacating or altering plat; notice.] Applications for vacating or altering a plat, addition, or part thereof, shall be by petition in writing, filed with the clerk of the court of common pleas, and the applicant or ap-

plicants shall give thirty days' notice thereof by publication in a newspaper printed and of general circulation in the county. The notice shall set forth briefly the part or parts of the plat or addition to be vacated. [R. S. Sec. 2609; 83 v. 24; 38 v. 32.]

Sec. 3595. [When court may alter or vacate plat.] If the petitioners produce to the court satisfactory evidence that such notice has been given, and that two-thirds of the persons owning lots or parts thereof in the corporation or the addition, as the case may be, or their authorized agents or attorneys, have made application to have the whole or a part of such corporation or addition, altered or vacated, the court shall, in its discretion, proceed to alter or vacate such corporation or addition, or any part of either. The vacation of a municipal corporation, addition, or part thereof, shall not vacate any part of a state or county road. [R. S. Sec. 2610; 83 v. 24; 38 v. 32.]

Sec. 3596. [Record; who may be made party defendant.] The proceedings shall be recorded by the clerk in the records of the court, a copy of which record shall be made and certified under the seal of the court by the clerk thereof, and shall, by the parties applying for such vacation or alteration, within thirty days from the rising of the court, be deposited with the recorder of the county, who shall record it. At the term at which notice is given of such application or at any subsequent term during the pendency of the application, any person feeling interested in the proceedings, upon motion, may be made a party defendant to the application, in which case, upon final hearing, the party succeeding shall have judgment against the other for the costs of the proceedings, and execution may issue therefor as in other cases. [R. S. Sec. 2610; 29 v. 352.]

Sec. 3597. [Commons may be changed into streets.] On application so made, and notice so given, the court of common pleas may change any commons included in the plat of a municipal corporation into streets, and cause such change to be recorded as herein provided. [R. S. Sec. 2611; 29 v. 352.]

Sec. 3598. [Clerk's fees.] For recording a plat required to be recorded under the provisions of this chapter and for other services required of him, the clerk of the court shall be entitled to the same fees as are allowed him by law for similar services. [R. S. Sec. 2612; 29 v. 352.]

Sec. 3599. [Application for vacation and assessment of damages.] If of opinion that any person owning a lot in such plat, addition, or parts thereof proposed to be vacated or altered, not assenting thereto, will sustain damage thereby, the court may proceed to hear proof in reference thereto, and may render judgment against the petitioners for such damages as it may think proper and just, to be assessed by the court against the petitioners ratably, according to the value of the property, owned by the petitioners, as it stands taxed on the tax list of the county. When necessary, the court shall appoint a guardian ad litem for all minors or persons of insane mind, interested in the premises. The judgment of the court vacating such plat, addition or parts thereof, shall be conditional upon the payment of the damages thus assessed. [R. S. Sec. 2613; 38 v. 32.]

Sec. 3600. [Changing of incorporated town or addition.] Any person or persons owning, either jointly or severally, and either in their own right or in trust, and having the legal title to, any land laid out in town lots, not within the limits or subject to the control of a municipal corporation, may change such lots and the streets and alleys bounding them, by making, acknowledging and having recorded, as in this chapter provided, a new plat of such land, and having the proper transfers made in the office of the county auditor. No such change shall be made if it affects injuriously any lots on the streets or alleys, or within the plat so changed, unless all the owners of the lots so affected are parties joining in making the change, or they give their consent in writing on the new plat, and it be recorded therewith. Any change of a town plat so made shall have the same force and effect as if made by the judgment of a court having jurisdiction thereof. [R. S. Sec. 2614; 76 v. 88.]

Sec. 3601. [Vacation of lots not within a municipal corporation.] Any person or persons owning, either jointly or severally, either in their own right or in trust, and having the legal title to any land laid out in town lots, or to any whole block or blocks of lots in any land laid out in town lots, and not within the limits or under the control of a municipal corporation, may vacate such lots or blocks of lots upon giving notice of his, her or their intention so to do, for two weeks in a newspaper published, and of general circulation, in the county where such land lies, and if any of such lots have been sold, personal written notice to the owner thereof. [R. S. Sec. 2614a; 80 v. 180.]

Sec. 3602. [When auditor shall make changes and transfers.] If no notice of an injunction granted against such vacation is served upon the auditor of the county where the lands lie, or notice of dissent from such vacation, by the owners of any of such lots, within ten days after the completion of such notice, he shall make all necessary changes and transfers in and upon his duplicate after such ten days from the time of the completion of the notice, proof of which shall be furnished him. [R. S. Sec. 2614a; 80 v. 180.]

Sec. 3603. [Certificate of auditor; record thereof by recorder.] The auditor shall give to the party or parties at whose instance such vacation is made, a certificate stating that such lots or blocks of lots have been vacated, upon the presentation of which to the recorder of the county, he shall write upon such plat of lots, block or blocks as they appear on the plat of such lots the word "vacated," and such vacation shall have the same effect as if made by the judgment of a court having jurisdiction thereof. The auditor and recorder shall be entitled to such fees for their services under this section as they are entitled by law in like cases, which shall be paid by the party or parties making such vacation. [R. S. Sec. 2614a; 80 v. 180.]

REVISION OF PLATS.

Sec. 3604. [Lots may be revised and renumbered.] Where the lots of a municipal corporation are not numbered consecutively upon the original plat thereof and the plats of additions

thereto, or subdivisions thereof, the auditor and recorder of the county, in conjunction with a person appointed by the mayor of the municipal corporation, may make a revision of the numbers of all the in-lots and out-lots of such municipal corporation, as they stand upon record, and number anew all the lots, so that the in-lots shall have but one consecutive series of numbers, beginning with number one, and the out-lots shall have but one similar series of numbers, also beginning with number one. [R. S. Sec. 2615; 46 v. 34.]

Sec. 3605. [Mode of renumbering.] The auditor and recorder, with such associate, shall make a schedule of all in-lots of the municipal corporation, beginning with the original plat thereof, setting down the lots in the order of their numbers, and placing opposite thereto the new numbers assigned thereto. There shall follow in the same manner with the plats of addition and sub-division, according to their priority in date of record, so that the first column shall contain the old numbers of the in-lots in their consecutive order and the second column shall exhibit opposite to such numbers respectively, the new numbers assigned to each of such lots. In the same manner, they shall make a schedule of the out-lots. Such schedule shall accurately and distinctly indicate the plat in which such in-lot or out-lot originally stands upon record, and the auditor and recorder shall place such schedule on record in their respective offices. [R. S. Sec. 2616; 46 v. 34.]

Sec. 3606. [New numbers shall be legal designation.] When the revision and renumbering of such lots have been made, and the schedule thereof recorded, the lots shall be assessed and entered upon the tax list for taxation, according to their new numbers. In the assessment and collection of taxes, they shall be lawfully known and designated by the new numbers so given them, and conveyances of them made by the new numbers shall be sufficient to pass the title. [R. S. Sec. 2617; 46 v. 34.]

Sec. 3607. [Expenses of renumbering, how paid.] When such revision and renumbering are done at the request of the corporate authority of a municipal corporation, the expenses shall be paid by the corporation. The commissioners of a

county in which unincorporated territory is situated, may direct the auditor and recorder to make such revision and renumbering thereof and cause the expenses to be paid from the county treasury. The commissioners may direct the auditor and recorder to make such revision and renumbering of an incorporated village, if they are of opinion that it is necessary for convenience and efficiency in taxation. [R. S. Sec. 2618; 46 v. 34.]

Sec. 3608. [Numbering of additions or subdivisions after revision.] After the revision is made and recorded, as hereinbefore provided, each person who lays off lots as an addition to such municipal corporation, or who makes a subdivision of lots therein, shall number the lots so divided upon his plat in regular consecutive numbers, commencing with the next number after the highest number of such in-lots or out-lots, as ascertained by the recorder from a careful examination of the original records and revisions. [R. S. Sec. 2619; 46 v. 34.]

Sec. 3609. [Compensation.] The auditor, recorder, and their associate, shall each receive the sum of two dollars per day for their services under this subdivision. [R. S. Sec. 2620; 46 v. 34.]

LOST OR DESTROYED RECORDS.

Sec. 3610. [Application to supply lost or destroyed records.] Any ten persons, their agents or attorneys, owning or being interested in any lots of land in a municipal corporation, where the original plat, or any addition thereto, has been recorded in the records of the county in which such municipal corporation is situated, and the records and original plat thereof have been lost or destroyed, may make application in writing to the county commissioners of the county to have the records of the plat or plats so lost or destroyed supplied, which application shall be filed with the auditor of the county. [R. S. Sec. 2621; 70 v. 65.]

Sec. 3611. [Publication of notice.] Upon the filing of the application, the auditor of the county shall give notice, by publication for two consecutive weeks in a newspaper published

and of general circulation in the county, of the filing thereof and also notify the county commissioners thereof. [R. S. Sec. 2622; 70 v. 65.]

Sec. 3612. [Commissioners shall appoint surveyor; duties of.] Upon the filing of the application and the giving of such notice, the commissioners of the county shall forthwith employ a competent surveyor, who, after being duly sworn to well and faithfully discharge the duties assigned him, shall proceed to replat such municipal corporation according to the original plan or plat thereof. To enable him to find more easily the lines and corners of streets, lanes, alleys, and lots, the surveyor may call and examine witnesses, under oath or otherwise. When he has fully performed all the duties assigned to him, and has made a plat of such municipal corporation, he shall make and attach his certificate to such plat that it is a correct copy of the original plat of such municipal corporation, as he verily believes, together with the costs and expenses of making it, and forthwith file it with the auditor of the county. [R. S. Sec. 2623; 70 v. 65.]

Sec. 3613. [Record of plat and certificate.] Upon the filing of the plat and certificate by the surveyor, the commissioners of the county shall cause them to be recorded in the office of the recorder of the county, and such record, or a copy thereof, certified by the recorder, shall be prima facie evidence of the plat of the municipal corporation in all the courts of this state. [R. S. Sec. 2624; 70 v. 65.]

Sec. 3614. [Record of proceedings.] The auditor of such county shall keep a full and complete record of the proceedings in the commissioners' journal, for which he shall receive such compensation as is allowed by law for similar services. The surveyor and recorder shall receive and be paid from the county fund of the county on the order of the county auditor, for their services, such fees as are allowed by law for similar work. [R. S. Sec. 2625; 70 v. 65.]

DIVISION II.

GENERAL POWERS.

CHAPTER 1.

ENUMERATION OF POWERS.

Sec. 3615. [General powers of municipalities.] [1] Each municipal corporation shall be a body politic and corporate,[2] which shall have perpetual succession, may use a common seal,[3] sue and be sued,[4] and acquire property by purchase, gift, devise, appropriation, lease, or lease with the privilege of purchase, for any municipal purpose authorized by law,[5] and hold, manage and control it and make any and all rules and regulations, by ordinance or resolution, that may be required to carry out fully all the provisions of any conveyance, deed or will, in relation to any gift or bequest, or the provisions of any lease by which it may acquire property. [102 v. 40; 99 v. 5, § 7; 96 v. 21, § 7.]

(1) **Old sections.**—See old sections 1552 R. S. and 1692 R. S. repealed; 95 v. 16, 78, 274, 526, 561, all repealed.

(2) **Corporation within federal statutes.**—A civil township made a body politic and corporate by state statute is a corporation within the meaning of the federal judiciary act of 1888. Loeb v. Columbia Township, 12 O. F. D. 349.

(3) **Corporate seal.**—Section 4550 provides for form of seal, and makes the Mayor custodian of the seal of the corporation. See Tiffin v. Shawhan, 43 O. S. 178, 186.

(4) **Action.**—*How conducted.*—Old section 1552 R. S. was held to confer upon council the power to sue, and it was not necessary that every action should be brought by the solicitor of the corporation. Deatrick v. Defiance, 1 C. C. 340. Where municipality attempts to confess judgment under section 11594 it is necessary that the municipality's legal representative appear in open court and confess judgment on behalf of the municipality. The word "person" in section 11594 applies to municipal corporations. Walcutt v. Columbus, 13 Dec. 561; 1 N. P. (N. S.) 225. The word "persons" in section 12148 includes municipal corporations. Springfield v. Walker, 42 O. S. 543.

Where brought.—Where city is situated partly in two counties, action must be brought where its offices and government are conducted. Fostoria v. Fox, 60 O. S. 340.

Claim due village changed to city.—The city suing for a claim formerly due a village from which the city has been advanced will not be required, on motion, to set out the manner by which it was advanced from the village to the city. Deatrick v. Defiance, 1 C. C. 340.

Action for conversion will lie against municipality.—Where pipes are laid in streets by proprietor of a subdivision under license and these pipes are subsequently taken over by the municipality as part of its water system, conversion will lie for their value. Lakewood v. Newell, 16 C. C. (N. S.) 503.

No action on quantum meruit against municipality.—See Wellston v. Morgan, 65 O. S. 219; Frisbie Co. v. East Cleveland, 98 O. S. 266; McCormick v. Niles, 81 O. S. 246, 251. But where money is voluntarily paid by a municipality through a misunderstanding of the legal effect of a contract, it can not be recovered in the absence of fraud or mistake of facts. Smith Co. v. Cleveland, 16 C. C. (N. S.) 77.

See further as to municipal liability on contracts, notes under § 4328, *post.*

(5) **Scope of power to purchase, hold and sell.**—Matters relating to scope of power of municipality to purchase, hold and sell real estate, see note 2 under § 3631, *post.*

Diversion to unauthorized use.—Where an owner dedicates land to the public for a particular use, specifying the use and imposing restrictions for the dedication as expressed, the land can not be applied to any other use or the restrictions disregarded. Newark v. Crane *et al.*, 19 C. C. (N. S.) 499.

Upon abandonment by a town of the public purpose of the dedication of the land, the property reverts to the original donor. *Ib.* Reversed on questions of fact. Newark v. Crane, 92 O. S. 537.

Sec. 3616. [Powers by ordinance or resolution.] All municipal corporations shall have the general powers[1] mentioned in this chapter, and council may provide by ordinance or resolution for the exercise and enforcement of them.[2] [99 v. 5, § 7; 96 v. 26, § 8.]

(1) **Municipal powers strictly limited.**—A municipal corporation has those powers only which are expressly granted to it, and such others as are necessary to carry out powers expressly granted. Collins v. Hatch, 18 Ohio, 523; Ravenna v. Pennsylvania Co., 45 O. S. 118; Bancroft v. Wall, 29 B. 306; Gas & Water Co. v. Elyria, 57 O. S. 374; Cincinnati v. Gass, 13 Dec. 703; 1 N. P. (N. S.) 169; State v. Carter, 67 O. S. 422, 433; L. S. & M. S. Ry. Co. v. Elyria, 69 O. S. 414; Carthage v. Dickmeier, 79 O. S. 323.

Municipal corporations have only such police power as is expressly

granted or clearly implied. Townsend v. Circleville, 78 O. S. 122.

Power to make contracts advantageous to the municipality, same as that of an individual; see Columbus v. Ry. Co., 2 C. C. (N. S.) 305; 25 C. C. 663.

Powers must be exercised in good faith for the accomplishment of the object for which the power is delegated, and not colorably for such a purpose in order to accomplish another object for which the power is denied to it by the state. Carpenter v. Traction Co., 13 N. P. (N. S.) 81.

An ordinance may be directed against any existing evil without covering the whole field of possible abuses, and this is so even though the forbidden act does not differ in kind from those that are not forbidden. Xenia v. Schmidt, 101 O. S. 437.

Purchase of land.—A majority vote of the City Council is required to purchase land, and the provisions of § 3680 G. C. have no application to such purchase. Op. Atty. Gen. (1913) p. 1531.

Estoppel.—Persons dealing with municipality must, at their peril, take notice of the limitations upon its powers imposed by statute. Lancaster v. Miller, 58 O. S. 558, 575; Hulbert v. Fitzsimmons, 57 O. S. 436, 439; State ex rel. v. Board of Public Service, 81 O. S. 218.

Where municipality has power to act it may be estopped by acts or acquiescence, but where there is a total absence of power, there is no estoppel. Horstman v. Street Ry. Co., 12 Dec. 756; Cleveland v. State Bank, 16 O. S. 236, 269; L. & N. R. R. Co. v. Cincinnati, 76 O. S. 481. See further note under § 4328 *post.*

Power to pay equitable claims.—Where claim is not collectible at law, but is just and equitable, and council has ordered its payment by ordinance, such ordinance is valid, and equity will enforce the claim. State ex rel. v. Brown, 8 C. C. 103; State ex rel. v. Wall, 2 N. P. (N. S.) 517; 15 Dec. 349.

Curative acts.—Validity of acts declaring that things done and created under unconstitutional laws shall nevertheless continue to be and remain and be recognized and regarded as legal. See Bartlett v. State, 73 O. S. 54.

(2) **Provide for enforcement of powers.**—This clause was held to permit a village to provide that sewer assessments should be paid to the clerk, and that he should pay them into the debt fund. State v. Carter, 67 O. S. 432, 434. Distinction between method of enforcement of general powers, and method provided for carrying out special powers, see Columbus Ry. & L. Co. v. Columbus, 10 N. P. (N. S.) 161; 20 Dec. 555.

Where municipality has power to pass an ordinance, injunction will not lie to determine whether one acting under it may or may not permit such acts as will amount to a nuisance. Columbus v. Barr, 21 Dec. 165; 10 N. P. (N. S.) 379.

Council to fix rates for municipal current.—See note 1 under § 3618.

For matters relating generally to the character of ordinances, see note under § 4224 *post.*

MUNICIPAL SERVICE.

Sec. 3617. [Police and fire departments.] To organize and maintain police and fire departments, erect the necessary buildings and purchase and hold all implements and apparatus required therefor.[1] [99 v. 7, § 7n; 96 v. 21, § 7.]

(1) **Other provisions as to police and fire departments** will be found in §§ 4372, *et seq. post.*

Sec. 3618. [Light, power and heat.] To establish, maintain and operate municipal lighting, power and heating plants, and to furnish the municipality and the inhabitants thereof with light, power and heat,[1] to procure everything necessary therefor, and to acquire by purchase, lease or otherwise, the necessary lands for such purposes, within and without the municipality.[2] [99 v. 34, § 7-o; 96 v. 21, § 7.]

(1) **Rates for municipal electric current.**—Municipalities of the state are authorized to establish, maintain and operate lighting, power and heating plants and furnish the municipality and the inhabitants thereof light, power and heat. The powers thus conferred are proprietary in their character and in the management and operation of such plant, municipal officials are permitted wide discretion. Courts are without authority to interfere therewith upon complaint merely that the capacity of the plant is overtaxed and streets of the municipality are insufficiently lighted by reason of furnishing current to private consumers, and that the rates charged for current are inadequate to meet the cost of production and transmission thereof. Butler v. Karb, Mayor, 96 O. S. 473.

But where the council of any such municipality fails to adopt and use a system or schedule of rates for current furnished private consumers as contemplated by Section 3616, General Code, but leaves the matter of rates to the administrative officers of the municipality, who arbitrarily fix and determine the rates in each case, and in so doing unjustly discriminate between citizens in the matter of rates and service, such action constitutes an abuse of corporate power which may be restrained by the court upon suit instituted by the city solicitor, or by a taxpayer if the city solicitor refuses upon written request to bring suit. *Ib.* Overruling in part Butler v. Karb, 16 N. P. (N. S.) 593, 607.

A council of a municipality in the State of Ohio has no authority to contract with the Council of another municipality to furnish current for the streets or for the citizens of the second municipality. Op. Atty. Gen. (1913) p. 1713.

Electric light plant owned by municipality can furnish service outside of corporate limits, when. See Op. Atty. Gen. (1919), p. 158.

Sale of electric current.—As to sale of current to inhabitants under former law, see Lakewood v. Electric Co., 21 N. P. (N. S.) 289.

(2) **Other provisions** relating to purchase or erection of gas and electric works will be found in §§ 3990 *et seq. post.*

Sec. 3618-1. [When municipality may purchase gas without advertisement or competitive bidding.] That any municipal corporation owning a municipal gas plant or system of gas distribution shall have the power to purchase gas, natural or artificial, and to furnish the same to said municipality and the inhabitants thereof for the purposes of light, power and heat. To carry out the power herein conferred, any such municipality is hereby authorized to make and execute a contract to purchase such gas through its appropriate boards or officers for any period not exceeding ten years, upon the council of such municipality authorizing and directing such contract to be made; and such board or officer may enter into such contract for the purchase of such gas after being so authorized by such council, without advertisement or competitive bidding, irrespective of the amount of money to be expended. Any such municipality may furnish and supply to its inhabitants any gas, natural or artificial, so purchased, on such terms and under such regulations as may be determined by the proper officers and authorities of said municipality. [108 v. 184; 101 v. 36.]

Sec. 3619. [Water supply.] [1] To provide for a supply of water, by the construction of wells, pumps, cisterns, aqueducts, water pipes, reservoirs, and water-works, for the protection thereof, and to prevent unnecessary waste of water, and the pollution thereof. To apply moneys received as charges for water to the maintenance, construction, enlargement and extension of the works, and to the extinguishment of any indebtedness created therefor.[2] [99 v. 34, § 7o; 96 v. 21, § 7.]

(1) **Special provisions** relating to power to construct and operate water works will be found in §§ 3955 *et seq. post.*

(2) **Use of stream as riparian owner.**—Municipality situated on natural flowing stream is a riparian proprietor, and may use for its own purposes and for domestic use of its inhabitants whatever water is necessary without liability to lower proprietor. Canton v. Shock, *et al.*, 66 O. S. 19.

Sec. 3620. [Public entertainment.] To establish, maintain and regulate free public band concerts, free public libraries and reading rooms,[1] to purchase books, papers, maps, and manuscripts therefor, to receive donations and bequests of money or property therefor, in trust or otherwise, and to provide for the rent and compensation for the use of any existing free public libraries established and managed by a private corporation or association organized for that purpose. [100 v. 53, § 7v; 97 v. 508; 96 v. 21, § 7.]

(1) **Resolution of council** to maintain a free public library and provide a site for the same, is authorized by the statutes relating to free public libraries. Smith v. Evans, 74 O. S. 17.

Sec. 3621. [Hospitals.] To provide for the rent and compensation for the use of any existing free public hospital established and managed by a private corporation or association organized for that purpose. [99 v. 9, § 7w; 96 v. 21, § 7.]

Sec. 3622. [Cemeteries and crematories.] To provide public cemeteries and crematories for the burial or incineration of the dead and to regulate public and private cemeteries and crematories.[1] [99 v. 7, § 7q; 96 v. 21, § 7.]

(1) **Other provisions** relating to cemeteries and crematories, see §§ 4154 *et seq. post.*

Private cemetery within city limits—steps to establish same. Op. Atty. Gen. (1916) p. 1493.

Sec. 3623. [Ship canals.] To construct, open, enlarge, excavate, improve, deepen, straighten, or extend, any canal,[1] ship canal or watercourse located in whole or in part within the corporation, or lying contiguous and adjacent thereto.[2] [99 v. 8, § 7s; 96 v. 21, § 7.]

(1) **Effect of grant of canal to city.**—After a grant by the state to a city of a portion of a canal, to be used for street and sewer purposes, operating as an abandonment of it for canal purposes, a conveyance by the state to a private individual of the right to surplus water for power, did not vest in such individual a right paramount to that of the city to make use of the part abandoned in such manner as involved the destruction of the water power. Elevator Co. v. Cincinnati, 30 O. S. 630.

Abandonment of a canal to a city by the state casts a liability on the city for such damages only as would

constitute a demand against the state. Hubbard v. Toledo, 21 O. S. 379.

A grant from the state authorizing the city of Toledo to enter upon and occupy a part of the Miami and Erie canal as a public highway was an abandonment of the canal by the state to the city. *Ib.*

When the state grants to a city a canal for street purposes and afterwards conveys to the city all its rights in such land the latter deed gives the city an ownership discharged from any easement in the public and it can sell the land. Paige v. Cherry, 17 C. C. 579.

The state may abandon any part of its canal though grantees of water power are injured thereby. Erkenbrecher v. Cincinnati, 2 C. S. C. R. 412.

Assessment for canal wall.—Assessment for street improvements may include assessment for expense of a wall to protect the street against the waters of a canal. Such a wall need not necessarily be built under the power given the city to improve canals, but may be constructed as a necessary part of a street improvement. Longworth v. Cincinnati, 34 O. S. 101.

(2) **Watercourses.**—A navigable watercourse defined. Hickok v. Hine, 23 O. S. 523; obstruction of a navigable stream. *Ib.*

Municipality cannot divert course of stream without compensation to riparian proprietors. Deming v. Cleveland, 22 C. C. 1.

See Sprankle v. Cleveland, 12 C. D. 644. (General power to improve not defeated by the special act as to making of dredging contracts.)

Floods of 1913.—For act of legislature authorizing local authorities to make extraordinary expenditures rendered necessary by the floods of 1913, and to issue bonds therefor, see 103 O. L. 141, and amendment, 103 O. L. 760. This act held constitutional. Assur v. Cincinnati, 14 N. P. (N. S.) 433. (Aff'd 88 O. S. 181.)

Conservancy law.—Organization of conservancy districts, powers, procedure, etc., see §§ 6828-1 to 6828-79 G. C. (104 O. L. 13).

Damage by flood.—Municipality is liable for damages growing out of its negligence in constructing or maintaining hydraulic works, although such negligence concurred with other causes, including the act of God. Piqua v. Morris, 98 O. S. 42.

But if the act of God, such as an extraordinary flood, was so overwhelming and destructive as to produce the injury whether the municipality had been negligent or not, its negligence cannot be held to be the proximate cause of the injury. *Ib.*

Sec. 3624. [Places of correction and for courts and officers' quarters.] To establish, erect, maintain and regulate jails, morgues, houses of refuge and correction, workhouses, station houses, prisons and farm schools, and to agree with the commissioners of any county in which said municipal corporation is located for the lease of suitable quarters in county buildings (existing or to be erected), for police and munici-

pal courts, police stations, police prosecutors' offices, probation officers' quarters and other similar municipal purposes.[1] [107 v. 502; 99 v. 8; 96 v. 21, § 7.]

(1) **Morgues.**—See § 10114 regulating erection of morgues; and see Koehler v. Pennewell, 75 O. S. 278, where morgue is defined.

Reformatory institutions.—For provisions governing, management, etc., see § 4097 *et seq. post.*

Municipal liability.—In constructing and maintaining a workhouse, a municipality acts in its governmental capacity and is not liable for injury to prisoners caused by negligence of persons in charge. Rose v. Toledo, 24 C. C. 540; 1 C. C (N. S.) 321; Bell v. Cincinnati, 80 O. S. 1; White v. Cleveland, 24 C. C. (N. S.) 503.

Regulations.—Officers have inherent power to make reasonable regulations for discipline. Rose v. Toledo, 24 C. C. 540; 1 C. C. (N. S.) 321.

Sec. 3625. [Census.] To take and authenticate a census of the municipality. [99 v. 9, § 7aa; 96 v. 21, § 7.]

Sec. 3626. [Department of purchase, construction and repair.] To establish and furnish the necessary equipment for a municipal department to be known as the department of purchase, construction and repair. Such department shall be under the management and control of the director of public service, who shall purchase all material, supplies, tools, machinery and equipment, together with all construction, alterations and repairs of every kind and thing in each of the departments of the municipality whether established by law or ordinance. [99 v. 10, § 7ee; 97 v. 571; 96 v. 21, § 7.]

Sec. 3627. [Competitive bidding.] No such purchase, construction, alteration or repair shall be made except, either upon requisition by the director or officer at the head of the department for which it is to be made or done or upon the order of council, nor shall any purchase, construction, alteration or repair for any of such departments be made or done except on authority of council and under the laws as to competitive bidding if the cost thereof exceeds five hundred dollars. [99 v. 10, § 7ee; 97 v. 571; 96 v. 21, § 7.]

Sec. 3628. [Misdemeanor.][1] To make the violation of ordinances a misdemeanor, and to provide for the punishment

thereof by fine or imprisonment, or both,[2] but such fine shall not exceed five hundred dollars and such imprisonment shall not exceed six months.[3] [99 v. 9, § 7cc; 96 v. 21, § 7.]

(1) **Old sections.**—Former sections of Revised Statutes, outlined in detail how municipalities might provide for the enforcement of ordinances by fines and penalties and what the amount of such fines and penalties might be.

For provisions relating to recovery of fine, see §§ 4561 to 4563.

(2) **Right to exercise power.**—Making ordinances, though penal ones, is not the exercise of a legislative power vested solely in the Legislature. Markle v. Akron, 14 O. 586, 590.

Judicial notice of ordinances.—Municipal courts and courts reviewing their judgments will take judicial notice of ordinances in prosecution for a violation of the same. Strauss v. Conneaut, 3 C. C. (N. S.) 445; 23 C. C. 320; but state courts, in an original action, will not take such notice, although the ordinances themselves, as printed or recorded in the book of ordinances, or a certified copy of them will be received in evidence. Toledo v. Libbie, 19 C. C. 704; aff'd without report, 51 O. S. 562.

Forfeitures.—Power to impose fines, penalties and forfeitures gives no power to pass an ordinance forfeiting property without proceedings and notice. Rosebaugh v. Saffin, 10 O. 31.

No city has power to forfeit without legal adjudication, as a penalty for violation of an ordinance, unless the power to forfeit is specifically granted. Cotter v. Doty, 5 O. 393.

Character of ordinances.—An ordinance which contravenes the policy of the state, as declared in general statutes is void. Canton v. Nist, 9 O. S. 439.

The provisions of this section do not have the effect of giving justices of the peace jurisdiction of complaints for violation of ordinances. Townsend v. Circleville, 78 O. S., 122.

The violation of a penal ordinance of a municipality as a result of which death ensues is not an unlawful killing within the provisions of the statute defining manslaughter. State v. Collingsworth, 82 O. S. 154. See further notes under § 4224, *post*.

Sunday closing.—An ordinance prohibiting labor or requiring places of business to be closed on Sunday, which makes no exception as to work of charity or necessity, is invalid. Canton v. Nist, 9 O. S. 439; Strauss v. Conneaut, 23 C. C. 320.

State and municipal jurisdiction to punish.—The jurisdiction to punish under an ordinance and under a state law is concurrent. Wightman v. State, 10 O. 452. But see Wellsville v. O'Conner, 24 C. C. 689; 1 C. C. (N. S.) 253.

(3) **Amount of fine.**—Former § 1862 R. S. provided what amount of fine would be reasonable to impose for violation of ordinances. It was held this section did not fix a limit for amount of fine, and a fine of more than fifty but not more than two hundred dollars for the first offense would not be unreasonable. Alliance v. Joyce, 49 O. S. 7.

An ordinance, making it an offense to disturb the good order and quiet of the municipality "by using profane language" and imposing a maximum fine of $200, is invalid in that it exceeds the maximum penalty of $50 prescribed by § 3665 G. C. Morris v. Conneaut, 20 N. P. (N. S.) 289.

STREETS AND PARKS.

Sec. 3629. [Establish and care for streets.] To lay off, establish, plat, grade, open, widen, narrow, straighten, extend, improve, keep in order and repair, light, clean and sprinkle, streets, alleys, public grounds, places and buildings, wharves, landings, docks, bridges, viaducts, and market places, within the corporation, including any portion of any turnpike or plank road therein, surrendered to or condemned by the corporation.[1] [99 v. 7, § 7r; 97 v. 507; 96 v. 21, § 7.]

(1) **Powers held in trust for the public.**—The powers conferred on municipal corporations with respect to the opening, improving and repairing of their streets and public ways are held in trust for public purposes and are continuing in their nature, to be exercised from time to time as public interest requires. R. R. Co. v. Defiance, 52 O. S. 262.

They cannot be granted away or relinquished or their exercise suspended or abridged except when express legislative authority is given. *Ib.*

Municipal power and liability.—For matters relating to power of council over streets, etc., and duty to keep same in repair, etc., and liability for failure to keep in repair, etc., see § 3714 and notes, *post.*

A municipality has power to construct a bridge upon any street or highway within the corporation, even though such highway be one under authority of County Commissioners under Sections 2421 and 7557 G. C. Op. Atty. Gen. (1916) p. 730.

Sec. 3630. [Shade trees.] To regulate the planting, trimming and preservation of shade trees in streets, alleys, public grounds and places, and to provide for the planting, removal,[1] trimming and preservation of such trees and other ornamental shrubbery. [99 v. 7, § 7r; 96 v. 21, § 7.]

(1) **Necessity for removal.**—The officers of a municipality have no right to destroy shade trees unless their removal becomes necessary for street purposes, and the abutting property owner can recover damages for their unnecessary removal. Newcomerstown v. Dickenson, 14 C. C. (N. S.) 191, (aff'd 77 O. S. 597); Massillon v. Huff, 14 C. C. (N. S.) 193.

Sec. 3631. [Power to acquire, hold and lease lands, with power to sell or donate.] To hold and improve public grounds, parks, park entrances, free recreation centers and boulevards, and to protect and preserve them.[1] To acquire by purchase, lease, or lease with privilege of purchase, gift, devise, condemnation or otherwise and to hold real estate or any interest therein and other property for the use of the corporation[2] and to sell or lease it,[3] or to donate[4] the same by deed in fee simple to the state of Ohio as a site for the erection of an armory. [102 v. 153; 102 v. 40; 99 v. 9, § 7z; 96 v. 21, § 7.]

(1) **Parks.**—Management and regulations, see §§ 4053 *et seq., post.*

Railway through park.—If a park is donated to a city for park purposes and forbidding all other purposes, the city has no right to grant a street railway route through it. Cleveland Ry. v. Barriss, 33 B. 314.

Under the general power to lay off roads and avenues through an ordinary public park, a city may authorize a street railway route to pass through the park and may reserve rent for such use of park. Mathers v. Cincinnati, 3 B. 551.

Drives and walks; relocation.—Park authorities may relocate walks and driveways in park the same whenever and in such manner as they may deem best suited to the purposes of the park. Nichols v. Cleveland, 104 O. S. 19.

Municipal liability.—Municipality in acquiring and maintaining public parks, acts in a private rather than a governmental capacity and is liable for negligence in keeping the pathways in such condition that injury results to one rightfully in the park and exercising due care. Harff v. Cincinnati, 11 N. P. (N. S.) 41.

(2) **Purchase of real estate.**—A municipality unless restrained by statute, has the implied power to purchase and hold all such real estate as may be necessary to the proper exercise of powers specifically granted. Avery v. U. S., 12 O. F. D. 175.

Power to acquire by purchase or gift property outside municipality, see Cleveland v. Painter, 18 Dec. 815; 6 N. P. (N. S.) 129.

Purpose of purchase.—A municipality has no power to purchase lands to give away as an inducement for parties to locate manufactories in the corporation. Markley v. Mineral City, 58 O. S. 430.

Where a city thus seeks to give property away, though its deed is of no effect, the courts will not interfere at the suit of the municipality to set the conveyance aside, but will leave the parties where it finds them. *Ib.*

A city foreclosing an assessment lien may buy in the property at sheriff's sale to save itself. Columbus v. Schneider, 7 N. P. 619.

A municipality cannot purchase property for the purpose of entering on a money-making business. Hamilton v. Gas Light Co., 8 N. P. 319.

Thus an appropriation by a municipality of funds for the establishing of a municipal moving picture theatre held not a proper

exercise of its governmental functions. State *ex rel.* v. Lynch, 88 O. S. 71.

Property illegally acquired.—Property acquired by a municipality under an authorized contract, where restitution is impracticable must be paid for. Cleveland v. Dennison, 16 C. C. 541.

Property acquired by a city under an unconstitutional law, for a valuable consideration belongs to it, the transaction being wholly executed and cannot be subjected to the grantor's creditors. Heck v. Findlay, etc., Co., 16 C. C. 111.

Conditions in deed to city.—The words "as and for a public street" in a deed to a municipal corporation do not *ex proprio vigore* import a condition. Avery v. U. S., 12 O. F. D. 175.

Acquisition by condemnation.—See notes to § 3677, *post.*

Holding in trust.—Municipality may take in trust devise for charitable uses. Perin v. Carey, 3 O. F. D. 634.

Power to hold ordinarily includes power to hold in trust. State ex rel. v. Toledo, 3 C. C. (N. S.) 468; 23 C. C. 327.

What municipal property taxable.—Lands not actually used in exercise of municipal function are taxable, although rents from them are applied to public purposes. Cincinnati v. Lewis, 66 O. S. 49. But see Zumstein v. Coal & Mining Co., 54 O. S. 264.

Execution against municipal property.—Property purchased for public building purposes is exempt from execution. Cincinnati v. Cameron, 6 Dec. (Re.) 727.

Exemptions from execution, how claimed and enforced, see State ex rel. v. Holden, 12 Dec. 91.

Appropriation of municipal property.—Property held for park purposes may be appropriated for railway right of way. Colby v. Toledo, 22 C. C. 732, (aff'd 68 O. S. 698); C. L. & N. Ry. Co. v. Cincinnati, 6 N. P. (N. S.) 325, and municipality may waive jury and agree to compensation. *Ib.* Property so appropriated does not revert to original owner, but such owner is entitled to compensation. Newton v. Manufacturers' Ry. Co., 14 O. F. D. 156.

(3) **Scope of power to sell or lease.**—See notes to § 3698 *post.*

(4) The council has no authority hereunder to donate a school site to Board of Education. Op. Atty. Gen. (1916) p. 861.

Sec. 3632. [Vehicles, and use of streets.] To regulate the use of carts, drays, wagons, hackney coaches, omnibuses, automobiles, and every description of carriages kept for hire or livery stable purposes; to license and regulate the use of streets by persons who use vehicles, or solicit or transact business thereon;[1] to prevent and punish fast driving or riding of animals, or fast driving or propelling of vehicles through the public highways; to regulate the transportation of articles through such highways and to prevent injury to such highways from overloaded vehicles, and to regulate the speed of inter-

urban, traction and street railway cars within the corporation.[2] [99 v. 6, § 7i; 96 v. 21, § 7.]

(1) **Scope of words "license and regulate."**—The power to license and regulate draymen, etc., implies the right of fixing the terms upon which they shall be permitted to exercise their calling, and of forbidding the exercise upon any other than the terms and in the manner prescribed Cincinnati v. Bryson, 15 O. 625. Under such a section, a city may require a reasonable sum from draymen, etc., by way of excise, on the special employment. *Ib.* Columbus v. Jeffrey, 13 Dec. 639; 1 N. P. (N. S.) 265.

Power to license conferred on council by this section must not only be construed strictly, but the object of such power so granted by the state, unless there be language indicating that the grant is conferred for the purpose of revenue, must be construed as one for regulation merely, and an exercise of the police power and not of the taxing power; and revenue can be raised only as an incident to regulation. Columbus v. Jeffrey, 13 Dec. 639; 1 N. P. (N. S.) 265. And see Op. Atty. Gen. (1919), p. 180.

But ordinance will be presumed, in absence of evidence to the contrary, to be intended to defray cost of regulation, and not to raise revenue. Columbus v Jeffrey, 16 Dec. 330.

Ordinance will not be classified as a general revenue measure, and therefore invalid, because of the fact that the receipts greatly exceed the expense of collection, where it appears that the surplus is turned into the fund for repair of the streets. Stern v. Columbus, 16 N. P. (N. S.) 353.

An ordinance regulating the operation of motor busses, reciting that it is passed to meet an emergency due to the withdrawl of street cars from the streets of the city, and that it is subject to repeal at the will of the council, confers no franchise rights upon persons operating motor busses subject to the regulations of such ordinance, nor does it confer any rights that may not be terminated by a repeal, either direct or by implication. Powelsland v. Toledo, 15 Oh. App. 198.

Scope of power.—An ordinance requiring a license fee of all persons using the streets with vehicles, and requiring license tags on vehicles, is constitutional. Sterling v. Bowling Green, 26 C. C. 581; 5 C. C. (N. S.) 217; see also Marmet v. State, 45 O. S. 63; Little v. State, 8 C. C. 51.

The word "vehicles," includes all classes and kinds of conveyances, and was not intended to be confined to conveyances kept for hire. Sterling v. Bowling Green, 26 C. C. 581; 5 C. C. (N. S.) 217.

Power conferred upon the auditor and chief of police in an ordinance licensing vehicles using the streets, to examine vehicles, if not satisfied with description furnished by applicant for license, is not judicial and does not invalidate the ordinance. Sterling v. Bowling Green, 26 C. C. 581; 5 C. C. (N. S.) 217.

Speed ordinance applying to territory outside of municipality as well as territory within, is not for

that reason void, but is simply inoperative in such outside territory. Chittenden v. Columbus, 26 C. C. 531; 5 C. C. (N. S.) 84.

Ordinance providing that no vehicle should be used on the streets of the municipality unless a license to use such vehicle has been obtained, as provided by the ordinance, by the owner or user, is unreasonable as to owners or users who are non-residents of the municipality and who bring the same onto the streets for pleasure or private business and, as to such persons, is void. Pegg v. Columbus, 80 O. S. 367.

But see Columbus v. Jeffrey, 13 Dec. 639; 16 Dec. 330; Sterling v. Bowling Green, 26 C. C. 581; 5 C. C. (N. S.) 217.

An ordinance is not unreasonable because it limits the speed of automobiles and bicycles to seven miles per hour; or because different rates of speed are prescribed for different portions of a prescribed district. Chittenden v. Columbus, 26 C. C. 531; 5. C. C. (N. S.) 84.

Ordinance regulating speed of automobiles is not void because another ordinance allows street cars to run at a greater speed. Chittenden v. Columbus, 26 C. C. 531; 5 C. C. (N. S.) 84.

A license fee for the use of the streets by vehicles may be graded according to the number of horses used. Marmet v. State, 45 O. S. 63, 76.

Ordinance providing license fee of $25.00 for each wagon hauling sand or certain other heavy products, while requiring fee of $10.00 for other wagons held valid. See Delhi v. Story, 83 O. S. 849, reversing 12 C. C. (N. S.) 273.

An ordinance providing that the driver of a vehicle, which has been in collision with person or property upon any street or public place within the municipal limits, shall stop and give such reasonable assistance as can be given and upon request give the name and address of the owner of the vehicle, is invalid where pains and penalties are provided in case of violation, and there is a failure to limit its application to drivers who have knowingly caused injury, or requirement is made that assistance be given without provision for compensation, or there is a failure to fix the standard as to what shall constitute reasonable assistance. Henry v. Cleveland, 27 O. C. A. 321.

Hackstands.—A city, under the general power to regulate hacks, may prohibit hackmen soliciting patronage at railway depots. Moerder v. Fremont, 19 C. C. 394. See also Snyder v. Depot Co., 19 C. C. 368.

Power to establish hackstands, see § 3635, *post*.

Automobiles. — See § 6290 *et seq.* and § 12603 *et seq.*

Municipality is without power to require license for automobiles used for pleasure. Crane v. Middletown, 21 C. C. (N. S.) 173; 4 Oh. App. 130.

Validity of ordinance regulating use of automobiles requiring as an arbitrary rule that the driver shall go to the left of vehicles heading in the same direction, see Goldstein v. Kline, 11 N. P. (N. S.) 1.

Motor Busses.—As to license of interurban motor busses, see 110 O. L. 211, 214.

Requiring vehicles to stop with street car.—An ordinance providing that "all vehicles going in the same direction with street cars within the corporation limits of the city, shall not pass between the street car and curb while passengers are getting off or on said street car, unless the vehicle has first come to a full stop," is discriminatory and therefore void. Hogans v. Columbus, 14 N. P. (N. S.) 33. *Contra*, Nicholas v. Cleveland, 101 O. S. 39; State v. O'Mara, 105 O. S. 94.

Street railway.—Council cannot prescribe the qualifications of conductors and motormen, or require ten days' instruction before they are allowed to operate cars. Columbus Ry. & L. Co. v. Columbus, 10 N. P. (N. S.) 161; 20 Dec. 555.

This section does not confer power to impose license fees on street or interurban railway companies for use of streets. Columbus v. Jeffrey, 13 Dec. 639; 1 N. P. (N. S.) 265.

Stopping of cars to take on or let off passengers cannot be required by penal ordinance under authority of this section. Townsend v. Circleville, 78 O. S. 122. See, *contra*, Lockyear v. Covert, 25 C. C. 486; 2 C. C. (N. S.) 389.

(2) **Speed of street cars.**—An ordinance providing that the "schedule time" for operating electric street railway cars shall not exceed ten miles an hour, is invalid as being unreasonable in allowing such cars to be run at any rate of speed providing the "schedule time" in going over the entire route, does not exceed ten miles an hour. Lewis v. Cincinnati, 8 N. P. 417. But see same case in 23 C. C. 127, where question is left open. See also Gannon v. St. Ry. Co. 64 O. S. 567.

With or without an ordinance, the law requires of the railway company "reasonable safety, in view of the facts and surrounding conditions." Lewis v. Cincinnati, 23 C. C. 127.

An old ordinance passed to apply to horse cars would not be applicable to electric street railway. *Ib.*

Effect of ordinance.—Ordinance regulating speed does not determine liability between company and individuals in case of accidents, but may go to the jury on the question of negligence. Becker v. St. Ry. Co. 1 N. P. 359; East Cleveland R. R. Co. v. Rosecrans, 24 B. 220; Ulrich v. Toledo Consol. St. Ry. Co., 67 O. S. 508 (see 10 C. C. 635).

See further note under § 4224, *post*.

Sec. 3633. [Impounding animals.] To regulate, restrain and prohibit the running at large, within the corporation, of cattle, horses, swine, sheep, goats, geese, chickens and other fowls and animals, and to impound and hold them,[1] and on notice to the owners, to authorize the sale of them for the penalty imposed by any ordinance, and the cost and expenses of the proceedings; to regulate or prohibit the running at

large of dogs, and provide against injury and annoyance therefrom, and to authorize the disposition of them when running at large contrary to the provisions of any ordinance.[2] [99 v. 6, § 7j; 96 v. 21, § 7.]

(1) **State laws.**—For state law forbidding running at large of animals in streets, etc., see § 5809. Municipal regulations are subject to the legislative provisions, and it is no defense to a charge of violation of the state law that municipal ordinance permitted the act. Perkins v. State, 80 O. S. 450. For provision as to pounds in villages, see § 5823 in part II.

(2) **Cannot be abated as nuisance.**—Authority to regulate running at large of animals is not given by general provisions giving cities power to abate nuisances. This power can be exercised only when specifically granted. Collins v. Hatch, 18 O. 523.

Dog Tax.—A *per capita* dog tax may be imposed as a police regulation. Holst v. Roe, 39 O. S. 340. And see Op. Atty. Gen. (1918) p. 472.

Sec. 3634. [Auctioneering.] To regulate auctioneering;[1] to regulate, license or prohibit the sale at auction of goods, wares and merchandise or of live domestic animals at public places within the corporation; and to regulate, license or prohibit the selling of goods, merchandise or medicines on the streets.[2] [99 v. 6, § 7h; 96 v. 21, § 7.]

(1) **"Auctioneer" defined.**—An auctioneer is a person who disposes of goods or lands by public sale to the highest bidder. Crandall v. State, 28 O. S. 479.

A person who, being in the business of selling merchandise at regular retail prices, sells a portion of them at his store-room by public outcry, but selling at the regular retail price, is not an auctioneer. Ib.

Criers of tobacco at warehouse sales held not to be auctioneers. Cincinnati v. Withers, 5 Dec. 570.

(2) **Regulation and license.**—Under the authority given by the statute "to regulate auctioneering" city councils, in view of promoting the order, comfort and convenience of the inhabitants, may pass ordinances regulating sales at auction upon the streets, alleys, sidewalks and public grounds of the city, and may subject the occupation of auctioneering to such police regulations as seem essential to the public convenience and protection. Sipe v. Murphy, 19 O. S. 536, 543.

Even without express statutory provision, but under the general laws to provide for the safety, health, etc., it is held a city may by ordinance prohibit sales at auction in the streets or public places of the city, and an ordinance of this character would not be unreasonable or in restraint of trade. White v. Kent, 11 O. S. 550.

As to regulation and prohibition of sales at auction of goods imported into the corporation for that purpose, see Sipe v. Murphy, 49 O.

S. 536; Brunner v. Harrison, 25 C. C. 247; 1 C. C. (N. S.) 111.

For provision for issuing the state license to auctioneers and payment of *pro rata* duties on all property and effects exposed to sale by public auction, see §§ 5866 to 5882 G. C.

Former section which contained provisions similar to those above was held not to be inconsistent with provisions now embodied in §§ 5866 to 5882 G. C. Sipe v. Murphy, 49 O. S. 536.

For further provision giving council power to license hawkers, peddlers, auctioneers of horses, etc., see §§ 3669 *et seq. post.*

Reasonableness of license fee.—A city ordinance imposing a fee of $25.00 a day for auctioneering goods brought into city for that purpose is held an unreasonable exercise of power. Sipe v. Murphy, 49 O. S. 536. See also Glazer v. Cincinnati, 31 B. 243.

Ordinance charging $20.00 per day as a license fee for selling goods held unreasonable. Newark v. Flatau, 39 B. 239; see also Flatau v. Mansfield, 13 C. C. 592, 597.

Sec. 3635. [Width of tires and rate of transportation.] To prescribe the width of the tires of wagons, carts, drays, and other vehicles used in the transportation of persons from one part of the corporation to another, or in the transportation of coal, wood, stone, lumber, iron, or other articles in the corporation, and establish stands for hackney coaches, cabs, or omnibuses,[1] enforce the observance and use thereof, and fix the rates and prices for the transportation of persons and property in such coaches or other vehicles from one part of the corporation to another. [R. S. Sec. 2671; 66 v. 221.]

(1) **Hack stand in front of stores** on side of street would be a nuisance, and an ordinance establishing such stand would be invalid. See Branahan v. Hotel Co., 39 O. S. 333.

But a hack stand in front of public property presents a different question, and if it does not materially obstruct the street, it is clearly within municipal power. Columbus v. Barr, 21 Dec. 165; 10 N. P. (N. S.) 379.

Regulation of motor bus company.—A municipal ordinance denying to a motor bus company for hire the right to use a municipal street for the purpose of a motor bus stop or station to let off or take on passengers is within the constitutional grant of municipal power, and therefore is a valid ordinance. Perrysburg v. Ridgeway 108 O. S. 245.

Council of City or Village may limit weight of heavy traffic over certain streets, when. Op. Atty. Gen. (1915) p. 820.

Section strictly construed.—This section must be strictly construed. Hotel Co. v. Branahan, 7 B. 57.

When injunction will lie, see Columbus v. Barr, 10 N. P. (N. S.) 379; 21 Dec. 165.

BUILDINGS AND CONSTRUCTIONS.

Sec. 3636. [Buildings.] To regulate the erection of buildings and the sanitary condition thereof, the repair of, alteration in and addition to buildings, and to provide for the inspection of buildings or other structures and for the removal and repair of insecure buildings;[1] to require, regulate and provide for the numbering and renumbering of buildings either by the owners or occupants thereof or at the expense of the municipality; to provide for the construction, erection, operation of and placing of elevators, stairways and fire escapes in and upon buildings.[2] [103 v. 263; 99 v. 6, § 7m; 97 v. 506; 96 v. 21, § 7.]

(1) **Building regulations.**—Ordinance requiring dead or solid fire walls in case walls are built adjoining interior property lines, held not unreasonable, and owner cannot enjoin revocation of permit, when he fails to conform to such ordinance. Tenbush Realty Co. v. Vorce, 29 C. C. 145. As to effect of ordinance limiting height of wooden buildings, on buildings already erected, see Cleveland v. Lenze, 27 O. S. 383.

Requisites of affidavit charging violation of ordinance requiring building permits, see Toledo v. Kiebler, 28 C. C. 782; 8 C. C. (N. S.) 437.

Height of building.—Where an ordinance prescribed certain regulations as to buildings of different heights, the remodeling of an attic into tenements was held to amount to an increase in the height of the building. State *ex rel.* v. Cunningham, 97 O. S. 130.

Tenement houses.— Ordinances of a municipality reasonably regulating the height, mode of construction and use of tenement houses are a proper exercise of the police power for the preservation and promotion of the safety, health and welfare of the community. A construction of such ordinances should be adopted, where possible, which effectuates the obvious purpose of their enactment. State *ex rel.* v. Cunningham, 97 O. S. 130.

Unreasonable building regulation.—The section of a building code enacted by a municipal council, which prohibits the erection of any building for the working of wood or other combustible materials within sixteen feet of any lot line is an unreasonable exercise of the police power and is void. State *ex rel.* v. Cleveland, 20 C. C. (N. S.) 538.

Police power cannot be exercised for purely esthetic purposes. Invalidity of ordinance regulating private garages. Meade v. Cincinnati, 23 N. P. (N. S.) 17; aff'd, 32 O. C. A. 17; 14 Oh. App. 412.

Power to raze buildings.—Under a former law (Sec. 1549-49 R. S., repealed) it was held that the state, in the exercise of its police power, may delegate to municipalities the right to raze buildings which become dangerous to life or property. Bruggeman

v. Cleveland, 24 C. C. (N. S.) 594.

The power to require destruction of buildings being arbitrary in its nature, must be exercised only for the public welfare, and the property must constitute a nuisance and the peril be imminent to warrant such summary action. Maxedon v. Rendigs, 9 Oh. App. 60; 31 O. C. A. 486.

Where the owner of a building, so situated as not to constitute a fire hazard to adjoining property, is delayed in making needed repairs in accordance with a building permit issued by a municipality, and he makes such building safe for his tenants during such repairs, an injunction will lie to prevent the destruction of such building, and the owner given a reasonable time to make such repairs. *Ib.*

Revocation of permit.—A building permit issued by the building commissioner of the city of Cincinnati for the erection of a building and factory for the purpose of buying, selling, processing and manufacturing the hair of animals and packing-house by-products is not protected by the constitutional prohibition as to the impairment of the obligation of contracts, and such permit may be revoked. State *ex rel.* v. Rendigs, 98 O. S. 251.

State law providing building regulations, see § 12600-1 et seq. G. C.

No power to require permit fees of school district. See Op. Atty. Gen. (1922) p. 1102.

(2) **Fire escapes.**—A law requiring owners of certain kinds of buildings to provide fire escapes on thirty days' notice and empowering court to enjoin use of building until owner does so, is valid as a proper exercise of police power. Cincinnati v. Steinkamp, 54 O. S. 284.

Discretion of building inspector.—A building inspector's discretion in issuing a permit cannot be interfered with by injunction. Collins v. Cleveland, 2 Low. D. 380. See also Leibschutz v. Black, 15 Dec. 372; 3 N. P. (N. S.) 392.

Council cannot authorize the building commissioner to refuse a permit to erect a building, lawful in material to be used and in plans and method of construction, and not in itself a nuisance, on the ground of its contemplated use. Ley v. Cash *et al.*, 12 N. P. (N. S.) 523.

Sec. 3637. [Signs, electricity, plumbing.] To regulate the erection of fences, bill boards, signs and other structures, within the corporate limits, and to provide for the removal and repair of, insecure bill boards, signs and other structures;[1] to regulate the construction and repair of wires, poles, plants and all equipment to be used for the generation and application of electricity;[2] to provide for the licensing of house movers, electrical contractors, plumbers and sewer tappers and vault cleaners.[3] [103 v. 93; 99 v. 6, § 7m; 97 v. 506; 96 v. 21, § 7.]

(1) **Regulation of material used.**—An ordinance requiring the use of such incombustible material in the erection of signs and bill

boards within the fire limits as will prevent the spread of fire and requiring the erection of the same in a safe and secure manner is valid. Cleveland v. Bryan, 8 N. P. 552.

Prohibiting bill boards.—Under the former statutes, giving power to municipalities merely "to regulate the erection of buildings, fences and other structures" it was held that an ordinance entirely forbidding the erection of signs, bill boards and structures for advertising was beyond the power of the municipality and void. Cleveland v. Bryan, 8 N. P. 552; Cusack v. Cincinnati, 9 N. P. (N. S.) 466; 20 Dec. 219.

Such an ordinance prohibiting bill board at a greater height than two feet above the level of the adjoining street and nearer than fifteen feet from the building line on the street was held to be unconstitutional and void, under the former statutes, as a deprivation of the use of property. *Ib.*

A municipal council is without power to provide by ordinance that in no case shall any billboard be erected within the municipal limits at a distance of less than fifteen feet from the sidewalk. State *ex rel.* v. Rapp, 14 N. P. (N. S.) 126.

Reasonableness. — Regulations must be reasonable and uniform and not unwarrantedly interfere with private property, or provide one rule for bill boards and another for fences in all respects of like character. Cusack Co. v. Cincinnati, 9 N. P. (N. S.) 466; 20 Dec. 219.

Billboards; reasonable regulations.—As to regulations of billboards held enforceable and those not enforceable, see State *ex rel.* v. Rapp, 16 N. P. (N. S.) 1.

Retroactive regulations.—Council has no power to regulate existing bill boards lawful at time erected, except such as are out of repair and menace to public safety. Cusack Co. v. Cincinnati, 9 N. P. (N. S.) 466; 20 Dec. 219.

(2) **Electric wiring.**—Municipality has power to provide by ordinance how electrical wiring and construction may be done; but cannot require persons who do electrical work to be examined and hold certificates of an electrical inspector. Toledo v. Winters, 21 Dec. 171.

Ordinance regulating electrical construction and providing that such construction shall conform to the National Electrical Code, is not invalid as a delegation of legislative powers. Toledo v. Winters, 21 Dec. 171.

No power in municipality to compel an electric light company to permit such municipality to use its poles, when. Op. Atty. Gen. (1914) p. 1750.

(3) **Plumbers and sewer tappers.**—Former section of Revised Statutes, the language of which is similar to the above section, was held not to authorize a provision in an ordinance that catch basin water closets must be constructed and sewer connections made only by licensed sewer tappers. State v. Tooker, 5 N. P. 122.

Ordinance requiring license fee of $5.00 and bond of $500.00, from all sewer tappers held reasonable. Wolfe v. Columbus, 10 N. P. (N. S.) 196.

Plumbers license ordinance, requiring examination of all master plumbers, except those who had been

in business in the city for ninety days prior to passage of the ordinance, held void, as unduly discriminatory. Wolfe v. Columbus, 10 N. P. (N. S.) 196.

State Inspector of Plumbing is without authority in municipalities which have adopted ordinances regulating plumbing. See Op. Atty. Gen. (1920), p. 354.

Sec. 3638. [Market places.][1] To establish, erect, maintain, protect and regulate public halls, public buildings and market houses[2] and by and with the consent of the abutting property owner or owners, or their lessee or lessees, to establish, maintain, protect and regulate, a market place or places, upon or on any street, square or public grounds or part thereof, within the municipality.[3] [99 v. 8, § 7u; 97 v. 508; 96 v. 21, § 7.]

(1) **Scope of provision.**—See Cincinnati v. Buckingham, 10 O. 257, 261.

(2) **Market houses.**—Dedication of space to a city for a market, gives the city a right to cover the space with a permanent building for a flower market. Fenton v. Cheseldine, 28 B. 223.

A city may authorize the obstruction of a street by a market house and is not liable to traveler injured by such obstruction. Block v. Cleveland, 3 W. L. M. 96.

A taxpayer has no right to enjoin the removal or abandonment of a market house. Gall v. Cincinnati 18 O. S. 563.

Right of abutting property owner to enjoin a market as a nuisance, see Pruden v. Cincinnati, 1 N. P. 340.

A city cannot convert a street into a market house and rent out places on the curbstone. Hites v. Dayton, 6 B. 142.

The power to maintain market houses is a continuing one, and its exercise is subject to revocation by the municipality. Gall v. Cincinnati, 18 O. S. 563.

(3) **Market defined.**—A municipal market consists: (1) Of a place for sale of provisions and articles for daily consumption. (2) Convenient fixtures. (3) A system of police regulations fixing market hours, making provision for lighting, watching, cleaning, detecting false weights and unwholesome food and other arrangements calculated to facilitate the intercourse and insure the honesty of buyer and seller. (4) Proper officers to preserve order and enforce obedience to rules. Cincinnati v. Buckingham, 10 O. 257.

Market regulations.—*Huckstering.*—Power to regulate huckstering does not authorize council to include in an ordinance persons as hucksters who do not fall within the ordinary meaning of that term. Mays v. Cincinnati, 1 O. S. 268.

Meat selling.—A city may prohibit selling meat on the sidewalk or street devoted to market purposes in less than certain quantities during market hours, where the city has provided a market and stall for rent at reasonable rates. Keck v. Cincinnati, 37 B. 57; and city may so prohibit even though a license has been given to sell meat. *Ib.*

Ordinances regulating sale of meat, etc., in markets must be reasonable and just, when applied to the subject matter. Kraft v. Cincinnati, 3 N. P. 195.

One licensed to sell meat from a stand, if refused a stand in the market house may sell in the open air, regardless of a market regulation forbidding such selling. *Ib.*

Charge for market stands.—An ordinance imposing a charge of twenty-five cents on every person occupying a stand in the open market spaces and a fine for its nonpayment to be collected by process and judgment forthwith, is valid. Cincinnati v. Buckingham, 10 O. 257.

Where a city has erected a market house in a street a court will enjoin the licensing of hucksters to use the remaining portion of the street, to the injury of abutting property owners. Wilder v. Cincinnati, 1 N. P. 347.

Municipal liability.—A city is liable for injuries caused by dangerous excavation in market place, after the city has notice of the defect. Nitz v. Toledo, 22 C. C. 454.

It is the duty of a market superintendent to see that a market place is not rendered dangerous, and if such officer is present when dangerous excavation is made, the city is charged with notice. *Ib.* Pedestrian walking on platform scales in market places, used for years as part of common thoroughfare not a trespasser. *Ib.*

Sec. 3639. [Sanitation.] To regulate by ordinance, the use, control, repair and maintenance of buildings used for human occupancy or habitation,[1] the number of occupants, and the mode and manner of occupancy, for the purpose of insuring the healthful, safe and sanitary environment of the occupants thereof; to compel the owners of such buildings to alter, reconstruct or modify them, or any room, store, compartment or part thereof, for the purpose of insuring the healthful, safe and sanitary environment of the occupants thereof, and to prohibit the use and occupancy of such building or buildings until such rules, regulations and provisions have been complied with. [99 v. 124, § 7-ff; 96 v. 21, § 7.]

(1) **Regulation of tenement houses, etc.**—See notes to Sec. 3636.

Housing code.—For construction of housing code with reference to distances from lot line, see Jaeger v. Topper, 103 O. S. 350.

DOCKS, LANDING AND FERRIES.

Sec. 3640. [Wharves and docks.] To regulate public landings, public wharves, public docks, public piers and public basins, and to fix the rates of landing, wharfage, dockage and the use thereof.[1] [99 v. 7, § 7r; 96 v. 21, § 7.]

(1) **Wharfage regulations.**—A city ordinance requiring every "steamboat, barge, keelboat and flatboat" to pay wharfage rent does not include a ferryboat. Cincinnati v. Walls, 1 O. S. 222. As to rights of grantee of wharf privileges by city, see Cincinnati v. C. & C. Bridge Co., 20 C. C. 396.

Sec. 3641. [Ferries.] To license ferries, and to regulate the use of public docks and public landings. [99 v. 8, § 7s; 96 v. 21, § 7.]

Sec. 3642. [License and regulation of ferries.] The exclusive power to establish, regulate, and license ferries, from such corporation, or any landing therein, to the opposite shore, or from one part of the corporation to another, and in granting such license, to impose such reasonable terms and restrictions, in relation to the keeping of such ferries, and the time, manner, and rates[1] of the carriage and transportation of persons and property, as may be proper and to provide for the revocation of any such license, and for the punishment by proper fines and penalties, for the violation of any ordinance prohibiting unlicensed ferries, or regulating those established and licensed. [R. S. Sec. 2672; 66 v. 223.]

(1) **Rates for ferries.**—This section authorizes the fixing of a rate of transportation from a landing in an Ohio municipality to the opposite shore in another state but not for the return passage. Bellaire v. Ferry Co. 105 O. S. 247.

Sec. 3643. [Street cars.] To require the employment of conductors on all street cars within the corporate limits.[1] [99 v. 9, § 7bb; 96 v. 21, § 7.]

(1) **Conductors.**—Without such provision municipalities were held not to have power to require employment of conductors on street cars. Thornhill v. Cincinnati, 4 C. C. 354.

Council has no authority, by penal ordinance, to prescribe the qualifications of conductors and motormen. Columbus Ry. & L. Co. v. Columbus, 10 N. P. (N. S.) 161; 20 Dec. 555.

FRANCHISES.

Sec. 3644. [Hot water and steam heating.] To use, or by ordinance grant, for periods not exceeding twenty-five years, the use of, its streets, avenues, alleys, lanes and public places, to lay pipes,[1] conduits, manholes, drains, and other necessary fix-

tures and appliances, under the surface thereof, to be used for supplying such municipality and its inhabitants with steam or hot water, or both, for heat or power purposes, or both, but in all such grants, such municipal corporations shall reserve the right to regulate, at intervals of not less than five years, the prices which the grantee or grantees may charge for such heat or power. [97 v. 7, § 7r; 97 v. 507; 96 v. 21, § 7.]

(1) **Steam pipes.**—Placing of pipes in a street and under the sidewalk, by virtue of this section, and under ordinance of council and approval of department of public service, cannot be enjoined by property owner as interference with easement. Stone v. Cuyahoga Light Co., 9 N. P. (N. S.) 545; 20 Dec. 130.

Sec. 3645. [Movable and rolling roads.] To use or grant, for periods not exceeding twenty-five years, the use of its streets, avenues, alleys, lanes and public places for the construction of inclined movable or rolling roads, for the conveying or moving of freight, vehicles, animals and other property, and those in charge thereof, upon such terms as the council of the municipal corporation may deem proper, but in all such grants, the municipal corporations shall reserve the right to regulate, at intervals of not less than five years, the prices which the grantee or grantees may charge for the conveying or moving of such freight, vehicles, animals, and other property. No such grant shall be made until there is produced to such council the written consent of the private property owners of more than two-thirds of the feet front of the lots and lands abutting on the street, avenue, alley, lane or public place, or part thereof, upon or over which it is proposed to construct the inclined movable or rolling road. [99 v. 7, § 7r; 97 v. 507; 96 v. 21, § 7.]

Sec. 3645-1. [U. S. mail subways.] To use, or by ordinance grant to any person, company or corporation, for periods not exceeding twenty-five years, the use of its streets, avenues, alleys, lanes and public places for the purpose of constructing, laying, maintaining and operating subways and underground conduits, together with manholes and all other necessary appliances for transmitting United States mail matter under or beneath such streets, avenues, alleys, lanes and public places. [101 v. 101.]

HEALTH AND SANITATION.

Sec. 3646. [Contagious diseases.] To provide for the public health,[1] to secure the inhabitants of the corporation from the evils of contagious, malignant and infectious diseases,[2] and to purchase or lease property or buildings for pest houses and to erect, maintain and regulate pest houses, hospitals and infirmaries. [99 v. 7, § 7p; 97 v. 507; 96 v. 21, § 7.]

(1) **Board of Health.**—The board which is to carry out the powers here granted is elsewhere provided for. (§§ 4404 *et seq.*)

A municipality may pay for transportation of a leper. Op. Atty. Gen. (1916), p. 827.

(2) **Scope of regulations.**—An ordinance providing a reasonable charge for supervising the work of removing the contents of privy vaults and for removing the bad effects thereof, for which the person cleaning is primarily responsible and covering the costs of issuing permits to do the work, and of collection would be legal. Toledo v. Buechele, 21 C. C. 429.

But a charge to cover the expense of disinfecting the work, an expense which should fall on the owner or the city, cannot be laid upon the person doing the work. *Ib.*

An ordinance providing that no person shall sell milk in a city without a permit from its acting board of health and authorizing examination and inspection of milk sold in the city, the places where produced and the cattle producing it and prescribing regulations regarding health of employes, etc., was held to be a health ordinance exclusively and to be within paragraph 24, § 1692 R. S., to which the present section corresponds. Walton v. Toledo, 3 C. C. (N. S.) 295; 23 C. C. 547, (aff'd 69 O. S. 548).

Such an ordinance is constitutional. *Ib.*

An ordinance relating to the sale of milk may require a fee of one dollar for each wagon used in the city in selling milk and require a tag to be attached to every such wagon before a permit will be granted. Such a charge is not a license in violation of § 3672. *Ib.*

Ordinance fixing standard sizes of bread loaves and prescribing a minimum held reasonable and valid. Allion v. Toledo, 99 O. S. 416; aff'g Toledo v. Allison, 30 O. C. A. 487.

Sec. 3647. [Water-courses and sewers.] To open, construct and keep in repair sewage disposal works, sewers,[1] drains and ditches,[2] and to establish, repair and regulate water-closets and privies.[3] [99 v. 8, § 7s; 96 v. 21, § 7.]

(1) **Sewers a proper use of street.**—Sewerage is one of the legitimate uses to which the public streets and alleys of a city may be appropriated. Cincinnati v. Penny, 21 O. S. 499; Elster v. Springfield, 49 O. S. 82.

Limitations by other sections.

—Under section such as this a council may construct a sewer, before a system of sewerage has been declared necessary and is not restricted by sections relating to construction of sewers after a system has been declared necessary. Hartwell v. R. R. Co., 40 O. S. 155.

Municipal liability.—See note under § 3871, *post*.

(2) **Ditches.**—See § 6494 *et seq.* G. C.

Except as provided in § 6494 General Code county commissioners are without jurisdiction to locate and construct a county ditch wholly within the limits of a municipality. Pleasant Hill v. Commissioners, 71 O. S. 133. See Op. Atty. Gen. (1919), p. 626.

Township trustees have jurisdiction to locate and construct a ditch within the township where it commences on farm lands without the limits of an incorporated village and extends into or through such village to an outlet. Greek v. Joy, 81 O. S. 315.

(3) **Water closets, license fee.** —Under a general power to regulate water closets there may be some question whether a city has the power to impose a license fee. Toledo v. Buechele, 19 C. C. 127, 129.

Where a city is authorized to exact a license fee from vault cleaners and does so, and also requires a permit from the board of health before cleaning any vault, it is unreasonable and unlawful to exact a fee for such permit. *Ib.*

Sec. 3647-1. [Drainage, in municipal corporations.] To cause any lot or land within the corporate limits on which water at any time accumulates and becomes stagnant, in a way prejudicial to the public health, convenience or welfare, by reason of not having natural drainage outlet, or which can not be drained by natural channels, to be drained by artificial means at the expense of the corporation. In case such drainage is beneficial to the owner of any lot or land so drained, then the owner of said lot or land shall bear that part of the expense of said drainage in proportion to the benefits which may result from the improvement in accordance with the provision for assessment as contained in section thirty-eight hundred and twelve of the General Code.[1] [101 v. 241.]

(1) **Other provisions** for drainage of lots at owner's expense will be found in § 3563, *post*. See that section and notes thereunder.

Sec. 3648. [Public conveniences.] To establish, maintain and regulate public baths and bath houses, drinking fountains, water troughs, and public toilet stations, and municipal lodging houses. [100 v. 53, § 7v; 97 v. 508; 96 v. 21, § 7.]

Sec. 3649. [Garbage.][1] To provide for the collection and disposition of sewage, garbage, ashes, animal and vegetable refuse, dead animals and animal offal and to establish, maintain and regulate plants for the disposal thereof.[2] [99 v. 9, § 7y; 96 v. 21, § 7.]

(1) **Scope of power.**—To grant monopoly for transporting and utilizing dead animals that have not been slaughtered for food. Stadler v. Cleveland, 17 Dec. 340; 4 N. P. (N. S.) 649. But see Bauer v. Casey, 26 C. C. 598.

Power governmental.—The removal of ashes by a municipality from business houses and the residences of private citizens is an exercise of a governmental function, and not of a private or proprietary duty. Shilling v. Cincinnati, 22 C. C. (N. S.) 526. But were a contrary holding to be made, no cause of action would arise in the case of one employed on an ash cart and with experience in that class of work, who complains that he injured himself lifting receptacles containing ashes because not enough help was provided for the work. *Ib. Contra,* Russo, Adm'r, v. Cleveland, 28 O. C. A. 25; aff'd 98 O. S. 465.

Fees charged.—The officers of a non-charter municipality, acting under a legally enacted ordinance providing therefor, may charge reasonable fees to the residents of the municipality for the collection of garbage. Op. Atty. Gen. (1919), p. 809.

(2) **A garbage reducing plant** operated under contract with a municipality with proper skill and care is not an indictable nuisance. Toledo Disposal Co. v State, 89 See note to § 3809, *post.*

Injunction against nuisance.—See note to § 3809.

Garbage as property.—The authority which is vested in municipalities to control the collection and reduction of garbage and offal does not include the right to take, without compensation to the owners, slaughterhouse offal and other articles of a sanitary character, unless such articles are mixed with garbage and other matter which is noxious and dangerous to health and life. Stadler v. Cleveland, 12 N. P. (N. S.) 321.

One who has existing contracts for the removal of slaughterhouse and other offal of a sanitary character and possessing value, may enjoin the enforcement of an ordinance in so far as it is in impairment of his contract obligations. *Ib.*

Sec. 3650. [Power to abate nuisance and prevent injury.] To cause any nuisance to be abated,[1] to prosecute in any court of competent jurisdiction, any person or persons who shall create, continue, contribute to or suffer such nuisance to exist; to regulate and prevent the emission of dense smoke, to prohibit the careless or negligent emission of dense smoke[2] from

locomotive engines, to declare each of the foregoing acts a nuisance, and to prescribe and enforce regulations for the prevention thereof; to prevent injury and annoyance from the same, to regulate and prohibit the use of steam whistles,[3] and to provide for the regulation of the installation and inspection of steam boilers and steam boiler plants.[4] [102 v. 62; 101 v. 222; 99 v. 5, § 7c; 96 v. 21, § 7.]

(1) **Scope of power.**—Under a section such as this a village may prohibit the storage of dynamite or other explosives in certain quantities within the corporate limits. Hays v. St. Mary, 55 O. S. 198.

Any municipality may, by ordinance, prohibit absolutely the transportation of nitro-glycerine through the streets. Walter v. Bowling Green, 26 C. C. 756; 5 C. C. (N. S.) 516. A fine of $100.00 for violation is not excessive. *Ib.*

Ordinance making it unlawful to manufacture, within municipal limits, fertilizer or other product from which offensive or unwholesome odors are given off, held valid. Schreier v. St. Bernard, 19 Dec. 476; 6 O. L. R. 598. Brown v. St. Bernard, 13 C. C (N. S.) 216; 32 C. C. 179.

Resolution of board of health providing for confiscation of milk found to be above a prescribed temperature, held valid. Kaiser v. Walsh, 17 Dec. 324; 4 N. P. (N. S.) 507.

An ordinance fixing standard sizes of bread loaves and prescribing a minimum weight, is not an unreasonable or arbitrary exercise of police power, and is constitutional. Allion v. Toledo, 99 O. S. 416, aff'g Toledo v. Allion, 11 Oh. App. 1; 30 O. C. A. 487.

Ordinance regulating or prohibiting anything as dangerous, offensive or unwholesome, must be limited, whether so expressed or not, to such things as constitute injury or annoyance to the public. Schreier v. St. Bernard, 19 Dec. 476; 6 O. L. R. 598; Brown v. St. Bernard, 32 C. C. 179; 13 C. C. (N. S.) 216. Affidavit for violation of such ordinance must allege that the thing forbidden was an injury or annoyance to the public. *Ib.*

Council may provide by ordinance for punishment of persons maintaining a nuisance, notwithstanding the same act is declared unlawful by § 12646 G. C. Brown v. St. Bernard, 32 C. C. 179; 13 C. C. (N. S.) 216.

An ordinance forbidding dry cleaning establishments only from using gasoline within municipal limits is unreasonable, as discriminating against a particular trade or business; if the business of dry cleaning is carried on in such a manner as to become a nuisance, or be dangerous, it may, however, be regulated or prohibited. Mildner v. Cincinnati, 32 C. C. 347.

An ordinance forbidding the erection or use of buildings in the residential districts of a city for the storage, cleaning or renovation of uncured animal hair and the by-products thereof, is not unreasonable nor arbitrary, and is a valid exercise of the po-

lice power. State *ex rel.* v. Rendigs, 98 O. S. 251.

An ordinance forbidding the transportation of any dead animals, fish or garbage, including condemned food, through the streets, by any person except the city contractor or his agents, was held void as violating the fourteenth amendment to the U. S. Constitution. Bauer v. Casey, 26 C. C. 598; 6 C. C. (N. S.) 69 (see 49 B. 299).

Gasoline stations.—Under the provisions of a city ordinance making it unlawful to locate, build, maintain or operate a gasoline or oil filling station in a residence district, without the consent of two-thirds of the owners of property within a specified distance, but exempting the owner or operator of any such station theretofore erected, such owner is not required to procure the consents of property owners before he may repair, remodel or rebuild such station. State *ex rel.* v. Dauben, 99 O. S. 406, reversing Columbus *ex rel.* v. Dauben, 28 O. C. A. 281; 8 Oh. App. 226.

Municipal liability.—The power to prevent injury from anything offensive or unwholesome and to cause nuisances to be abated is governmental, and municipality is not liable for damages from a private nuisance resulting from its omission to exercise the power by adoption of ordinances or by failure of officers to enforce ordinances passed in the exercise of the power. Mansfield v. Bristor, 76 O. S. 270.

The collection of garbage is not a function of sovereignty, and municipality is not liable for the negligence of a collector. Russo v. Cleveland, 28 O. C. A. 25; 39 O. C. C. 45; aff'd 98 O. S. 465.

Nuisance.—*What is.* — What amount of annoyance or inconvenience will constitute a nuisance depends upon circumstances, and a nuisance cannot be precisely defined. Columbus, etc., Co. v. Freeland, 12 O. S. 392.

Houses of ill fame are nuisances, subject to municipal regulation. Crofton v. State, 25 O. S. 249. So are hack-stands in streets, Branahan v. Hotel Co., 39 O. S. 333. Open pit in unenclosed lot in town. Hess v. Lupton, 7 O., pt. 1, 216. Boxing contests for prizes held in public. State v. Hobart, 8 N. P. 246.

But obstructions caused by building are not nuisances. Clark v. Fry, 8 O. S. 358. Nor bicycle riding on sidewalk. Custer v. New Philadelphia, 20 C. C. 177. Nor a stream of water. Deming v. Cleveland, 22 C. C. 1.

Gas works are not a nuisance, and a municipality cannot arbitrarily declare them to be such, or, unless they in fact become a nuisance, prohibit them within a certain district or require that the consent of private property owners be obtained before permitting their operation elsewhere. Defiance v. Gas and Electric Company, 12 Dec. 424.

The drilling of gas or oil wells within a certain distance of dwellings may be prohibited. Cline v. Kirkbridge, 22 C. C. 527.

Whether blasting with gunpowder in city is a nuisance, see Tiffin v. McCormack, 34 O. S. 638. Obstructing flow of water. Tootle v. Clifton, 22 O. S. 247.

The question what is and what is not a public nuisance is a judicial one, and it is not competent

to delegate it to the local legislative or administrative boards; the local declaration that a nuisance exists is, therefore, not conclusive, and the party concerned may contest the fact in court. Deming v. Cleveland, 22 C. C. 1, 11.

What nuisance may be abated.—A city has no authority to cause to be abated any nuisance other than a public nuisance. Whitcomb v. Springfield, 3 C. C. 244.

Extent of regulation of nuisance.—City cannot create civil liability for nuisance. Veigel v. Lukenheimer, 10 B. 293; Vandyke v. Cincinnati, 1 Disney, 532; Chambers v. Ohio, etc., Co., 1 Disney, 327.

Power in a municipality to compel removal of a nuisance includes power to require work done so as to prevent its recurrence. Bliss v. Kraus, 16 O. S. 54.

Power of board of health over nuisances, see § 4420, *post.*

Delegation of power.—A municipal council has power to declare a blacksmith shop a nuisance and prohibit or restrict it as to location and use, and such council also has power to delegate to its building commissioner or other agent the power to grant a permit for such a shop restricted as to such location and use, but such council has not the power to delegate to any citizen or group of citizens of such municipality any power of control over such officer. The granting of such power of control is a delegation of legislative power and is void; and a writ of mandamus will lie to compel such officer to grant the permit without the consent of any citizen or a group of citizens of a municipality. O'Rourke v. Rapp, 14 N. P. (N. S.) 23.

(2) **Extent of regulation of smoke.**—Under section such as this, giving power to regulate consumption of smoke, a city is not authorized to declare that dense smoke is a nuisance *per se*, but only if it causes injury or annoyance. Cleveland v. Malm, 5 N. P. 203; Sigler v. Cleveland, 3 N. P. 119.

An ordinance prohibiting "dense" smoke is void, for uncertainty. *Ib.*

An ordinance prescribing a certain scale for measuring the density of smoke, and declaring anything in excess of that scale to be a public nuisance, is within the power of council under this section, and is valid. Cincinnati v. Burkhardt, 10 C. C. (N. S.) 495; 30 C. C. 350.

Under this section a city may create a supervising engineer's department to regulate and compel consumption of smoke. Cincinnati v. Gass, 13 Dec. 703; 1 N. P. (N. S.) 169. Power to appoint such engineer would vest in the mayor. *Ib.*

Proper party defendant in prosecution for violation of ordinance regulating emission of smoke, is the corporation or person permitting or causing the emission. Cincinnati v. Burkhardt, 30 C. C. 350; 10 C. C. (N. S.) 495.

(3) **Steam whistles.**—Without this express grant of power council could not prohibit the blowing of steam whistles. Whitcomb v. Springfield, 3 C. C. 244.

(4) Power herein granted for regulation of steam boilers and steam boiler plants is not inconsistent with power of state to inspect the same. Op. Atty. Gen. (1911-12), p. 17.

INSPECTION.

Sec. 3651. [Weights and measures.] To regulate the weighing and measuring of hay, wood and coal, and other articles exposed for sale, and to provide for the seizure, forfeiture and destruction of weights and measures, implements and appliances for measuring and weighing which are imperfect or liable to indicate false or inaccurate weight or measure, or which do not conform to the standards established by law and which are known, used or kept to be used for weighing and measuring articles to be purchased, sold or offered or exposed for sale.[1] [99 v. 6, § 71; 96 v. 21, § 7.]

(1) **Character of regulations.** —A state statute making it penal to use any measure but standard half bushel when buying wheat from original producer was held unconstitutional because it protects only the producer and not those selling to him and is class legislation. Yeazell v. State, 40 B. 63.

Under its charter of 1834 and the general laws of the state it was held that Cincinnati could appoint a sealer of weights and measures and enforce by fine the use of weights and measures sealed by him. Huddleson v. Ruffin, 6 O. S. 604.

The power to provide for weighing and measuring of articles for sale does not authorize an ordinance forbidding the delivery in the city, without being weighed by the city weigher of hay already sold outside the city. Heminger v. Cleveland, 3 W. L. M. 46.

Ordinance making it unlawful to expose for sale any commodity, etc., which is commonly sold by measure, in any measure or receptacle which is not tested, marked and sealed by the sealer of weights and measures, is not a valid exercise of power under this section. Gates v. Cleveland, 18 C. C. (N. S.) 349.

Sealer of weights and measures, see § 4318 *et seq.*, *post.*

Sec. 3652. [Inspection.] To provide for the inspection of spirits, oils, milk, breadstuffs, meats, fish, cattle, milk cows, sheep, hogs, goats, poultry, game, vegetable and all food products. [99 v. 8, § 7u; 96 v. 21, § 7.]

NUISANCES.

Sec. 3653. [Powers to fill lots and remove obstructions.] To cause any lot or land within its limits on which water at any time becomes stagnant, to be filled up or drained, all putrid substances to be removed from any lot, and the removal of all obstructions from all culverts or covered drains or private

property, laid in any natural water-course, creek, brook or branch, where they obstruct the water naturally flowing therein, causing it to flow back or become stagnant, in a way prejudicial to the health, comfort, or convenience of any of the citizens of the neighborhood, and, if such culverts or drains be of insufficient capacity, to cause them to be made of such capacity as reasonably to accommodate the flow of such water at all times therein. The council may direct, by resolution, the owner to fill up or drain such lot, remove such putrid substance, or remove such obstructions, and if necessary enlarge such culverts or covered drains to meet the requirements thereof.[1] [R. S. Sec. 2149; 81 v. 37; 66 v. 225.]

(1) **Scope of power.**—A city council cannot arbitrarily declare a stream a nuisance and order it abated. The power to abate nuisances in any way the corporation deems expedient is not an unrestricted power. The abatement must be necessary for the public good and limited by necessity, and no wanton injury to property must be committed. Deming v. Cleveland, 22 C. C. 7, 9.

Validity of resolution directing lots to be filled.—A resolution under the Act of 1852, similar to this, directing lot owners to fill and drain their lots in such manner as should be necessary to remove all stagnant water, was held to be constitutional as a reasonable sanitary measure. Bliss v. Kraus, 16 O. S. 54.

Scope of such resolution.—By reasonable construction of such resolution it required not merely the removal of stagnant water, but that the work be done in such a way as to prevent the recurrence of stagnant water. Bliss v. Kraus, 16 O. S. 54.

Description of premises.—Where the property described in the resolution for the abatement of a nuisance identifies the premises, a misnomer of the township will not invalidate the proceedings. Poland v. Connolly, 16 O. S. 64.

FORM OF RESOLUTION DIRECTING OWNERS OF LOTS TO FILL AND DRAIN THE SAME.

Be it resolved by the council of the city [*or* village] of....., State of Ohio:

That the owners of the following lots, to-wit:—(insert description of property required to be filled and drained) be and they are hereby directed to fill and drain said lots so as to remove therefrom all stagnant water.

That such owners be required to comply with the direction herein given within two weeks from the receipt of notice hereof or the publication of the same as herein directed, and that if the same shall not be done by that

time the corporation will do the work at its own expense and collect the amount thereof from such owners in the manner provided by law.

The clerk is hereby directed to serve a copy of this resolution upon the owners of such lots or on their agents or attorneys and publish the same for two consecutive weeks in ..... a newspaper of general circulation in the corporation.

Adopted the .....day of....., 19....

.....
President of Council.

Attest.....
Clerk.

If it is desired to direct putrid substances to be removed, obstruction to water courses to be removed, culverts to be enlarged, etc., in accordance with the above section, the form given above may be changed to meet requirements.

Sec. 3654. [Duty of owner to comply with direction.] After service of a copy of such resolution, or after a publication thereof in a newspaper of general circulation in such corporation for two consecutive weeks, such owner, or his agent or attorney shall comply with the directions of the resolution within the time therein specified. [R. S. Sec. 2150; 66 v. 225.]

Sec. 3655. [May be done at the owner's expense in case of refusal or neglect.] In case of failure or refusal to comply with the resolution, the work required thereby may be done at the expense of the corporation, and the amount of money so expended shall be recovered from the owner before a justice of the peace, or any court of competent jurisdiction. Such expense from the time of the adoption of the resolution shall be a lien on such lot, which may be enforced by suit in the court of common pleas of the proper county, and like proceedings may be had as directed in relation to the improvement of streets. [R. S. Sec. 2151; 66 v. 225.]

Sec. 3656. [Health officers shall enforce provisions.] The officers connected with the health department of every such municipal corporation shall see that the provisions of the preceding three sections are strictly and promptly enforced. [R. S. Sec. 2152; 66 v. 225.]

PEACE AND MORALS.

Sec. 3657. [Regulation by license, shows, games, trafficking in tickets, etc.; exceptions.] To regulate, by license or otherwise, restrain or prohibit theatrical exhibitions, public shows and athletic games of whatever name or nature, for which money or other reward is demanded or received; to regulate, by license or otherwise, the business of trafficking in theatrical tickets, or other tickets of licensed amusements, by parties not acting as agents of those issuing them, but public school entertainments, lecture courses and lectures on historic, literary or scientific subjects shall not come within the provisions of this section.[1] [102 v. 88; 99 v. 5, § 7g; 97 v. 505; 96 v. 21, § 7.]

(1) **License fees.**—Under a provision such as this a municipal corporation may exact a license fee from theatrical exhibitors. Such exaction is not violation of the constitution. Baker v. Cincinnati, 11 O. S. 534.

The authority to fix the amount of license fees may be delegated to the mayor within the limits fixed by council. *Ex parte* Ryan, 7 B. 50.

Moving picture operators.—A municipality has power to license operators of moving picture machines. *In re* Sam Lewis, 14 N. P. (N. S.) 609; but such ordinance is invalid unless it fixes a standard of qualifications. *Ib.*

Prohibition.—Council could not prohibit a performance unless it were given for pay or reward. *Ex parte* Ryan, 7 B. 50.

Sale of reserved seats after doors open.—An ordinance forbidding sale of reserved seats after the doors are opened would be valid, and a speculator who bought the tickets the day before would be subject to the prohibition. Cincinnati v. Brill, 7 N. P. 534.

Sec. 3658. [Preserve peace and protect property.] To prevent riot, gambling, noise and disturbance, indecent and disorderly conduct or assemblages, and to preserve the peace and good order, and to protect the property of the corporation and its inhabitants.[1] [99 v. 5, § 7a; 96 v. 21, § 7.]

(1) **Constitutionality.**—The right to confer police power on a city is implied in the constitutional power to create a city. Bliss v. Kraus, 16 O. S. 54.

Scope of power.—Police power may be exercised by a city, but the authority to enact any particular ordinance must be given expressly or by necessary implication. Ravenna v. Pennsylvania Co., 45 O. S. 118. Where the grant is uncertain

the power must be denied. Wellsville v. O'Connor, 1 C. C. (N. S.) 253; 24 C. C. 689, 690.

The exercise of the police power must be reasonable. Exacting a license fee of $50 a day for transient dealers is unreasonable. Glaser v. Cincinnati, 31 B. 243. A city may prohibit disturbance of peace by singing, speech making, etc., in the street and it is no defense that such acts are done in conducting religious exercises. Trimble v. Bucyrus, 9 D. 832. Such a section as this would give power to prohibit the publication of obscene matter. O'Brien v. Cleveland, 1 Clev. 100, 4 Dec. (Re) 189.

Loitering.—Disorderly conduct is not defined by any Ohio statute, or by any ordinance of the city in which the accused was convicted of loitering, and the court is unable to sustain the conviction by holding that loitering constitutes disorderly conduct as a matter or law. *In re* Dunlap, 13 N. P. (N. S.) 325; aff'd, *In re* Opal Howard, 15 C. C. (N. S.) 171.

Municipalities are without statutory authority for the enactment of an ordinance making loitering or wandering about the streets a crime. *Ib.*

Contra, under home rule charters. See Welch v. Cleveland, 97 O. S. 311.

Seditious utterances. — Municipal authorities are charged with the duty of maintaining peace and order in the municipality, and if in their discretion they are of opinion that statements made in public places are seditious or treasonable, or of such a nature as to cause disorder and disturbance of the peace, it is their duty to interfere, and, if necessary, to put an end to such meeting. Robertson v. Canton, 20 N. P. (N. S.) 188.

Gambling.—An ordinance making it unlawful for any person to knowingly have in his possession "any writing, slip, paper or document * * * recording a wager * * * upon the speed or power of endurance of any beast" is within the provision of this section. *In re* Sherlock, 19 N. P. (N. S.) 302.

Under this section the municipality may pass an ordinance to prevent gambling, and Section 13056 G. C., providing punishment for like offense, does not invalidate such ordinance. Magris v. Canton, 22 N. P. (N. S.) 312.

Concealed weapons. — A city may by ordinance punish for carrying concealed weapons within its limits. Op. Atty. Gen. (1915) p. 1437; (1919), p. 1539.

Under a section of former statutes similar to this, it was held that a municipal corporation has no power to prohibit the blowing of steam whistles within the corporation. Whitcomb v. Springfield, 3 C. C. 244; nor to compel a railroad to maintain watchman at crossing. Ravenna v. Pennsylvania Co., 45 O. S. 118; nor to make penal the running of horse cars without a driver or conductor. Thornhill v. Cincinnati, 4 C. C. 354.

A section such as this would not give power to exact a license from ticket brokers. Frank v. Cincinnati, 7 N. P. 146.

Power to punish, see §§ 3664 *et seq.* The general power to "preserve the peace and good order" is

limited by the provisions of §§3664 *et seq.*, and the manner of the exercise of the power is governed by those sections. Wellsville v. O'Connor, 1 C. C. (N. S.) 253; 24 C. C. 689. But see Esch v. Elyria, 27 C. C. 446; 7 C. C. (N. S.) 9.

Municipal liability.—Though a section such as this gives the power to prevent disturbance of the public peace and protect property, a municipality will not be liable for failure to exercise this power. Western College v. Cleveland, 12 O. S. 375; Frederick v. Columbus, 58 O. S. 538; Green v. Muskingum County, 3 C. C. (N. S.) 212; 23 C. C. 43.

Thus the failure to prevent a riot would not render the city liable for property destroyed. Western College v. Cleveland, 12 O. S. 375. Robinson v. Greenville, 42 O. S. 625.

Sec. 3659. [Billiards, pool and gambling.] To regulate billiard and pool tables, nine or ten pin alleys or tables, and shooting and ball alleys;[1] and to authorize the destruction of instruments or devices used for the purpose of gambling.[2] [99 v. 5, § 7b; 96 v. 21, § 7.]

(1) **Scope of power.**—A keeper of a billiard table resort may be punished for keeping open on Sunday unless he observes the seventh day of the week instead of Sunday. Billigheimer v. State, 32 O. S. 435.

A statute forbidding the keeper of a public house or retailer of liquor to keep a bowling alley would be unconstitutional. State v. Thompson, 7 N. P. 630.

Aliens.—The enactment of a municipal ordinance which prohibits the granting to one who is not a citizen of the United States of a license to operate a billiard or pool table for hire, does not violate the 14th Amendment to the Federal Constitution, but is within the discretion of municipal authority. State *ex rel.* v. Carrel, 29 O. C. A. 225; aff'd, s. c. 99 O. S. 285.

License fees.—An ordinance regulating pool rooms, which places a license fee of $15 on each pool table maintained in a pool room within the corporate limits, will not be held invalid on the theory that it is a tax for revenue purposes, or for the reason that it has been levied with the intention of prohibiting pool rooms altogether. Handley v. Westerville, 12 N. P. (N. S.) 105.

Effect of prohibition.—Where a nine-pin alley is forbidden a builder cannot recover for services in constructing. Spurgeon v. McElwain, 6 O. 442.

(2) **Gambling devices.**—Ordinary slot machines are devices used for gambling. Fletcher v. State, 18 C. C. 674; but when not, see Heelman v. State, 6 N. P. 258.

Sec. 3660. [Houses of ill-fame.] To suppress and restrain disorderly houses and houses of ill-fame,[1] and to provide for the punishment of all lewd and lascivious behavior in the streets and other public places.[2] [99 v. 5, § 7d; 96 v. 21, § 7.]

(1) **Nuisances.**—Houses of ill fame may be suppressed as nuisances. Crofton v. State, 25 O. S. 249.

Defined.—See § 6193 G. C.

Powers of Board of Health as to, see note to § 4413 *post.*

(2) **Lewd behavior.**—Ordinance prohibiting walking, riding, or conversing with any lewd female, is not authorized by a section such as this. Cady v. Barnesville, 4 Dec. (Re) 396.

Sec. 3661. [Intoxicating liquors.] To regulate ale, beer, porter houses and shops, and the sale of intoxicating liquors as a beverage.[1] But nothing in this chapter shall be construed to amend, repeal or in any way affect the provisions of law relating to the sale of intoxicating liquors on Sunday or local option as to sale of liquors in municipalities.[2] [99 v. 5, § 7e; 96 v. 21, § 7.]

(1) **Meaning of "regulate."**—For a consideration of the scope of the word "regulate," see Brown v. Van Wert, 4 C. C. 407, 411; 47 O. S. 477, and Bronson v. Oberlin, 41 O. S. 476, 483.

Power to regulate does not include power to prohibit saloons in certain districts. Berning v. Norwood, 1 O. L. R. 25, 29 (aff'd 72 O. S. 593).

(2) **As nuisances.**—Place of habitual resort for tippling is a nuisance. Miller v. State, 3 O. S. 475.

Extent of power.—Under a general statute giving power to pass ordinances for the "health, safety, morals, etc.," of the city, it was held a municipal corporation could not prohibit the opening of shops, including saloons, on Sunday without excepting cases of necessity and charity, and the case of those who conscientiously observe the seventh day of the week. Canton v. Nist, 9 O. S. 439. And could not prohibit the sale of wine, etc., in less quantities than a gallon. Thompson v. Mt. Vernon, 11 O. S. 688. But under a statute expressly giving the power to "regulate, restrain and prohibit ale, beer and porter houses," it was held a city has authority to provide for the punishment of the keeper of any place where ale, etc., is habitually sold or furnished, to be drunk at such place. Burckholter v. McConnellsville, 20 O. S. 308. And under a statute giving power to *regulate* such places, a municipality may prohibit and punish the employment of females in places where liquor is sold. Bergman v. Cleveland, 39 O. S. 651. And may forbid any person to keep such place open on Sunday, though no exception is made in cases of necessity or charity or in favor of those who conscientiously observe the seventh day of the week. Piqua v. Zimmerlin, 35 O. S. 507.

A part of an ordinance forbidding keeping open on Sunday, providing that lighting up of the room where liquor is sold shall be *prima facie* evidence of keeping open,

though invalid, does not render the ordinance void. Piqua v. Zimmerlin, 35 O. S. 507.

An ordinance fixing the hours of closing and opening saloons, and requiring closing between ten P. M. and six A. M., is valid. Weaver v. Mt. Vernon, 7 N. P. 374. To the same effect, Bauer v. Avondale, 4 B. 12.

An ordinance requiring saloons to remove all screens and to have a bright light at ten o'clock at night is constitutional. Editorial note, 34 B. 39; Washington v. Gallagher, 7 N. P. 511.

Exceptions in ordinance.— Where a municipal corporation follows the authority given in a statute for the passage of an ordinance, it is not necessary to include all the exceptions in other statutes relating to the same subject matter. Edis v. Butler, 8 N. P. 183. (aff'd 68 O. S. 645); but see Gaskey v. Belle Centre, 8 N. P. (N. S.) 153. Nor, if exceptions are included, to follow the substance of the statutory provisions. Landman v. Columbus, 17 Dec. 61.

There was held to be no inconsistency between paragraph 5 of § 1692 R. S. (which is similar to the above section) and § 4364-20 R. S. (now §§ 13050 *et seq.* G. C.) and an ordinance prohibiting keeping places where intoxicants are sold open on Sunday without containing the exceptions in § 4364-20 R. S. was held to be valid. Emery v. Elyria, 8 N. P. 208.

State law on same subject.— A village may pass a Sunday closing ordinance, although there is a state law to the same effect. State v. Ulm, 7 N. P. 659. But ordinance must contain exceptions provided in the statute under which it is passed. Akerman v. Lima, 7 N. P. 92.

Ordinances may be passed providing for punishment of some act which is made criminal by state statutes and offenders may be punished in both jurisdictions for the same act. Emery v. Elyria, 8 N. P. 208.

The jurisdiction to punish under a state law and under a municipal ordinance is concurrent. Wightman v. State, 10 O. 452; and conviction in one jurisdiction would be a bar to prosecution in the other. *Ib.* But see Emery v. Elyria, 8 N. P. 208.

Recovery of penalty.— A civil action may be maintained by a municipal corporation to recover the penalty imposed by ordinance for retailing intoxicating liquors. Markle v. Akron, 14 O. 586.

Intoxicating liquors.—Strong beer is an intoxicating liquor within the meaning of an ordinance forbidding retailing intoxicants without a license. Markle v. Akron, 14 O. 586.

Sec. 3662. [Taverns.] To regulate taverns and other houses for public entertainment.[1] [99 v. 5, § 7f; 96 v. 21, § 7.]

(1) **Scope of power.**—Municipal corporations have no power to impose restrictions upon or to regulate places where non-intoxicating drinks are sold. Sullivan v. Wellston, 8 N. P. (N. S.) 108.

Sec. 3663. [Vicious literature.] To restrain and prohibit the distribution, sale and exposure for sale of books, papers, pictures and periodicals or advertising matters of an obscene or immoral nature.[1] [99 v. 9, § 7x; 96 v. 21, § 7.]

(1) It was held that publishing obscene matter might be prohibited by a city under the general provisions of former sections, such as this. O'Brien v. Cleveland, 1 Cleve. 100; 4 Dec. (Re) 189.

Sec. 3664. [Public peace.] To provide for the punishment of persons disturbing the good order and quiet of the corporation by clamors and noise in the night season, by intoxication, drunkenness, fighting, committing assault, assault and battery, using obscene or profane language in the streets and other public places to the annoyance of the citizens, or otherwise violating the public peace by indecent and disorderly conduct, or by lewd and lascivious behavior. In like manner to provide for the punishment of any vagrant, common street beggar, common prostitute, habitual disturber of the peace, known pickpocket, gambler, burglar, thief, watch-stuffer, ballgame player, a person who practices any trick, game or device with intent to swindle, a person who abuses his family, and any suspicious person who can not give a reasonable account of himself.[1] [103 v. 168; R. S. Sec. 2108; 66 v. 183.]

(1) **Scope of power.**—Where the legislature has by general law exercised its jurisdiction as to the punishment of an offense, there is a presumption of its intention to make its jurisdiction over such subject exclusive, and the municipality cannot provide for punishment of the same offense unless the power is clearly given. Wellsville v. O'Conner, 24 C. C. 689; 1 C. C. (N. S.) 253.

This section does not give power to make the crime of assault and battery a municipal offense. *Ib.* See also Cleveland v. Lovelle, 3 O. L. R. 648; Esch v. Elyria, 27 C. C. 446; 7 C. C. (N. S.) 9.

An ordinance under this section, providing for the punishment of any known thief found in the municipality, is valid, and not violative of the guarantees in the constitution. Morgan v. Nolte, 37 O. S. 23.

A municipality has no authority under this section to make punishable intoxication or being in a state of intoxication; but it may punish disturbance of the peace by intoxication. Jeffries v. Defiance, 25 B. 68; Hughes v. Cincinnati, 14 N. P. (N. S.) 494.

Sections 3664, 3665 and 3666 give municipalities authority to pass ordinances as to vagrancy, but the

exercise of the power given by these sections was held to be optional, and a city may, if it sees fit, waive its option. Application of Squires, 19 C. C. 736.

Suspicious person. — Ordinance of home rule city defining and punishing "suspicious person" held valid. Welch v. Cleveland, 97 O. S. 311.

There is no statutory authority, however, for an ordinance providing punishment for "loitering" on the streets. *In re* Opal Howard, 15 C. C. (N. S.) 171; but there is ample authority to punish vagrants, and an ordinance passed in the exercise of such power is not invalid because the word "loitering" is used in defining the offense, and in creating the class of vagrants contemplated. *In re* Baldridge, 28 O. C. A. 353; 6 Ohio App. 76; and see Welch v. Cleveland, 97 O. S. 311.

Begging.—Municipality may prohibit. LeFever v. Columbus, 23 N. P. (N. S.) 372.

Sufficiency of indictment charging defendant with being a "known thief," see Coakley v. Cincinnati, 13 C. C. (N. S.) 394.

As to evidence in prosecution for being a known gambler, see Hersh v. Cincinnati, 21 C. C. (N. S.) 561.

Sec. 3665. [Punishment of breaches of peace.] Such punishment may be by imposing and collecting fines, or by imprisonment in the proper jail or workhouse at hard labor, or both, at the discretion of the court, but no such person shall be fined for a single offense to exceed fifty dollars.[1] Such imprisonment and hard labor shall not, for the first offense, exceed thirty days, for the second offense, ninety days, for the third offense six months, and for the fourth or any further repetition of the offense, one year. [R. S. Sec. 2109; 66 v. 183.]

(1) This section controls amount of fine that may be prescribed for offenses named in preceding section as against Sec. 3628, Morris v. Conneaut, 20 N. P. (N. S.) 289.

Sec. 3666. [Imprisonment.] The council may provide that any person who refuses or neglects to pay the fine imposed on conviction of any such offense, and the costs of prosecution, shall be imprisoned and kept at hard labor until, at the rate of seventy-five cents for each day's labor, exclusive of Sundays, he shall have earned an amount equal to such fine and costs. [R. S. Sec. 2110; 66 v. 183.]

Sec. 3667. [Regulation as to labor.] The council may make suitable regulations to conduct such labor to the best advan-

tage, and in a manner consistent with the age, sex, and health of the prisoners, and such labor may be done at the corporation prison, workhouse, or elsewhere, and under the charge of such officers or other persons as the council may select. [R. S. Sec. 2111; 67 v. 75.]

Sec. 3668. [Hospitals for diseased prisoners.] The council may provide suitable hospitals for the reception and care of such prisoners as may be diseased or disabled, to be under such regulations, and under the charge of such persons as the council may direct. [R. S. Sec. 2112; 66 v. 183.]

LICENSES.

Sec. 3669. [Explosives.] To regulate the transportation, keeping and sale of gunpowder and other explosives or dangerous combustibles and materials, and to provide or license magazines therefor.[1] [99 v. 6, § 7k; 96 v. 21, § 7.]

(1) **Scope of section.**—Ordinance regulating transportation of dynamite and other explosives in certain quantities along streets of villages, is within scope of section such as this. Hays v. St. Marys, 55 O. S. 197.

Under sec. 3650, municipality has power to prohibit absolutely the transportation of nitro-glycerine through the streets. Walter v. Bowling Green, 26 C C. 756; 5 C. C. (N. S.) 516; and under both sections 3650 and 3669 the storage of dynamite or other high explosives in certain quantities within the municipality, may be prohibited by ordinance. Hays v. St. Marys, 55 O. S. 197. Such a provision in an ordinance is not inconsistent with §§ 12536 and 12538. *Ib.*

An ordinance which forbids dry cleaning establishments only to use or store gasoline within the city limits is void as unjustly discriminatory. Mildner v. Cincinnati, 13 C. C. (N. S.) 88.

Forfeiture.—Under section such as this, there is no authority to decree a forfeiture of gunpowder, nor can a forfeiture be declared without notice and adjudication. Cotter v. Doty, 5 O. 394.

Municipal liability.—Municipality is not liable for damages caused by fire resulting from its failure to enforce an ordinance against storing of inflammable oils. Roberts & Co. v. Cincinnati, 5 Rec. 73.

Sec. 3670. [Licenses.] To regulate and license manufacturers and dealers in explosives, pawnbrokers,[1] chattel mortgage and salary loan brokers,[2] peddlers, public ball-

rooms, scavengers, intelligence offices, billiard rooms, bowling alleys, livery, sale and boarding stables, dancing or riding academies or schools, race courses, ball grounds,[3] street musicians, second hand dealers, junk shops and all persons engaged in the trade, business or profession of manicuring, massaging or chiropody. In the granting of any license a municipal corporation may exact and receive such sums of money as the council shall deem proper and expedient.[4] [101 v. 232; 99 v. 9, § 7dd; 97 v. 509; 96 v. 21, § 7.]

(1) **Pawnbrokers.**—See § 6339 and Kopelman v. Toledo, 29 C. C. 455; 9 C. C. (N. S.) 545.

(2) **Loan brokers.**—Salary loan broker defined. French v. Toledo, 81 O. S. 160.

This section does not authorize exaction of license from persons engaged, otherwise than as brokers. in business of loaning money and upon loans secured by mortgages on personal property. French v. Toledo, 81 O. S. 160.

The statute does not provide that a license may be be required of an employe. French v. Toledo, 81 O. S. 160, 170.

The state may in the exercise of police power license and regulate chattel mortgage and salary loan brokers and may delegate authority to do so to municipalities. Sanning v. Cincinnati, 81 O. S. 142.

Chattel mortgage or loan broker obtaining State License need not pay license fees to a city. Op. Atty. Gen. (1916) p. 832.

Ordinance licensing chattel mortgage and salary loan brokers and requiring detailed record of loans to be filed with city auditor does not violate Section 14 of the bill of rights. Sanning v. Cincinnati, 81 O. S. 142.

Ordinance licensing chattel mortgage and salary loan brokers and requiring license fee of $250 per year and record of loans, articles pledged, interest charged, etc., and requiring such record to be filed in the office of the city auditor, held valid; but provision requiring signing of application by wife, if pledgor a married man, held void. Chambers v. Cincinnati, 11 C. C. (N. S.) 273; 31 C. C. 8.

(3) **Ball Grounds.** — Ordinance for licensing ball grounds is not violated by one maintaining ball ground on private property and not for profit. Silverton v. Davis, 30 C. C. 523; 10 C. C. (N. S.) 60, 709).

Sufficiency of affidavit and evidence in trial for violation of such ordinance. *Ib.*

Further licensing power.—For further provisions relating to licensing power and for annotations on this subject, see §§ 3672 to 3676, *post.*

(4) **Amount of fee.**—See note to § 3659, *ante.*

Sec. 3671. [Evidence.] In the trial of any action brought under the power of licensing herein given, the fact that any

party to such action represented himself or herself as engaged in any business or occupation, for the transaction of which a license may be required, or as the keeper, proprietor or manager of the thing for which a license may be exacted, or that such party exhibits a sign indicating such business or calling, or such proprietorship or management, shall be conclusive evidence of the liability of such party to pay the license therefor. [99 v. 9, § 7dd; 96 v. 21, § 7.]

Sec. 3672. [License power; exception.] To license exhibitors of shows or performances of any kind, not prohibited by law, hawkers, peddlers, auctioneers of horses and other animals on the highways or public grounds of the corporations, vendors of gunpowder and other explosives, taverns and houses of public entertainment, and hucksters in the public streets or markets,[1] and, in granting such license, may exact and receive such sum of money as it may think reasonable, but no municipal corporation may require of the owner of any product of his own raising, or the manufacturer of any article manufactured by him, license to vend or sell in any way, by himself or agent, any such article or product.[2] Such council may confer upon, vest in and delegate to the mayor of the corporation authority to grant, issue and revoke licenses.[3] [101 v. 37; R. S. Sec. 2669; 86 v. 164; 82 v. 148; 77 v. 74; 76 v. 167; 66 v. 223.]

(1) **Definition of a license.**—State ex rel. v. Hipp, 38 O. S. 199.

Constitutionality.—It is within the power of the legislature to authorize municipalities to impose a charge for licensing. Though the constitution does not expressly confer such power, it is not prohibited and may be exercised. Baker v. Cincinnati, 11 O. S. 534.

A license fee exacted from exhibitors and others, though a substantial amount, does not violate the constitutional requirement of uniformity of taxation, nor the rule requiring a tax to be according to the true value in money. Baker v. Cincinnati, 11 O. S. 534; and see Marmet v. State, 45 O. S. 63, and Cincinnati v. Bryson, 15 O. 625.

Exactions of license fees are justified as an exercise of police power rather than of the power to tax for revenue purposes. Toledo v. Brown, 32 C. C. 357; 14 C. C. (N. S.) 165; (aff'd, 83 O. S. 491.)

Reasonableness of charge.—A city ordinance imposing a fine of $25 per day for auctioning goods brought into the city for the purpose is an unreasonable exercise of power. Sipe v. Murphy, 49 O. S. 536.

An ordinance fixing a charge of

25 cents a day for occupying a stand in market was held good. Cincinnati v. Buckingham, 10 O. 257.

A license fee of $50 per day imposed on transient dealers was held unreasonable. Glaser v. Cincinnati, 31 B. 243.

An ordinance charging $20 per day as a license fee for selling goods imported into the municipality for sale and for advertising bankrupt, receivers', etc., sales would be unreasonable. Newark v. Flatau, 34 B. 239. (Supreme Ct. not reported.) See also Flatau v. Mansfield, 14 C. C. 592, 597.

To hold ordinance invalid because fee is excessive, the fee must be manifestly unreasonable and oppressive. Fee of $50.00 a year for certain persons selling goods upon the streets held reasonable. Murphy v. Columbus, 15 Dec. 60; 2 N. P. (N. S.) 484.

Licensing power cannot be used to tax an employment.—The power of taxation is a sovereign power and can be exercised only when expressly granted. The power to tax employments, not being conferred on municipalities, they cannot exercise it, as a means of preventing the employment, or otherwise.

The sum demanded for license to pursue an employment, when used as a means of supplying the public treasury, is a tax upon such an employment, and not strictly a license. Such a tax a municipality has no power to levy. Mays v. Cincinnati, 1 O. S. 268.

When the sum demanded is, however, "rather a price received for accommodations provided by the public," it is strictly a license fee. Cincinnati v. Buckingham, 10 O. 257.

Requiring the fees to be paid into the street repair fund, does not show conclusively that ordinance is for purpose of raising revenue, and not a price received for accommodations provided by the public. Murphy v. Columbus, 15 Dec. 60; 2 N. P. (N. S.) 484.

The burden imposed on officials may justify a license fee beyond the mere expense of filling up the blanks. Baker v. Cincinnati, 11 O. S. 534, 543; Columbus v. Jeffrey, 1 N. P. (N. S.) 265; 13 Dec. 639; and the fact that some revenue is derived from a license does not make the ordinance invalid *Ib.;* and the presumption is that the fee does not exceed the expense of regulation, unless the contrary plainly appears. *Ib.;* Cincinnati v. Bryson, 15 Ohio 625; Columbus v. Jeffrey, 16 Dec. 330. So an ordinance, exacting a license fee for theatrical exhibitions for six months and also a fee for the officer issuing the license, was upheld. Baker v. Cincinnati, 11 O. S. 534.

Discrimination.—*Against goods made outside of state.*—An ordinance, under this section, requiring hawkers and peddlers to pay a license, in so far as it is applicable to goods made outside the state is void as a regulation of commerce, and a dealer compelled to pay may recover back license fee. Burkhart v. Columbus, 17 B. 342. See also *In re* Julius, 26 C. C. 423; 4 C. C. (N. S.) 604.

The power to license auctioneers cannot be used to discriminate between sales of goods of the same class already in the city and those

imported into it. Sipe v. Murphy, 49 O. S. 536.

A city cannot discriminate against articles made outside the state, and an ordinance requiring canvassers for their sale to pay a license is void. *Ex parte* Clamp, 16 B. 229.

License to sell goods is in legal effect a tax upon such goods, so that if a license to sell goods applies to goods made outside the state and discriminates against them, it is void as a regulation of interstate commerce. Arnold v. Yanders, 56 O. S. 417, 420.

As between different persons in municipality.—An ordinance is not invalid because it requires different fees of persons using one kind of vehicle from those required of persons using another kind, if the graduation of fees is reasonable. Murphy v. Columbus, 15 Dec. 60; 2 N. P. (N. S.) 484.

Against persons living outside of municipality.—An ordinance requiring a license for selling goods from such persons only as do not live in the municipality is void. Radebaugh v. Plain City, 28 B. 107.

Character and effect of license ordinances.—An ordinance requiring license for all vehicles using the streets, is applicable to non-residents transporting articles between two states and is not void as a regulation of interstate commerce. Bogart v. State, 20 B. 458.

An ordinance, under legislative act requiring license fee for each vehicle using the streets, the fee being graded according to the number of horses used, is constitutional. Marmet v. State, 45 O. S. 63.

A license having been given to sell meat from a stand, the licensee, if refused a stand in the market-house, may sell in the open air, regardless of a prohibition in the market regulations against such selling, Kraft v. Cincinnati, 3 N. P. 195, 6 O. D. 8.

Ordinance must be reasonable and not tending to foster a monopoly. *Ib.*

Forbidding retail of meat on sidewalk or in the street outside the market-house on market days is a reasonable and valid ordinance. Having issued a license to defendant to sell meat does not surrender the right to regulate. Keck v. Cincinnati, 6 O. D. 97; 37 B. 57, edit.

An ordinance limiting statutory rights is void. State v. Tooker, 5 N. P. 122.

Municipality has no authority to grant license to peddler to occupy portion of sidewalk with permanent structure for vending his wares. United Cigar Stores Co. v. Von Bargen, 19 Dec., 10; 7 N. P. (N. S.) 420.

Enforcement.—Ordinance may provide that payment of license fee be compellable by fine. Marmet v. State, 45 O. S. 63.

A debt to the municipality is incurred for a license fee provided by ordinance to be paid for carrying on the business for which the license is required; and this is so though the ordinance may prescribe penalties for carrying on such business without a license and though no license has been applied for or issued. Kopelman v. Toledo, 29 C. C. 455; 9 C. C. (N. S.) 545. See further, as to collection of license fees by civil action, Cincinnati v. Beuhausen, 22 B. 421.

Authorities of municipality may arrest proprietor of variety show who exhibits without a license, but cannot close the place or abate the business under § 2669. Ryan v. Jacob, 6 B. 139.

Payment of license fee for occupying market stand may be enforced by a fine imposed in a summary process before the mayor. Cincinnati v. Buckingham, 10 O. 257.

Under a license law requiring a license for wagons, etc., using the streets, the person driving is not liable for punishment, if he did not own the vehicle or have any interest therein. O'Rourke v. State, 6 C. C. 612.

Recovery of illegal license fee.—*Involuntary payment.*—When a license fee, though illegal, has been voluntarily paid, upon the party's own petition and without protest, it cannot be recovered back. Mays v. Cincinnati, 1 O. S. 268.

As to what is a voluntary payment to the officer issuing the license, see Mays v. Cincinnati, 268; Baker v. Cincinnati, 11 O. S. 534; Stephan v. Daniels, 27 O. S. 527, 539; Toledo v. Buechele, 19 C. C. 127 (affirmed, without report, 65 O. S. 603).

In Toledo v. Buechele, 19 C. C. 127, the rule as to involuntary payments is thus laid down: "The money will be deemed to be paid involuntarily, and may be recovered back, where the position or interests of the party paying it were such as to require from another the performance of a duty enjoined by law, and the party paying it, was illegally compelled to pay the money to induce the other to perform such duty for him."

One who disputes the amount of a license should tender a reasonable amount, or pay and sue to recover the amount paid on any excess over the right amount. Cincinnati v. Bryson, 15 O. 625; *ex parte* Ryan, 7 B. 50.

Limitation for recovery.—Recovery of license fee illegally exacted is not limited to one year. It does not come within § 12075 G. C. Toledo v. Buechele, 19 C. C. 127 (aff'd without rep., 65 O. S. 603).

Revocation.—A license to conduct concert hall cannot be revoked by the mayor on mere complaint that the hall is disorderly. Smith v. Major, 16 C. C. 362.

Exhibitor of show—Who is.—An ordinance forbidding persons to exhibit or participate in exhibiting a performance without license, applies to proprietors and not to performers. *Ex parte* Ryan, 7 B. 50.

License cannot be exacted from ticket brokers under the general provisions of this section. The power to license such brokers must be specifically given. Frank v. Cincinnati, 7 N. P. 146. But such license would be allowed under the provisions of § 3567.

Hawking and peddling are proper subjects for police surveillance and may be licensed, if done without discrimination and a reasonable license fee charged. Brunner v. Harrison, 8 N. P. 303.

But council cannot by ordinance include persons as hucksters who do not fall within the ordinary meaning of that word. Mays v. Cincinnati, 1 O. S. 268.

(2) **Validity.**—This provision is not invalid as making an unjust discrimination between two classes

of vendors. Toledo v. Brown, 32 C. C. 357; 14 C. C. (N. S. 165, (aff'd 83 O. S. 491.) See also Columbus v. Jeffrey, 16 Dec. 330.

Persons selling products of their own raising or manufacture designated in this section, are not peddlers or hawkers against whom license fees may be imposed. Toledo v. Brown, 32 C. C. 357; 14 C. C. (N. S.) 165 (aff'd, 83 O. S. 491).

Manufacturer.—Who is.—One who buys cattle and converts them into roasts, steaks, etc., is not a manufacturer under this section. Tippecanoe v. Boercher, 5 C. C. 6.

A tailor soliciting orders for suits of clothes and making and delivering suits is a manufacturer within meaning of this section and cannot be required to pay a license as a peddler. Radebaugh v. Plain City, 28 B. 107.

Fee for permits.—An ordinance relating to the sale of pure milk in a city and requiring inspection of milk sold, required a fee of one dollar to be paid and a tag attached to each wagon used in selling milk, before a permit to sell in the city would be granted. It was held that the mere fact that the fee was charged and tag required did not constitute the permit a license in violation of this clause of § 3672, exempting vendors of their own products from payment of a license. Such permit is a mere step to secure enforcement of the object of the ordinance, viz., the sale of pure milk, and to enable the purchaser to rely on the fact that the requirement of the board of health has been complied with. Walton v. Toledo, 3 C. C. (N. S.) 295; 23 C. C. 547, (aff'd 69 O. S. 548).

Health regulations.—An ordinance which is exclusively a health regulation, under the power given in former § 1692 R. S. whether affected by this clause, excepting vendors of their own products from payment of license, even if such ordinance should provide for licenses, see Walton v. Toledo, 23 C. C. 547, 3 C. C. (N. S.) 295 (aff'd 69 O. S. 548).

(3) **Delegation of power by council.**—Power granted to council by the legislature, except ministerial powers, cannot be delegated. The power to fix the standard of competency of applicants for license as stationary engineers cannot be delegated by council to inspectors. Hengst v. Cincinnati, 7 N. P. 1.

Council cannot delegate to mayor power to grant or refuse a license at his discretion. Silverton v. Davis, 30 C. C. 523; 10 C. C. (N. S.) 60; (aff'd 80 O. S. 709.)

An ordinance licensing certain business and providing certain conditions as a condition to obtaining a license is not rendered invalid by the delegation to the health commissioner of authority to determine what shall constitute adequate ventilation or plumbing. Yee Bow v. Cleveland *et al.*, 28 O. C. A. 561; aff'd s. c. 99 O. S. 269.

Validity of ordinances.—This section by express words permits council to delegate the power to license to the mayor. But if this is not so, an ordinance against unlicensed performances will not be held void when a person can pay and recover back if license fee has been exacted wrongfully. *Ex parte* Ryan, 7 B. 50.

Ordinance not invalid because the city treasurer and not the mayor authorized to issue licenses. Murphy v. Columbus, 15 Dec. 60; 2. N. P. (N. S.) 484.

License issued by auditor upon application to the mayor, is in effect issued by the mayor, and an ordinance providing for issuance in this way is not thereby rendered invalid. Toledo v. Brown, 32 C. C. 357; 14 C. C. (N. S.) 165, (aff'd, 83 O. S. 491.)

Sec. 3673. [Further licensing powers of council.] To license transient dealers, persons who temporarily open stores or places for the sale of goods, wares or merchandise, and each person who, on the streets, or traveling from place to place about such municipality, sells, bargains to sell, or solicits orders for goods, wares or merchandise by retail. The granting of such license shall be controlled by the provisions of the next preceding section.[1] [R. S. Sec. 2669b; 90 v. 311.]

(1) See notes to § 3672, *ante.*

Constitutionality.—In view of the guarantees of the Bill of Rights, Section 3673 cannot be so interpreted as to authorize a municipal council to impose a license fee upon merchants who do not sell upon the public streets or places, but only solicit orders and negotiate future sales at the residences of their customers. Tea Co. v. Tippecanoe, 85 O. S. 120. As to effect of this decision, see Op. Atty. Gen. (1915) p. 589.

Sections 3673 and 3676 G. C., in so far as they purport to authorize the requirement of licenses from transient dealers as a condition of their doing business within the municipality, are unconstitutional and void, and ordinances based on these statutes are therefore without effect. Evans v. Wooster, 28 O. C. A. 285; aff'd without opinion, Wooster v. Evans, 92 O. S. 504.

Council may not impose license fee upon agents or salesmen who go from house to house selling goods. Op. Atty. Gen. (1915) p. 439.

A provision in an ordinance requiring transient dealers to take out a license before selling goods in the corporation, if standing alone, would be unconstitutional. Flatau v. Mansfield, 14 C. C. 592. An ordinance which discriminates in favor of persons who form a purpose to sell *after* coming into municipality and against those who come temporarily *with* the purpose, is unreasonable. Brunner v. Harrison, 1 C. C. (N. S.) 111; 25 C. C. 247. An ordinance requiring a license fee from agents of portrait companies of another state for the privilege of canvassing for orders for pictures to be manufactured by such companies in such foreign state, is void, as a regulation of interstate commerce. *In re* Julius, 26 C. C. 423; 4 C. C. (N. S.) 604.

Ordinance imposing license fee of $300 on all temporary stores

and transient dealers, is invalid as unreasonable. Uhrlaub v. Cincinnati, 28 C. C. 797; 8 C. C. (N. S.) 505, (aff'd 72 O. S. 667).

Sec. 3674. [Licensing of advertising mediums and matters.] To license bill-posters, advertising sign-painters, bill distributors, card-tackers, and advertising matter of any article or compound which has not been manufactured or compounded within the corporation limits of such municipality.[1] In granting such license the council may exact and receive such sums of money as it may think expedient, and may delegate to the mayor thereof the authority to grant, issue and revoke such license. Nothing in this section shall be construed to authorize the council of a municipality to exact and receive a license fee from merchants doing business therein, for advertising their own business. [R. S. Sec. 2669c; 91 v. 362.]

(1) See Flatau v. Mansfield, 14 C. C. 592, 597, and note to § 3676.

Bill poster.—Constitutionality of license, see Angove v. State, 8 N. P. 514.

Sec. 3675. [Vehicle license; money to be used for street repairs.] To license the owners of vehicles used for the transportation of persons or property, for hire,[1] and all undertakers and owners of hearses, but the owners of such vehicle may be made liable for the breach of any ordinance regulating the conduct of the drivers thereof. All moneys and receipts, in any municipal corporation, which are derived from the enforcement of any ordinance or law requiring the payment of a vehicle license fee, shall be credited and paid into a separate fund, which fund shall be known as the public service street repair fund. All moneys and receipts so credited to such fund shall be used for the sole purpose of repairing streets, avenues, alleys and lanes within such municipal corporation. [101 v. 147; R. S. Sec. 2670; 66 v. 224.]

(1) **Draymen.**—Validity of ordinance exacting license fee from draymen, under provision such as this see Cincinnati v. Bryson, 15 O. 625.

Vehicle licenses in general, see note (1) to § 3632, *ante*.

Sec. 3676. [Licensing of transient dealers.] To license transient dealers or persons who open stores or places for the

temporary sale of goods, wares or merchandise, and in granting such license may exact and receive such sum of money as it may think expedient, and may delegate to the mayor thereof authority to grant, issue and revoke such licenses. This section shall not apply to persons selling by sample only, nor to any agricultural articles or products offered or exposed for sale by the producer.[1] [87 v. 100, § 1; 86 v. 244; R. S. Sec. 2670-1.]

(1) **Validity.**—Former §2670-1 R. S. codified in the above section, was held invalid as violating §§ 1 and 2 of the Bill of Rights. Flatau v. Mansfield, 14 C. C. 592.

An ordinance passed pursuant to such section was held invalid also because partial and discriminating between goods in the municipality and goods brought in for sale. *Ib.;* Newark v. Flatau 34 B. 239.

See further notes to § 3673, *ante.*

DIVISION III.

SPECIAL POWERS.[1]

CHAPTER 1.

APPROPRIATION OF PROPERTY.

Sec. 3677. [Appropriation of property; street improvement, etc.; canal improvement; water supply; change of venue.][2] Municipal corporations shall have special power to appropriate, enter upon and hold real estate within their corporate limits. Such power shall be exercised for the purposes, and in the manner provided in this chapter.[3]

1. For opening, widening, straightening, changing the grade of,[4] and extending streets, and all other public places, and for this purpose the corporation may appropriate the right of way across railway tracks and lands held by railway companies, where such appropriation will not unnecessarily interfere with the reasonable use of the property so crossed by such improvement,[5] and for obtaining material for the improvement of streets and other public places;

2. For parks, park entrances, boulevards, market places, and children's playgrounds;[6]

3. For public halls and offices, and for all buildings and structures required for the use of any department;[7]

4. For prisons, workhouses, houses of refuge and correction, and farm schools;

5. For hospitals, pesthouses, reformatories, crematories and cemeteries;[8]

6. For levees, wharves and landings;[9]

7. For bridges, aqueducts, viaducts and approaches thereto;

8. For libraries, university sites and grounds therefor;

9. For constructing, opening, excavating, improving or extending any canal, or watercourse, located in whole or in part

within the limits of the corporation or adjacent and contiguous thereto, and which is not owned in whole or in part by the state, or by a company or individual authorized by law to make such improvement;[10]

10. For sewers, drains, ditches, public urinals, bath-houses, water-closets and sewage and garbage disposal plants and farms;[11]

11. For natural and artificial gas, electric lighting, heating and power plants, and for supplying the product thereof;

12. For establishing esplanades, boulevards, park ways, park grounds, and public reservations in, around and leading to public buildings, and for the purpose of reselling such land with reservations in the deeds of such resale as to the future use of such lands, so as to protect public buildings and their environs, and to preserve the view, appearance, light, air and usefulness of public grounds occupied by public buildings and esplanades and park ways leading thereto.

13. For providing for a supply of water for itself and its inhabitants by the construction of wells, pumps, cisterns, aqueducts, water pipes, dams, reservoirs, reservoir sites and waterworks, and for the protection thereof; and to provide for a supply of water for itself and its inhabitants, any municipal corporation may appropriate property within or without the limits of the corporation; and for this purpose any such municipal corporation may appropriate in the manner provided in this chapter, any property or right or interest therein, theretofore acquired by any private corporation for any purpose by appropriation proceedings or otherwise. Either party to such appropriation proceedings shall have the same right to a change of venue as is now given by law in the trial of civil actions.

14. For the construction or operation of street, interurban, suburban or other railways or terminals and the necessary tracks, way stations, depots, terminals, workshops, conduits, elevated structures, subways, tunnels, offices, sidetracks, turnouts, machine shops, bridges and other appurtenances for the transportation of persons, packages, express matter, freight and other matter, in, from, into or through the municipal corporation; and for such purpose or purposes any municipal

corporation may appropriate any property within or without its corporate limits; any municipal corporation may appropriate any property or right or interest therein theretofore acquired by any private or public utility corporation for any purpose by appropriate proceedings, as well as the right to cross on, over or under any street, avenue, alley, way or public place or part thereof of any other municipality, township or country. [103 v. 496; 101 v. 15; 99 v. 207, § 10; 97 v. 333; 96 v. 26, § 9.]

(1) **Similar grants elsewhere.**—Some of the special powers given in this division are included also in the list of general powers. This is true to some extent of the power to sell and lease and to appropriate property and of the power to open and repair streets. In so far as the powers granted in the list of general powers are granted also in the list of special powers, and their manner of exercise specified, the powers are limited by the provisions of this section and must be exercised as herein provided. See Gas Co. v. Tiffin, 59 O. S. 420, 441; Doll v. Barr, 58 O. S. 113, 120.

Validity.—This section is not in violation of Article I, § 10, U. S. Constitution, or of the 14th Amendment, because it affords no opportunity to the owner to be heard as to the necessity and extent of the taking. Sears v. Akron (U. S. Sup. Ct.), 16 O. L. R. 96.

(2) **Old sections.**—The appropriation provisions of the code correspond to former chapter 3, division 7, title 12 R. S. (§§ 2232-2261) repealed. For a judicial construction of former chapter 3, see Toledo St. Ry. Co. v. Fostoria, 7 C. C. 293 (aff'd without report, 56 O. S. 726).

(3) **Strictly construed.**—The power conferred to appropriate property, such as is given by this section, must be strictly construed. Toledo St. Ry. v. Fostoria, 7 C. C. 293, 295 (aff'd by Supreme Court without report, 56 O. S. 726); Harbeck v. Toledo, 11 O. S. 219; Pontiac Co. v. Commission, 104 O. S. 447.

Scope of powers.—The lawful exercise of the powers conferred on municipal corporations to enter upon and take private property for certain purposes enumerated, requires a legal appropriation as provided by statute, involving the assessment of compensation for the property when taken without the owners' consent. Mansfield v. Balliett, 65 O. S. 451, 460.

Purposes.—The determination of particular purposes for which the power of eminent domain shall be exercised, rests entirely with the Legislature. Giesy v. R. R. Co., 4 O. S. 308. See also Vought v. Railway, 58 O S. 123.

A right to appropriate land for a certain purpose may carry with it the right to appropriate for purposes incidental to the original purpose. Ward v. M. & N. Tp. & Bridge Co., 6 O. S. 15.

A municipal corporation may appropriate an easement in land abutting on a street for the purpose of

making a sloping fill to afford lateral support to the street. Dobson v. Cincinnati, 34 O. S. 276.

Ditches and drains were held to be public uses which justify condemnation. Sessions v. Crunkilton, 20 O. S. 349; so were canals, Willyard v. Hamilton, 7 O. pt. 2, 111.

Municipality cannot appropriate property for a railroad under guise of opening a street. Morehouse v. Norwalk, 6 B. 267.

Property already devoted to public use.—Under the general power to lay off and establish streets, a municipal corporation may extend a street across a right of way of a railroad, provided the second use is not inconsistent with the first. Little Miami R. R. Co. *et al.* v. Dayton, 23 O. S. 510.

But lands already devoted to a public use cannot be condemned to a second public use inconsistent with the first. B. & O. R. R. Co. v. Bellaire, 4 B. 201; unless the power to do so is clearly and expressly given by statute. R. R. Co. v. Dayton, 23 O. S. 510; R. R. Co. v. Belle Centre, 48 O. S. 273.

The express grant of power to municipal corporations to appropriate property of a railroad for street purposes, does not exclude the appropriation of such property for any other purpose permitted under the general grant of powers. R. R. Co. v. Belle Centre, 48 O. S. 273; and see note (7) *post*. Power to appropriate cemetery not used for many years, see Pansing v. Miamisburg, 31 C. C. 130; 11 C. C. (N. S.) 511 (aff'd, 79 O. S. 430).

Amount taken.—Though the words "but no more shall be taken or appropriated than is reasonably necessary for the purpose to which it is to be applied" found in the former statute are not included in this section, it would seem that this limitation is nevertheless implied. See Giesy v. R. R. Co., 4 O. S. 308.

The discretion to determine the quantity of property required for the purpose for which it is taken rests with the corporation, and its determination will not be disturbed, in the absence of fraud or bad faith. R. R. Co. v. Ironton, 19 O. S. 299. The appropriation by a city of land for park purposes vests in the city, not the fee, but an easement for the purposes intended. Newton v. Manufacturers' Ry. Co., 14 O. F. D. 156; White v. Cleveland, 21 Dec. 311.

When right to possession accrues.—The right of a city to take and hold property for street purposes does not accrue until compensation has been assessed by a jury. Garvin v. Columbus, 5 N. P. 236.

Estoppel to question validity of proceedings.—A co-tenant is not estopped to question the validity of appropriation proceedings by the acceptance of the compensation money by his co-tenant. Garvin v. Columbus, 5 N. P. 236.

Collateral attack.—In the absence of fraud or prejudice, plaintiffs seeking to enjoin a street assessment of previous appropriation proceedings. Hendrickson v. Toledo, 3 C. C. (N. S.) 355; 23 C. C. 256.

Injunction against appropriation proceedings, see White v. Cleveland, 21 Dec. 311.

Overlapping appropriations.—See McFarlan v. Norwood, 26 C. C. (N. S.) 33.

What use requires compensation.—The use of streets for sewers and drains does not require ad-

ditional compensation. Cincinnati v. Penny, 21 O. S. 499.

Construction of a public ditch across a railway track is an appropriation of the railway company's property for which compensation must be made. R. R. Co. v. Commissioners, 63 O. S. 23.

The water taken by a city for its own use and supplied to its inhabitants, is taken by virtue of its rights as a riparian proprietor and not by virtue of its power of eminent domain, and it need not pay compensation to lower proprietors for such use. Canton v. Shock, 66 O. S. 19.

Change of use.—Where a city has acquired property for park purposes, a lease of part of the property for exclusive wharf purposes, with depots, etc., is a separate and distinct use and entitles the reversioners to additional compensation. White v. Cleveland, 21 Dec. 311.

As to the right to enjoin proposed change of use of property appropriated for a specific purpose, see White v. Cleveland, 21 Dec. 311.

Estoppel to claim compensation.—If a railroad company has been allowed to occupy a street on condition that the city shall not be required to appropriate in order to cross the tracks with other streets, the company will be estopped to claim compensation. R. R. Co. v. Hamilton, 3 C. C. 455.

Who entitled to compensation.—Where property, given for a specific charitable purpose, with a clause of reverter if used for other purposes, is condemned by a municipality for a street, the compensation goes to the owner at time of condemnation and not to the grantor. Babb v. Cincinnati, 36 B. 206.

Measure of compensation.—See notes to § 3683, *post.*

Assessment to pay compensation.—See notes to § 3812, *post.*

Property taken without appropriation proceedings.—*Owner's rights.*—When property has been taken by a municipality and devoted to a public use, without being first appropriated by regular proceedings, the value of the land may be recovered by the owner in proceedings instituted by him against the city. Longworth v. Cincinnati, 48 O. S. 637; State ex rel. v. Harrison, 81 O. S. 98.

Must show title.—Owner suing municipality for value of lands unlawfully taken must show good title; validity of tax title considered. Boone v. Cincinnati, 13 Dec. 256.

Estoppel to sue.—The fact that owner acquiesced in the appropriation as an accomplished fact and ratified it by tendering a deed and offering to allow judgment that, upon value being fixed plaintiff should be ordered to convey to the corporation, does not estop the owner to sue for compensation or constitute a dedication of the land to public use. Longworth v. Cincinnati, 48 O. S. 637.

The fact that owner bought land with knowledge of city's use of it for street purposes and expenditure of money therefor will not estop him from recovering compensation for unlawful taking. Boone v. Cincinnati, 13 Dec. 256, (aff'd 72 O. S. 682).

The fact that the owner of property, a part of which is unlawfully appropriated to widen a street, puts down a sidewalk either voluntarily

or by order of the city, does not show dedication. Webber v. Toledo, 3 C. C. (N. S.) 319; 23 C. C. 237.

Date of valuation.—Value of land at time the owner begins proceedings, and not at the date when it was unlawfully taken, governs. R. R. Co. v. Perkins, 22 C. C. 630, (aff'd 49 O. S. 326); Boone v. Cincinnati, 13 Dec. 256.

Statute of limitations.—Owner suing municipality for compensation is not barred until expiration of six years from time he was precluded from enforcing his right to recover possession of land. *Ib.*

Appropriation of municipal property.—See note to § 3631, *ante.*

Money in treasury.—As to necessity for certificate of money in treasury before beginning appropriation proceedings, see notes to § 3806, *post.*

(4) **Damages caused by improvement.**—*Liability.*—See notes to § 3823, *post.*

(5) **Crossing railroad tracks.**—The power expressly given to appropriate a right of way across railroad tracks for street purposes would not exclude appropriation of such property for other municipal uses. R. R. Co. v. Belle Centre, 48 O. S. 273. The compensation would give right to use of the land for any and all street purposes, but would not include new servitudes, and for these the railroad would be entitled to additional compensation. C. C. C. & St. L. Ry. Co. v. U. B. & N. Ry. Co., 26 C. C. 180. A street railway would not be such new servitude. *Ib.*

Where street is extended across tracks, railroad company is entitled to compensation for cost of bridge to carry its trains over street. Railway Co. v. Troy, 68 O. S. 510.

Where the municipality is about to file a petition in the probate or common pleas court in an action to appropriate a right of way across a railroad track, the railway company may, in a proper case, enjoin the appropriation on the ground that it will unnecessarily interfere with the reasonable use of the property so crossed, and the court may restrain further proceedings in the appropriation case until the claim of the company has been judicially determined. Ry. Co. v. Greenville, 69 O. S., 487. *Contra*, Cleveland, etc., Ry. Co. v. Akron, 1 C. C. (N. S.) 174.

What is an unnecessary interference with the use of the property, discussed, see Cleveland R. R. Co. v. Akron, 6 N. P. (N. S.) 81; 18 Dec. 231.

The determination of the question of interference with the reasonable use of the property to be crossed as provided for by this section is preliminary to the appropriation proceedings provided by § 8897 *et seq.*, but under proper pleadings all questions may be determined in the same proceeding before the court of common pleas. Railroad Co. v. Martin's Ferry, 92 O. S. 157.

(6) **Parks.**—See § 3631 ante, and notes.

Compensation for market.—As to compensation to property owners for market in street, see Pruden v. Cincinnati, 12 C. D. 721.

(7) **Offices and prisons.**—The lands of a railroad company not needed for its purposes, may be appropriated for public offices, prisons, etc. R. R. Co. v. Belle Centre, 48 O. S. 273.

(8) **Location of pest house.**—See note under § 4090, *post*.

(9) **Land for wharf.**—Under a statute authorizing the appropriation of property for a public wharf the discretion of determining the quantity of ground required is vested in the municipality and the courts will not interfere, if the discretion is exercised in good faith. Iron R. R. Co. v. Ironton, 19 O. S. 299.

Municipal liability.—The authority to acquire sites for levees as here conferred, does not impose a duty on a municipality. If a city does make provision to protect lands from overflow, under such authority, it is not liable on account of the inadequacy of the provisions which it sees fit to make. Hamilton v. Ashbrook, 62 O. S. 511.

(10) **Canal is public work** for which appropriation may be allowed. Willyard v. Hamilton, 7 O. pt. 2, 111.

(11) **Ditches and drains** are public uses of property which justify condemnation. Sessions v. Crunkilton, 20 O. S. 349.

Compensation.—The construction of a public ditch across or upon a railroad right of way is an appropriation of the railroad company's property which entitles the company to compensation. R. R. Co. v. Commissioners, 63 O. S. 23.

Appropriation of private sewer.—Where a municipality has appropriated a private sewer for public use either by depriving the owner of all dominion over it, or for a special purpose, and the owner tendered a deed to the property wrongfully taken, it is for the jury to determine the question of compensation. McDonald v. Cincinnati, 4 N. P. 253; Kinney v. Cincinnati, 18 Dec. 257; 6 N. P. (N. S.) 137.

Ditch.—Construction of within corporate limits; laws which govern; assessments, how made. See Op. Atty. Gen. (1919), p. 626.

Sec. 3678. [Appropriation of real estate; damages; exception.][1] In the appropriation of property for any of the purposes named in the preceding section, the corporation may, when reasonably necessary, acquire property outside the limits of the corporation. No land shall be purchased for public cemeteries within two hundred yards of a dwelling house without the consent, in writing, of the owner of the tract of land on which such dwelling house is situated. But any municipal corporation shall have the right to appropriate land, for the establishment of a cemetery or for the enlargement of any existing cemetery, within two hundred yards of any dwelling house, when such consent in writing cannot be obtained, by making the owner of such dwelling house a party to all proceedings and actions for such appropriation; such appropriation shall be made in all respects according to the

provisions of this chapter, and the amount of damages to which such owner will be entitled by reason of locating said cemetery within two hundred yards of such dwelling, shall be determined by such appropriation proceedings. In such appropriation proceedings the damage to the remainder of the land of such owner shall be determined and included in the amount of damages, provided, however, that for the purpose of making a necessary enlargement of an existing cemetery, any municipal corporation which shall own, or shall acquire by purchase, any lands suitable for such enlargement, may devote and use the same for cemetery purposes as such enlargement of such existing cemetery, if the said land shall be distant from any dwelling house not less than one hundred feet or the width of an existing street or alley intervening. The addition of any land across a street or public road, as now located or which shall be hereafter established, shall not be considered an enlargement of an existing cemetery under the provisions of this section. [103 v. 550; 101 v. 203; 96 v. 27, § 11.]

(1) **Old Sections.**—The right to acquire property outside the corporation was, by the former statutes, given only in the case of appropriation of material for the improvement of the streets for public parks; for waterworks and electric light purposes; for cemeteries; for levees; and for sewers, ditches and drains. (See old § 2232 R. S. repealed).

Acquisition by purchase or gift, of property outside the municipality, held to be authorized. Cleveland v. Painter, 6 N. P. (N. S.) 129; 18 Dec. 815, (aff'd 82 O. S. 420).

Property in another municipality.—A municipality may enlarge its park area by appropriating contiguous lands notwithstanding they lie wholly within the limits of another municipality. Schrenk v. Cincinnati, 24 C. C. (N. S.) 317. Affirming Cincinnati v. Ziegler *et al.*, 16 N. P. (N. S.) 169.

Sec. 3679. [Resolutions shall be passed.] [1] When it is deemed necessary to appropriate property, council shall pass a resolution,[2] declaring such intent, defining the purpose of the appropriation, setting forth a pertinent description of the land, and the estate or interest therein desired to be appropriated. For water works purposes and for the purpose of creating reservoirs to provide for a supply of water, the council may

appropriate such property as it may determine to be necessary. [99 v. 208, § 12; 98 v. 164; 96 v. 27, § 12.]

(1) **Old sections.**—See old §§ 2234 and 2235 R. S. repealed.

(2) **Appropriations for street improvements.**—Sec. 2642 R. S. (Now section 3715 General Code), provides specially for appropriations of property for opening, widening, etc., of streets, and requires that "council shall provide by ordinance for the same."

Former § 2235 R. S. to which the present section corresponds, and relating, as the present section does, to appropriations for all purposes, provided merely for a resolution declaring intent to appropriate, but did not provide for an ordinance to appropriate. Cases under the former § 2235 R. S. held that in case of opening, widening, etc., of streets, the special provisions of § 2642 R. S. requiring an ordinance to appropriate but not the preliminary resolution would govern and that the preliminary resolution provided for in § 2235 R. S. was not necessary when the appropriation concerned street improvements. See Krumberg v. Cincinnati, 29 O. S. 69; Tyler v. Columbus, 6 C. C. 224; Caldwell v. Carthage, 49 O. S. 334; Cincinnati v. Mathers, 6 Dec. (Re.) 755; Toledo v. Bayer, 7 N. P. 324. In Toledo v. Bayer, *supra*, the court noted the variance between §§ 2234 R. S., 2235 R. S. and 2642 R. S., and applied the rule that "where there is a general provision in regard to the method of procedure regarding several subjects followed by a special provision as to the procedure in regard to one or more of the subjects, the special provision will govern." It will be noticed that by the provisions of present sections 3679 and 3680 G. C. both the preliminary resolution and the ordinance to appropriate are required. In view of this, the safe course, in the case of appropriations for opening, etc., of streets, would be to have both the resolution and the ordinance, the ordinance being passed by a two-thirds vote and describing the property as required by § 3715.

The preliminary resolution, was held necessary in Erie Railway Co. v. Youngstown, 26 C. C. 679; 5 C. C. (N. S.) 332.

It has also been held that § 2642 R. S. did not provide all that must be done to appropriate property for the purpose therein specified; the appropriation proceedings must be had as provided in the laws relating to the appropriation of property generally. Garvin v. Columbus, 5 N. P. 236.

Interest acquired.—It is not necessary, in the proceedings, to declare the interest to be acquired, and in absence of declaration a fee simple will be presumed. Pansing v. Miamisburg, 11 C. C. (N. S.) 511; 31 C. C. 130, (aff'd 79 O. S. 430).

Interest less than fee.—Where a lesser interest than a fee in real estate is sought to be appropriated in a condemnation proceeding by a municipality, or board, for public use, the lesser interest must be defined with such certainty as to appraise the owner of the nature and extent of the interest which is to be taken and also with such certainty as will enable a jury in accordance with the constitution to intelligently

assess the compensation to be paid for the interest taken. Pontiac Co. v. Comm. 104 O. S. 447.

Such lesser interest cannot be construed to mean authority to prescribe regulations from time to time, as to the manner in which the property may be used or improved by the owner while he is in possession. Ib.

Necessity of appropriation cannot be questioned, except for collusion or fraud. Pausing v. Miamisburg, 11 C. C. (N. S.) 511; 31 C. C. 130, (aff'd, 79 O. S. 430).

ORDER OF PROCEDURE IN APPROPRIATION OF PROPERTY.

(1) *Resolution declaring intent,* defining purpose and describing property to be appropriated, for which but one reading is necessary.

(2) *Notice to the owners,* served, or published once a week for three consecutive weeks in case such owners or their agents can not be found.

(3) *Ordinance to appropriate,* and directing the solicitor to apply to the proper court to assess compensation; to be passed by a two-thirds vote of council.

(4) *Application* to assess compensation.

(5) *Notice of application* and time and place of the same, served as other legal process, or, if service can not be had, then by publication once a week for three weeks.

(6) *Time set for trial* by jury to assess compensation.

(7) *Jury summoned,* trial, verdict and judgment entry.

FORM OF RESOLUTION DECLARING INTENTION TO APPROPRIATE.

Resolution No.....

Declaring intention to appropriate property for..... purposes.

Be it resolved by the council of the city [*or* village] of..... State of Ohio:

That it hereby declares its intention to appropriate for (street or park, etc.) purposes, for (opening.....street, or establishing a park at.....etc.) the following described property, to-wit: (here describe property to be appropriated.)

Passed.....19....

.....
President of Council.

Attest:

.....
Clerk.

Sec. 3680. [Proceedings on passage of resolution.] [1] Immediately upon the passage of such resolution, declaring such intent, for which but one reading shall be necessary, the mayor shall cause written notice thereof to be given to the owner, person in possession thereof, or having an interest of record in,

every piece of property sought to be appropriated, or to his authorized agent, and such notice shall be served by a person designated for the purpose, and return made in the manner provided by law for the service and return of summons in civil actions.[2] If such owner, person, or his agent can not be found, notice shall be given by publication once a week for three consecutive weeks in a newspaper of general circulation in the corporation, and council may thereupon pass an ordinance by the votes of two-thirds of all members elected thereto, directing such appropriation to proceed.[3] [99 v. 208, § 12; 96 v. 27, § 12.]

(1) **Old section.**—Compare old §§ 2234 and 2235 R. S. repealed.

(2) **Sufficiency of notice.**—As to the sufficiency of notice to inform property owners of city's intent to appropriate an easement, see Fenner v. Cincinnati, 4 N. P. 182. Failure to file claim for damages under insufficient notice not a forfeiture of right to recover. *Ib.*

Mortgagees need not be notified of intention to appropriate. Notice to legal owners is sufficient. Put-in-Bay v. Stimmel, 18 C. C. 644.

(3) **Effect of appropriation ordinance.**—The passage of the appropriation ordinance appropriates the property, and improvements made thereon after that date are at the owner's risk. Toledo v. Bayer, 7 N. P. 324. But see Stribley v. Cincinnati, 9 C. C. 122, where it is held that the value of the property is to be determined as of the time of trial and not as of the time of the passage of the ordinance; but it is said "that to some extent the passage of the ordinance may affect the property owner. He would not be allowed compensation, probably, if with notice of intent of city to improve, he unreasonably and in haste put improvements on the property."

Passage of the ordinance places the municipality in as advanced a state as private corporation after court has determined the preliminary questions. Toledo v. Bayer, 7 N. P. 324; Ry. Co. v. Greenville, 69 O. S. 487.

Referendum on ordinance.—In proceedings for the appropriation of land by a municipality, the ordinance to appropriate is the controlling act, and it and not the preliminary resolution is the measure on which a referendum should be taken where the referendum vote of the people is desired. McFarlan v. Norwood *et* al., 26 C. C. (N. S.) 33; 28 C. D. 323.

FORM OF NOTICE OF RESOLUTION DECLARING INTENT TO APPROPRIATE.

To ....., city clerk [*or* such other officer or person as the mayor may designate to serve the notices].

You are hereby directed to notify the owner, every person in possession

of, or having an interest in, the property [*or* the several pieces of property] described in the resolution hereinafter referred to, that the council of the City [*or* Village] of ....., Ohio, on the ..... day of ....., 19...., duly adopted a resolution declaring the intention to appropriate the property therein described, of which resolution the following is a copy:

(Here set forth copy of resolution.)

You will make due return of such service in the manner provided by law.

.....

Mayor.

(For manner of service and return, see §§ 11286 *et seq.*)

FORM OF ORDINANCE TO APPROPRIATE.

Ordinance No.....

To appropriate property for.....purposes.

Be it ordained by the council of the city [*or* village] of....., State of Ohio, two-thirds of all members elected thereto concurring,

Sec. 1. That the following described property be and the same is hereby appropriated to public use for ..... purposes for (opening.....street, or other purpose) to-wit:

(Here give description of property appropriated.)

Sec. 2. That the solicitor be and is hereby authorized and directed to apply to a court of competent jurisdiction to have a jury impaneled to make inquiry into and assess the compensation to be paid for such property.

Sec. 3. That the costs and expenses of said appropriation be paid out of ..... fund. (If bonds are to be issued, see section 3939 *et seq.*)

Sec. 4. That this ordinance shall take effect and be in force from and after the earliest period allowed by law.

Passed.....19....

.....

Attest: President of Council.

.....

Clerk.

Sec. 3681. [Application to court.][1] Upon the passage of such ordinance, the solicitor shall make application to the court of common pleas or to a judge in vacation, to the probate court, or to the insolvency court, in the county in which the land sought to be taken is located, which application shall describe as correctly as possible the land to be appropriated, the interest or estate therein to be taken, the object proposed, and the name of the owner of each lot or parcel thereof.[2] [98 v. 164, § 13; 96 v. 27, § 13.]

(1) **Old section,** 2236 R. S., repealed.

Jurisdiction as against foreclosure proceedings.—See Walters v. Homberg, 19 C. C. (N. S.) 514; 3 Oh. App. 326.

(2) **Sufficiency of description.**—See R. R. Co. v. Prentice, 13 O. S. 373. A petition in appropriation should state the purpose sufficiently to show a public use and that the power is conferred by statute. Ry. Co. v. Bohm, 34 O. S. 114.

Boundary lines.—The determination of the extent of boundary lines of property taken in condemnation proceedings is final between the municipality and the owner, and cannot be relitigated in another action between the same parties. Cincinnati v. Hosea, 19 C. C. 744; (aff'd without report, 66 O. S. 687).

Amendment to application.—Council cannot, while condemnation case is being tried, change by ordinance the terms of its application and ask for more property. Grant v. Hyde Park, 67 O. S. 166.

FORM OF APPLICATION TO ASSESS COMPENSATION.

.....Court.....County, Ohio.

The city [*or* village] of ..... Plaintiff. v. (Insert names of all persons owning or claiming any interest in the property appropriated.) Defendants.	Application to assess compensation.

Now comes the city [*or* village] of....., State of Ohio, and represents that it is a city [*or* village] under the laws of Ohio, and that its Council by resolution duly passed on the.....day of.....19.... did declare its intention to appropriate the property hereinafter described, to public use, for [street, *or* park, *etc.*] purposes for [widening..... street, *or* for other purpose ....., etc.], of which resolution due notice was given according to law, and by ordinance duly passed on the .....day of.....19...., two-thirds of all the members elected to council concurring therein, did direct the appropriation of said property to proceed;

That the several parties made defendants herein own or claim to own or have some title or interest in said property as the same is divided into lots or parcels and designated and shown on the plat filed herewith and made part hereof, and that the descriptions of said several lots or parcels and the names of the parties who own or claim to own or have an interest in the same, are as follows: (Here insert separate description of each piece of property to be appropriated, giving name of the owner or person claiming an interest and state the interest claimed.)

Wherefore, plaintiff asks the court to cause a jury to be impaneled to make inquiry into and assess the compensation to be paid by the plaintiff for the property appropriated as above set forth, and that upon the pay-

ment to the owners or deposit of the amount so assessed, as the court shall order, possession of said property may be awarded it according to law.

City [*or* village] Solicitor.

.....

PRECIPE.

To the Clerk:

Issue notice to the defendants named in the above application, that the plaintiff will, on the ..... day of ....., 19.., at ..... M., apply to the Honorable....., Judge of the..... Court, of.....County, for the impaneling of a jury to make inquiry into and assess the compensation to be paid by the city [*or* village] of.....to the owners for the following property, to-wit: (Here insert description of the entire piece of property to be appropriated.)

.....

City [*or* village] Solicitor.

Sec. 3682. [Service of notice to owners of property.][1] Notice of the time and place of such application shall be given in the ordinary manner of serving legal process,[2] to all owners[3] or agents of owners resident in the state, whose place of residence is known, and to all others by publishing the substance of the application, with a statement of the time and place at which it is to be made, once a week for three weeks[4] next preceding the time of the application in some newspaper of general circulation in the county. [96 v. 28, § 14.]

(1) **Old section.**—This section corresponds to § 2237 R. S. repealed.

(2) **Service of notice.**—Service at residence within the jurisdiction is good. Trustees v. O'Meara, 2 B. 142. See generally R. R. Co. v. Belle Centre, 48 O. S. 273, 290.

In case of death of owner or person having an interest, pending proceedings, revivor must be had in the name of the heirs, and not administrators. R. R. Co. v. Bohm, 29 O. S. 633.

(3) **Mortgagee** whose mortgage is recorded must be notified. Harrison v. Sabina, 1 C. C. 49. And if property is taken without notice to him he may sue the corporation and recover damages. *Ib.* And, generally, it would seem that all persons having an interest would come within the word "owners" in the statute. *Ib.* And see Big Four, etc., Co. v. Cincinnati, 12 Dec. 218.

(4) **Publication** for three weeks is satisfied by an insertion once each week for three weeks. Early v. Doe, 16 How. (U. S.) 610. But three full weeks should elapse after the first publication before the hearing is had. Miller v. Pearce, 2 C. S. C. R. 44, 50. But see Cincinnati v. Fenner, 8 N. P 342 (reversed on other grounds, 65 O. S. 567).

FORM OF NOTICE BY PUBLICATION.

LEGAL NOTICE.

.....(naming persons to be notified by publication) are hereby notified that an application in writing substantially as herein set forth will be made by the city [*or* village] of .....to the Honorable ....., Judge of the .....Court of.....County, Ohio, on the.....day of .....at..... o'clock....M., to impanel a jury to assess the compensation to be paid by said city [*or* village] to the owners of the following described real estate: (Describe entire tract and lots into which it is divided, giving the names of the owners), said property having been condemned and appropriated to public use for the purpose (state the purpose of appropriation), by a resolution declaring the intention to appropriate duly passed by the council of said city [*or* village] on the..... day of....., 19...., and an ordinance directing the appropriation to proceed, duly passed by said council on the.....day of....., 19...., and the plaintiff asks that upon payment to the owners or deposit of the amount of compensation assessed, as the Court shall order, possession of said property may be awarded it according to law.

.....
City [*or* village] Solicitor.

Sec. 3683. [Court to fix time for inquiry.][1] If it appears that such notice has been served five days before the time of application, or has been duly published, or that such notice has been waived, the court shall set a time for the assessment of compensation by a jury,[2] but it may be made at a special term of court, and the jury shall be drawn and the trial proceed as in other civil actions.[3] [96 v. 28, § 15.]

(1) **Old sections.**—This section corresponds to §§ 2238, 2239 and 2240 R. S. repealed.

(2) **Waiver of jury** is not a fatal irregularity and cannot be taken advantage of collaterally. Hendrickson v. Toledo, 23 C. C. 256; 3 C. C. (N. S.) 355. See also Colby v. Toledo, 22 C. C. 732, (aff'd 68 O. S. 698).

(3) **Proceedings.** — Appropriation proceedings by municipal corporations are now made to conform to proceedings in "other civil actions," except where governed by the special provisions in §§ 3679 to 3697.

Continuances.—No provision is made for continuing the time of hearing as was provided in § 2241 R. S. repealed, but this would be covered by the general provision that the trial shall proceed as in other civil actions.

Scope of preliminary hearing. —There is no authority for filing an answer to the application to assess compensation. Ry. Co. v. Greenville, 69 O. S. 487. So a railway company was held not to have the right to

file an answer setting up that a crossing of its property by a street would unnecessarily interfere with railway uses. *Ib.* Whether court may grant leave to file an answer to the application, see R. R. Co. v. Hyde Park, 4 N. P. 296; Ry. Co. v. Greenville, 69 O. S. 487, 497. When the resolution and ordinance have been passed and recorded the municipal power has been exercised and the appropriation made, and further proceedings are for compensation to the owner whose property has been appropriated. Ry. Co. v. Greenville, 69 O. S. 487, 493. The court only determines in the preliminary hearing that notice has been duly served, *Ib.* (*contra*, Toledo R. R. Co. v. Toledo, 7 N. P. 285); and cannot consider the question whether the proper preliminary resolution has been duly passed by council. Erie Railway Co. v. Youngstown, 26 C. C. 679; 5 C. C. (N. S.) 332.

The proper remedy, where preliminary requisites have not been complied with by the municipality, is an action to enjoin the municipality from continuing with the condemnation proceeding. Erie Railway Co. v. Youngstown, 26 C. C. 679; 5 C. C. (N. S.) 332; Ry. Co. v. Greenville, 69 O. S. 487.

Separate trials.—Under former statutes it was held that property owners were not entitled to separate trials and there could be but two peremptory challenges on each side of the case. Cincinnati v. Neff *et al.*, 19 B. 404. But as to number of peremptory challenges see § 11439 G. C.

Compensation — For what made.—Where the city appropriates an easement on property for a sloping fill in connection with street construction, compensation must be made for the damages resulting from taking the easement, but the fee in the land need not be paid for. Dodson v. Cincinnati, 34 O. S. 276.

Compensation must be allowed for diversion of a watercourse, made necessary by the appropriation of property. Hueston v. R. R. Co., 4 O. S. 685.

The mere incorporation of a company for development of water power does not, where no property has been acquired or work of construction commenced, create a property right for which it must be compensated under appropriation proceedings by a municipality of property for a water supply. Sears v. Akron (U. S. Sup. Ct.), 16 O. L. R. 96.

Railroad company is entitled to compensation for cost of bridge over street, when its property is appropriated to extend a street under its tracks. Ry. Co. v. Troy, 68 O. S. 510.

If fair and reasonable rent of property appropriated exceeds amount fixed in terms of lease, the lessee may be compensated for the difference. Cincinnati v. Neff, 20 B. 8.

The lessee of property appropriated for a street is still liable for the rent and he must be compensated. Foote v. Cincinnati, 11 O. 408.

If a tract is platted into lots and the plat recorded, the corporation is not liable to pay damages to lots not taken as "damages to the residue." Banning v. Trustees Southern Ry., 3 B. 965.

A lessee's damages for improvements made by him under a parol lease for three years destroyed by opening a street, must come from

the lessor and not from the city. Clark v. Cincinnati, 1 Dec. (Re.) 10.

In an appropriation of a tenant's interest in lands, value of the buildings on the part not taken may be given in evidence, though the tenant has a right to remove them at the termination of the lease. Batterman v. Cleveland, 18 C. C. (N. S.) 446.

Riparian rights are property which must be paid for and city injuring natural watercourse by the emptying of sewage must make compensation to riparian owner. Mansfield v. Balliett, 65 O. S. 451.

As to case of lease expiring before payment of the award, see Cleveland v. Cuyahoga, etc., 41 O. S. 600.

The value of the property at the time of trial, and not at the date of the condemnation ordinance is to be given. Stripley v. Cincinnati, 9 C. C. 122. But see Toledo v. Bayer, 7 N. P. 324.

Landlord and tenant; separate findings. — In an appropriation proceeding brought by a municipal corporation against a landlord and his tenant, each is entitled to a separate finding and a separate review of that finding. Batterman v. Cleveland, 18 C. C. (N. S.) 446.

What compensation includes. —The appropriation of property for street purposes embraces not only an ascertainment of compensation to the owner for land taken, but damages to the residue of his abutting property, and where a municipality in its application makes general demand for an appropriation for street purposes, the effect of a judgment in such case is to give the municipality the right to use the land for all street purposes including the right to establish a reasonable and proper grade, and any damages that may arise from such change of grade are included in said appropriation proceedings. Grant v. Village of Hyde Park, 47 B. 851, 67 O. S. 166; Tenney *et al.* v. Cincinnati, 24 C. C. 237; 67 O. S. 518.

Measure of compensation.— The elements of compensation are, (1) the abstract value of the land taken, (2) the value arising from the relative situation of the land, taken in connection with the residue of the owner's land from which it is severed, and, (3) the effect upon the value of the residue of the owner's land arising from the uses to which the part taken is appropriated. R. R. Co. v. Ball, 5 O. S. 568; Lorain St. Ry. Co. v. Sinning, 17 C. C. 649; Seither *et al.* v. Cleveland, 17 C. C. (N. S.) 552; aff'd 86 O. S. 357.

As to the measure of compensation when land devoted to a public use is transferred to another public use, see Hatch v. R. R. Co., 18 O. S. 92; Goodin v. Canal Co., 18 O. S. 169; R. R. Co. v. Zinn, 18 O. S. 417.

Enhancement by reason of proposed improvement.—Fair market value of the land at time of taking must be paid the owner and jury cannot consider, or make use of the fact that it has been increased in value by the proposed construction of the improvement. Nichols v. Cleveland, 104 O. S. 19. Giesy v. R. R. Co., 4 O. S. 308; Cincinnati v. Ziegler, 16 N. P. (N. S.) 169. But as to increase in value by proposed erection of a city hall for which property was appropriated, see Cincinnati v. Neff, 20 B. 8.

Fair market value of property appropriated is that amount which the owner may reasonably expect to sell for at time of condemnation and at a voluntary, not a forced, sale. Ry. Co. v. Knauss, 47 B. 807.

Damages to residue must be actual and not theoretical or speculative. *Ib.*

Compensation for toll house when turnpike is brought within city limits, see Turnpike Co. v. Cincinnati, 6 N. P. 233.

Value of leasehold taken, how measured, see Cincinnati v. Eversman, 4 O. L. R. 140; Cincinnati v. Neff, 20 B. 8.

Evidence.—*Burden.*—The burden to establish value is on the owners. Cincinnati v. Neff, 20 B. 8. *Contra*, holding that in such proceeding there is no "burden of proof" and that the jury merely acts as an appraising board. Martin v. Columbus, 101 O. S. 1.

Special benefits.—Special benefits connected with the appropriation of the specific land may be taken into consideration in estimating compensation. Ry. Co. v. Williams, 9 B. 253; R. R. Co. v. Ball, 5 O. S. 568. But whether special benefits not connected with the locality or subject matter may be considered *quere* R. R. Co. v. Ball, 5 O. S. 568; and see R. R. Co. v. Collett, 6 O. S. 182, and Ry. Co. v. Longworth, 30 O. S. 108, 112.

A map which shows that by reason of the contemplated improvement new lines of travel past a store will be opened up, which may offset some loss of trade from the old travel, is sufficient evidence to warrant a charge that the measure of damages to property not taken may be reduced by special benefits, if any, which may be found to accrue from the improvement. Batterman v. Cleveland, 18 C. C. (N. S.) 446.

General and special benefits defined. R. R. Co. v. Collett, 6 O. S. 182; Schaible v. Ry., 10 C. C. 334.

Rental.—Rental may be proved as tending to show value of the premises. Cincinnati v. Neff, 20 B. 8.

Special adaptability of the land to the purposes of the condemning corporation cannot be considered. Gibson v. Norwalk, 13 C. C. 428; *contra*, Seither *et al.* v. Cleveland, 17 C. C. (N. S.) 552; aff'd 86 O. S. 357.

Speculative value cannot be considered. Value cannot be enhanced by evidence of a contingent character such as probable rents dependent on will of others who may require the land as a roadway. Powers v. Railway, 33 O. S. 429.

And loss of trade or business or diminished rental may not be shown. Railway v. Railway, 30 O. S. 604, 623; Railway v. Gardner, 45 O. S. 309; Morison v. Cleveland, 17 C. C. (N. S.) 427.

Improvements injured.—The cost of tile draining injured by the appropriation, cannot be shown. Schaible v. Ry., 10 C. C. 334, 338; but if there is no market value for improvements on the land taken and no value established under any rule, their cost may be shown as an element of value. Foote v. R. R. Co., 21 C. C. 319.

Opinion.—Witness cannot give his opinion as to the amount of damages land owner will sustain by the appropriation; but he may give

his opinion as to the value of all the land before and after the appropriation of a part. R. R. Co. v. Campbell, 4 O. S. 583; R. R. Co. v. Ball, 5 O. S. 568; R. R. Co. v. Gardner, 45 O. S. 309. But see Miller v. Weber, 1 C. C. 130.

Opinion of jury as to value, see Union, etc., Co. v. Cincinnati, 14 C. C. (N. S.) 85.

Opinions of value based on sales but not actual sales may be put in evidence. Neither forced sales nor forced purchases give the standard. Ry. Co. v. Garrard, 7 B. 272; Cincinnati v. Neff, 20 B. 8; Devou v. Cincinnati, 16 O. F. D. 172.

Platted land—The owner may show that the land has been platted for future subdivision as a matter affecting its value. Ry. Co. v. Longworth, 30 O. S. 108. An unrecorded map is admissible for this purpose. R. R. Co. v. Perkins, 22 C. C. 630.

It is not error to permit the introduction of a plat to show the quantity of land in each of the parcels appropriated if the engineer who drew it, testifies to its correctness. Neff v. Cincinnati, 32 O. S. 215.

The fact that lands have been platted and laid out in building lots may be considered in determining their value. Ry. Co. v. Knauss, 47 B. 807.

Verdict must show separately compensation for land taken and damages to residue. Ry. Co. v. Knauss, 47 B. 807.

When in a condemnation suit testimony is received tending to establish a number of different methods of grading a street and bearing upon the probable grade which the municipality may in the future adopt, and the jury has found substantial damages to the residue of the lands and return the same in a general verdict, and has at the same time returned a special verdict to the effect that damages are allowed on account only of future grade which might be established, and that if the street should be improved on a grade which would not necessitate a certain cut there would be no damage, it is error to disregard the general verdict and to hold that the same is controlled by the special verdict, and upon that ground set aside the amount found in the general verdict as damages to the residue. Grant v. Hyde Park, 67 O. S. 166.

FORM OF ENTRY.

State of Ohio, ...County, ...Court.

The city [*or* village] of .....
Plaintiff.
v.
.....*et al.*
Defendants.
} Entry.

This cause coming on to be heard upon the application of the city [*or* village] of.....to impanel a jury to assess the compensation to be paid the owners of the property described in said application and the court finding that all the resident defendants have been duly served with notice of the pendency of the application in the ordinary manner of serving legal process at least five days prior to this application and

that all non-residents defendants have been served with notice by the publication of the substance of the application in the ....., a newspaper of general circulation in the county, once a week for three consecutive weeks from and after the.....day of.....19...., and that all the proceedings are regular and valid, does hereby order that a jury be impaneled on the.....day of.....19...., at .....o'clock ....M. for the purpose of assessing the compensation to be paid for said property.

Sec. 3684. [View of premises; opening and closing of case.][1] A view of the premises shall be ordered when desired by the jury or demanded by a party to the proceedings.[2] The owners shall have the right to open and close the case.[3] [96 v. 28, § 16.]

(1) **Old sections.**—See old §§ 2242, 2245, 2250 R. S. repealed.

(2) **View of the premises** is solely to enable the jury to apply the testimony. It cannot be considered by the jury as evidence. Columbus v. Bidlingmeier, 7 C. C. 136; Besuden v Commissioners, 7 C. C. 237; Ry. Co. v. Knauss, 47 B. 807.

(3) **Open and close.**—Under former statutes, see Neff v. Cincinnati, 32 O. S. 215.

Sec. 3685. [Guardian ad litem.][1] If, at the time of the application, it appears that any of the owners of the property sought to be taken are infants or insane, and that they have no guardian, a guardian ad litem shall be appointed in their behalf. [96 v. 28, § 16.]

(1) **Old section.**—See old section 2243 R. S. repealed.

Sec. 3686. [Deposit of money.][1] No delay in the proceedings shall be occasioned by doubt as to the ownership of any property, or as to the interest of the respective owners, but in such cases the court shall require a deposit of the money allowed as compensation for the whole property or the part in dispute. As soon as the corporation shall have paid the compensation assessed, or secured its payment by a deposit of money under the order of the court, possession of the property may be taken. [96 v. 28, § 16.]

(1) **Old section,** 2250 R. S. repealed

Sec. 3687. [How assessment signed.][1] The assessment shall be in writing, signed by the jury, and shall be so made that the

amount payable to the owners of each lot or parcel of land may be ascertained.[2] [96 v. 28, § 16.]

(1) **Old section.**—See old section 2245 R. S. repealed.

(2) **Separate interests.**—Statute does not provide for ascertainment of value of separate interests, but only of the entire interest taken, and persons having separate interests must have their proportionate value determined when distribution is made. Cincinnati v. Mueller, 19 Dec. 533; 8 N. P. (N. S.) 195.

Several tracts.—Where condemnation proceedings involve several tracts, it is not error to allow jury to hear testimony as to value and assess damages as to one tract, before proceeding with inquiry as to remaining tracts. Cincinnati v. Morton, 31 C. C. 117; 10 C. C. (N. S.) 416.

Conclusiveness of award.—City estopped after lapse of years to deny title in person designated in its application as owner and to whom award of compensation was made. Toledo v. Weber, 23 C. C. 564.

Sec. 3688. [When appropriation includes part of a building.][1] When a building or other structure is situated partly upon the land to be appropriated, and partly upon adjoining land, and such structure can not be divided upon the line between such lands, without manifest injury, the jury in assessing compensation to any owner of the land, shall assess the value thereof, exclusive of the structure, and make a separate estimate of the value of the structure. The owner of the structure may elect to retain and remove it, or to accept the value thereof as estimated by the jury. If he fails to make such election within ten days from the final determination of the cause, he shall be deemed to have elected to accept the value of the structure, as fixed by the jury. [96 v. 28, § 16.]

(1) **Old section,** 2245 R. S. reepaled.

Sec. 3689. [Verdict in whole or in part.][1] The jury shall be sworn to make the whole inquiry and assessment, but may return a verdict as to part and be discharged as to the rest, in the discretion of the court. If a jury is discharged from rendering a verdict in whole or in part, another shall be drawn and impaneled at the earliest convenient time, who shall make the whole inquiry and assessment, or the part not made. [96 v. 29, § 17.]

(1) **Old section.**—Section 2246 R. S. repealed.

Consideration by jury.—In fixing value, the jury in considering the evidence before them may also apply their own sound judgment as to value. Union Grain & Hay Co. v. Cincinnati, 14 C. C. (N. S.) 85.

FORM OF OATH TO JURY.

You, and each of you, do solemnly swear that you will justly and impartially inquire into and assess, according to your best judgment, the amount of compensation due the proper owners in the cases which will be brought before you in this proceeding, by reason of the appropriation of their property, described in the application, to the public use by the plaintiff corporation, the city [*or* village] of..... in the proceeding now pending irrespective of any benefit from any improvement proposed by such corporation; and you do further swear, that you will, in assessing any damages that may occur to such property owners, by reason of the appropriation other than the compensation, further ascertain how much less valuable the remaining portion of said property will be in consequence of said appropriation; this you swear as you shall answer to God.

FORM OF VERDICT.

We, the jurors, in this case, duly impaneled and sworn, do assess as the compensation to be paid by the city [*or* village] of.....to the owner or owners of the several lots and parcels of land described in the application herein as follows: 1st. To the owner or owners of lot or parcel No. 1.

Value of land, including buildings and other structures situated wholly on part taken, ... dollars and.....cents ($.....).
Damages to residue ..... dollars and ..... cents ($.....).

Value of buildings [*or* other structures] situated partly on part taken, ...dollars and.....cents ($.....).

To the owner or owners of lot or parcel No. 2, etc.

(To be signed by all the Jurors; see § 3687.)

Sec. 3690. [Orders as to payment or deposit of assessment.][1] The court shall make such order as to payment, deposit or distribution of the amounts assessed as may seem proper, may require adverse claimants to all or a part of the money or property to interplead and fully determine their rights in the same proceeding, and may direct the time and manner in which possession of the property condemned shall be taken or delivered, and may, if necessary, enforce any order giving possession.[2] [98 v. 164, § 18; 96 v. 29, § 18.]

(1) **Old sections.**—Sections 2247 and 2248 R. S. (repealed).

(2) **Distribution.**—If city is given right to take possession of property subject to a lease, and the lease expires before possession is taken, the city must nevertheless pay the lessee the amount awarded him before taking possession. Cleveland v. Society, 41 O. S. 600.

Unpaid street assessments, which are liens on the property taken, how provided for in the distribution, see Scully v. Cincinnati, 29 C. C. 713; 9 C. C. (N. S.) 63.

The amounts assessed and paid into court belong to the owner of the property at the time of the assessment, and do not pass to a grantee of the remaining property. Hyde Park v. Dyer, 7 N. P. (N. S.) 244; 53 B. 335.

Adverse possession by municipality as against person not made party to proceedings, see McNeely v. Cincinnati, 19 Dec. 210; 7 N. P. (N. S.) 441.

FORM OF JUDGMENT ENTRY.

State of Ohio..... County, ...Court.

The city [*or* village] of.....
Plaintiff.
v.
.....*et al.*
Defendants.
} Judgment Entry.

This cause coming on to be heard upon the application of the city [*or* village] of.....for the assessment of compensation to be paid to the owners of the lots described in the application and all interests therein appropriated by the said city [*or* village] for.....purposes (state the purpose of the appropriation) and all parties having been duly and legally served with process and a jury having been impaneled to assess the compensation and having viewed the premises, heard the testimony of witnesses, the arguments of counsel and the charge of the court and having returned their verdict into court assessing the compensation to be paid for the several lots therein mentioned as follows: (copy verdict). And the court having examined all the proceedings herein finds them all regular and according to law and does further find that said lots of land and the several interests therein belong to the persons whose names are set opposite to them as below set forth.

It is therefore ordered and adjudged that said verdict and the several assessments made therein be and they are hereby confirmed.

It is further ordered that said corporation pay [*or* secure to be paid by a deposit of money under the direction of this court] within.....days the amount of compensation so assessed for the use of the following named persons (give names of owners and amount of compensation assessed to each). And it is further ordered that upon payment [*or* deposit] by said corporation of the several amounts allotted by the jury to the persons above mentioned as the owners of the several lots, or into court, that the city [*or* village] shall be entitled to all interests and estate in, and to the

possession of, the lots and parcels above mentioned and that an order shall issue to the sheriff of.....County, to put the plaintiff into possession of said property and interests.

It is further ordered that said corporation within.....days from this date, pay the costs herein, taxed at.....dollars.

Sec. 3691. [Effect of payment or deposit.] Upon the payment or deposit, by the corporation, of the amount assessed, as ordered by the court, an absolute estate in fee simple shall be vested in such corporation, unless a lesser estate or interest is asked for in the application, in which case such lesser estate or interest as is so asked for shall be vested. [98 v. 164, § 18; 96 v. 29, § 18.]

Sec. 3692. [Reappropriation to perfect title.] A municipal corporation may again appropriate, in conformity with the provisions of this chapter, any real estate which it has previously, lawfully appropriated, in order to perfect, in it, a title in fee simple absolute to such previously appropriated real estate. [98 v. 164, § 18; 96 v. 29, § 18.]

Sec. 3693. [Costs, how paid.][1] The costs[2] of the inquiry and assessment shall be paid by the corporation, and all other costs taxed as the court directs. At or after the time of making the application, the corporation may offer to confess judgment for an amount to be stated, and the costs then made, in favor of any owner, who in any manner enters appearance, or upon whom or whose agent personal service may be made. If such owner refuses to accept such offer, and on the trial does not recover more, he shall pay all costs accruing after the offer, and an offer so made shall be governed by the provisions of statute for an offer to confess judgment.[3] [96 v. 29, § 19.]

(1) **Old section.**—See old section 2249 R. S. repealed.

(2) **Jury fees** in probate court held not to be a part of the costs in appropriation proceedings. Hill v. Durr, 47 B. 440.

(3) **Offer to confess.**—As to form and sufficiency of offer, see Adams *et al.* v. Phifer *et al.*, 25 O. S. 301; Tipton v. Tipton, 49 O. S. 364; Armstrong v. Spears, 18 O. S. 373; Fike v. France, 12 O. S. 624.

FORM OF OFFER TO CONFESS JUDGMENT.

State of Ohio, ...County.....Court.

The city [*or* village] of .....
Plaintiff.
v.
.....*et al.*
Defendants.
} Offer to confess judgment.

Now comes the city [*or* village] of....., plaintiff corporation herein, and, before the impaneling and swearing of the jury herien (or here insert time when offer is made), offers to allow judgment to be taken in this action in favor of....., a party defendant herein and against said city [*or* village] in the sum of.....dollars and .....cents, as compensation to said.....owner of lot [or parcel] No.....described in the application herein, together with the costs to the time of this offer.

.....
City [*or* village] Solicitor.

Sec. 3694. [Interested parties may give bond.][1] Before or after the passage of an ordinance for opening a street or other public highway, any person may execute his bond[2] payable to the corporation to the acceptance of council, conditioned for the payment of all damage which may be assessed by the jury, and such bond shall be good in law, and if such person pay or deposit according to the order of court, then such street or other highway shall be opened; or the corporation may at its discretion make such payment or deposit, and collect by law the amount of such damages of such person or his sureties.[3] [96 v. 29, § 20.]

(1) **Old section,** 2251 R. S., repealed.

(2) **Form of bond.**—See form used and discussed in Inclined Plane Ry. Co. v. Cincinnati, 23 B. 68.

(3) **Validity of bond** to pay all damages, see Toledo Ry. Co. v. Fostoria, 7 C. C. 293, 299.

Acceptance of bond.—As to what constitutes, see Ry. Co. v. Cincinnati, 23 B. 68.

No repayment.—Section 2251 R. S. (repealed) was held not to contemplate any repayment to interested party giving bond other than that found in the beneficial interest because of the proposed appropriation. Ry. Co. v. Cincinnati, 25 B. 91; (aff'd by Supreme Court, 32 B. 400) and city cannot legally make a contract for such repayment. *Ib.*

Sec. 3695. [Review of proceedings.][1] The municipal corporation, or the owner of property, the value of which has been assessed, as herein provided, may prosecute error as in other civil actions, and error shall lie to the court of appeals from the judgments of the court, except that from the judgments of the probate court error shall lie to the court of common pleas.[2] The trial court, upon proper terms, may suspend the execution of any order, but in all cases where the municipal corporation pays or deposits the compensation assessed, and gives adequate security for any further compensation and costs, the right to take and use the property condemned shall not be affected by such review. [103 v. 405; 100 v. 100, § 21; 96 v. 29, § 21.]

(1) **Old sections.**—See old §§ 2252, 2253, 2254 R. S. repealed.

(2) **Final order.**—An order granting a motion for a new trial on ground that verdict is not sustained by the evidence, made in an appropriation proceeding by a municipality is not an order affecting a substantial right, for the reversal of which a petition in error can be prosecuted. Neuzel v. College Hill, 81 O. S. 571.

Interest.—In a new proceeding after possession taken by condemning corporation and reversal of first proceeding the jury may include in the compensation, interest on the amount due, from the time of taking possession. Ry. Co. v. Koblentz, 21 O. S. 334.

Trial after reversal, see § 11066 G. C. and Cincinnati v. Lohman, 10 C. C. (N. S.) 119; 30 C. C. 92.

When compensation payable.—Owners of land taken for public purposes may waive the right to immediate payment. State v. Irvin, 12 Dec. 330.

Sec. 3696. [Appeal to court of common pleas.][1] If the proceeding is had in the probate court a party interested in the inquiry and assessment may take an appeal to the court of common pleas and thereupon the same proceeding shall be had as if the application had been originally made in that court, except that the corporation shall not be required to give notice of its application, and the inquiry and assessment shall be limited to the case of the party taking the appeal, and the court shall make such order for the payment of the costs accruing upon the appeal as seems equitable and just.[2] [100 v. 100, § 21; 96 v. 30, § 21.]

(1) **Old section.**—See old §§ 2252—2254 R. S. repealed.

(2) **Pending actions.**—The amendment in 100 O. L. 100, abolishing appeals from Insolvency Court to Common Pleas Court

and providing instead for review by petition in error in the Circuit Court, affects actions pending in the Insolvency Court and not carried into judgment before the passage of the amendment. Seither v. Cleveland, 32 C. C. 617; 12 C. C. (N. S.) 378.

Procedure.—Error to circuit court for refusal to dismiss appeal, see Akron v. Miller, 82 O. S. 405; Nichols v. Cleveland, 17 C. C. (N. S.) 503.

The procedure prescribed by § 6408 R. S. governs such appeals. Miller v. Akron, 16 C. C. (N. S.) 554.

Sec. 3697. [Neglect to pay or take possession in six months; attorney's fees.][1] When a municipal corporation makes an appropriation of property, and fails to pay or take possession thereof, within six months[2] after the assessment of compensation shall have been made, its right to make such appropriation on the terms of the assessment so made shall cease and determine, and lands so appropriated shall be relieved from all incumbrance on account of any of the proceedings in such case, and the judgment or order of the court directing such assessment to be paid shall cease to be of any effect, except as to the costs adjudged against the corporation. Upon motion of any defendant, such costs may be retaxed, and a reasonable attorney's fee paid to the attorney of such defendant, which, together with any other proper expenses incurred by the defendant, may be included in the costs.[3] [96 v. 30, § 22.]

(1) **Old section.**—See old § 2260 R. S. (repealed).

(2) **When time begins to run.**—Time commences to run from the entry of the judgment or order directing the assessment to be paid and not from the rendition of the verdict. Ryan v. Hoffman, 26 O. S. 109.

When title passes.—In an appropriation of property by a municipality title does not pass until full compensation has been paid or secured to be paid. Cincinnati v. Jones, 24 C. C. (N. S.) 374.

(3) **Owner's remedies.**—If the corporation takes possession after the expiration of the six months intending to proceed under the appropriation proceedings, the land owner may elect either to sue for the amount awarded him in the appropriation proceedings or have damages assessed at the time possession is taken. But having elected to sue for the amount awarded in the appropriation proceedings he is entitled to interest only from the time possession was taken. Toledo v. Groll, 2 C. C. 199; (aff'd 23 B. 220); Webber v. Toledo, 3 C. C. (N. S.) 319; 23 C. C. 237.

Where city appropriates and takes possession of property, but does not pay the compensation the owner

cannot maintain ejectment but must sue for compensation. Weber v. Toledo, 3 C. C. (N. S.) 319; 23 C. C. 237.

A corporation cannot be compelled by mandamus to take possession of the land and pay the compensation on its refusal to do so. State v. R. R. Co., 17 O. S. 103.

Waiver by acceptance of deposit.—The land owner is not bound to accept the compensation, deposited after the six months, but if he does so he waives strict compliance with the statute. Cincinnati v. Hosea, 19 C. C. 744, (affirmed 66 O. S. 687). And in such case the owner cannot demand interest on the fund deposited. *Ib.*

Land owner may waive his rights to have the property after the expiration of the six months and by accepting the compensation, ratify the proceedings. Ryan v. Hoffman, 26 O. S. 109.

When owner's right barred.—The right of the owner whose property has been appropriated and, after six months, taken possession of, but not paid for, is not barred by the statute of limitations in less than 21 years. Section 11222 G. C.

The six years' statute, is not applicable. Webber v. Toledo, 3 C. C. (N. S.) 319; 23 C. C. 237.

Who may sue.—Conveyance by the land owner of property condemned, carries with it the right of action for taking it after the expiration of the six months. Clarke v. Cleveland, 9 C. C. 118.

The devisee of a testator who owned part of the property condemned, and to whom the remainder was conveyed after the appropriation, but before possession taken, has the right to maintain an action for amount assessed in the appropriation proceedings where the corporation has failed to take possession within the six months. Webber v. Toledo, 3 C. C. (N. S.) 319; 23 C. C. 237.

Refusal by corporation before six months expires.—A municipal corporation may waive its right to take property condemned, before the expiration of the six months and in such case if the waiver is determined to have been made the corporation must pay attorney fees, etc., as required in case of failure to take after the six months. Andrews v. Hyde Park, 20 C. C. 278.

A motion to retax costs in such case does not come within § 11634 providing that "the motion to vacate a judgment because of its rendition before the action stood regularly for trial can be made only in the first three days of the succeeding term." *Ib.*

Dismissal of proceedings.—Proceedings to appropriate by a municipal corporation may be dismissed by the city solicitor with or without the direction of the legislative board of the city, but in case of such dismissal, the city must pay counsel fees and other expenses deemed just by the court, to the property owners. Cincinnati v. Thrall, 6 N. P. 158.

Proceeding under invalid law.—Where the municipal corporation has sought to take property under a law, declared unconstitutional and because the unconstitutionality has been prevented from taking the property, it is not liable to pay counsel fees, etc., as in case where it fails to take possession within six months after a valid appropriation. Hyde Park v. Grant, 6 N. P. 471;

(in Supreme Court, 47 B., 831; 67 O. S. 166).

But the claim for attorney's fees, etc., cannot be defeated on the ground that the appropriating ordinance was invalid. Andrews v. Hyde Park, 20 C. C. 278.

No bar to new proceedings.—The failure to pay and take possession within the six months is no bar to a new proceeding to appropriate the same property by the same corporation, after the expiration of the six months. Trustees of Southern Ry. v. Haas, 42 O. S. 239.

Character of taking after six months.—Where a city takes possession by paying compensation *after* the six months, it gets title by appropriation and not by purchase. Ryan v. Hoffman, 26 O. S. 109, 122.

Section applies to damages for change of grade.—Former § 2260 R. S., to which the present section corresponds, was held applicable to application to assess damages to abutting property owners for change of grade or other improvements. Toledo v. Jacobson, 11 C. C. 220 (aff'd, 38 B. 248).

Taxes; deducted from compensation.—A lien for taxes is not divested by condemnation proceedings, and taxes which have become a lien on the property appropriated on the date the title passes may be deducted from the compensation awarded. Cincinnati v. Jones, 24 C. C. (N. S.) 374.

CHAPTER 2.

SALE OR LEASE OF PROPERTY.

Sec. 3698. [Lease or sale of corporate property.][1] Municipal corporations shall have special power to sell or lease real estate or to sell personal property belonging to the corporation, when such real estate or personal property is not needed for any municipal purpose. Such power shall be exercised in the manner provided in this chapter.[2] [96 v. 26, § 9; 96 v. 30, § 23.]

(1) **Old sections.**—These provisions relating to the sale or lease of property correspond to chapter 16, division 8, title 12, R. S. §§ 2673 to 2675-10 R. S. inc. repealed.

Other Code provisions.—Sec. 3631 gives municipalities the right to sell or lease real estate. But though the power is given in general terms there, its exercise would be limited by the special provisions of this and subsequent sections. See Kerlin Bros. v. Toledo, 20 C. C. 603.

As to passage of ordinance for sale or lease of property, see § 4224, *post*.

(2) **Scope of power.**—*Generally.*—As a general rule, a corporation, if not restrained by its charter may dispose of any property which it has a right to acquire. Newark v. Elliott, 5 O. S. 114; Reynolds v. Stark County, 5 O. 204.

Land under a bridge used by the city for support of the bridge and not used as a street, may be leased by the city for any purpose not inconsistent with its use as a support for the bridge. Ricard Boiler & Engine Co. v. Toledo, 25 C. C. 64.

There is no express or implied power in municipality to lease the use of the city poles for wires of private company. Columbus v. Public Service Co., 17 Dec. 291; 4 N. P. (N. S.) 329.

Sale on time.—Authority to sell on terms satisfactory to a municipal board, gives power to sell on time. Cincinnati v. Dexter, 55 O. S. 93; Reynolds v. Stark County, 5 O. 204.

Sale of gas plant.—Sale of its gas plant is within the power of a municipality under a provision authorizing it to sell real or personal property not needed for its use. Thompson v. Nemeyer, 59 O. S. 486.

Property acquired for specific purposes.—Where property is dedicated to the municipality for a specific purpose, it cannot be sold as against the reversioner. Board v. Edson, 18 O. S. 221.

When land is granted to a city upon a valuable consideration to be used for streets and other purposes, the title will not, in the absence of an express stipulation

to that end, revest in the grantor because the land is subsequently used for street and railroad purposes. The Cleveland Terminal & Valley Railroad Co. *et al.* v. The State *ex rel.*, 85 O. S. 251.

Where land is given to a municipality for corporate purposes, or where the land is acquired by purchase, the municipality may dispose of it as individuals might. Reynolds v. Stark County, 5 O. 204; Le Clerq v. Gallipolis, 7 O. (pt. 1) 218; but where the corporation takes as a trustee, to hold for prescribed uses, the *cestui que trust* retains a vested estate, the enjoyment of which will be protected in equity. Le Clerq v. Gallipolis, 7 O. (pt. 1) 218.

Where municipality appropriates property for park purposes, it cannot sell or lease such property for wharf purposes; the power to sell or lease does not give power to dispose of any greater or other interest than the municipality holds. White v. Cleveland, 21 Dec. 311. But see § 3699-1 *post.*

Conveyance by city.—*Effect.*—A deed by a municipal corporation for the conveyance of property, passes the legal title to the purchaser, although the consideration expressed is far below the value of the property or merely nominal. Newton v. Mahoning Co., 26 O. S. 618.

As to when court will interfere because of insufficiency of price, see Kerlin Bros. v. Toledo, 20 C. C. 603.

When the contract whereby the grant is conveyed contains the elements of a valuable consideration as where the grantee surrendered the right to operate a ferry between certain points, in consideration of wharf and boat landing privileges, equity cannot be invoked to amend the contract or revoke the grant without an offer to restore the rights parted with when the contract was executed. Whether the grant amounted to an easement or a mere license, it is irrevocable when executed. Cincinnati v. Bridge Co., 20 C. C. 396.

No warranty as to title or quantity.—City officers can not bind the municipality as to title or quantity of property offered for sale, and a purchaser of property so offered can not maintain an action for the value of property not delivered. Kerlin Bros. v. Toledo, 19 C. C. (N. S.) 120.

Form.—As to the manner in which a municipal corporation should execute a deed, see Tiffin v. Shawhan, 43 O. S. 178.

Sec. 3699. [Lease or sale of real estate; procedure.][1] No contract[2] for the sale or lease of real estate[3] shall be made unless authorized by an ordinance, approved by the votes of two-thirds[4] of all the members elected to the council, and by the board or officer[5] having supervision or management of such real estate. When such contract is so authorized, it shall be made in writing[6] by the board or officer having such supervision or management and only with the highest bidder,[7] after advertisement once a week for five consecutive weeks[8] in a

newspaper of general circulation within the corporation.[9] Such board or officer may reject any or all bids and re-advertise until all such real estate is sold or leased. [98 v. 165, § 24; 96 v. 30, § 24.]

(1) **Old sections.**—Compare old sections 2673 and 2673*a* R S. (repealed).

(2) **Strict construction.**—The formalities required by the statutes for the sale of property of a city must be strictly complied with. Kerlin Bros. v. Toledo, 20 C. C. 603.

No estoppel against municipality.—A contract by a city which is void because bids were not first advertised for, imposes no liability on the city. Wellston v. Morgan, 65 O. S. 219.

No estoppel from the acts of the city officers can arise to cure an omission to advertise. Lancaster v. Miller, 58 O. S. 558.

Bids.—Construction.—A bid in response to an advertisement for sale of natural gas plant, making one offer for the part of the property outside the city, another offer for the part within the city and a third offer for both taken together, constitutes in reality three bids, and a sale of the outside property based on the first offer is not invalidated by a condition attached to the last offer. Kerlin Bros. v. Toledo, 20 C. C. 603.

Insufficiency of price.—To authorize a court to interfere with the action of a city council in a sale of the property of the city on the ground of the insufficiency of the price, the price received must have been so much less than would probably be obtained by again offering the property that it might be said by all men of fair judgment that the acceptance of the bid amounted to a reckless and improvident act. Kerlin Bros. v. Toledo, 20 C. C. 603.

Auctioneer.—Sale at auction is authorized by this section, but employment of an auctioneer is not authorized. State, ex rel. v. Carrel, 103 O. S. 56.

Bidding in general.—See notes under §§ 3833 and 4328, *post.*

(3) **Real estate.**—As to what property comes within the term "real estate" as used in a section such as this, see Kerlin Bros. v. Toledo, 20 C. C. 603. The term is broader as here used than it is under the general definition of the law. *Ib.*

Council must proceed under this section where part of the property sold is real estate, and it is sold as an entirety. See Kerlin Bros v. Toledo, 8 N. P. 62.

(4) **Two-thirds vote.**—As to what would satisfy the requirements of the statute, relative to "votes of two-thirds of all members elected to Council," see State *ex rel.* v. Orr, 61 O. S. 384; Guernsey Co. v. Cambridge, 7 C. C. 72.

(5) **Concurrence of board.**—Under the present statute, the sale of city property cannot be made by council, without the concurrence of the board or officer having the property in charge. As to this matter under former statutes, see Kerlin Bros. v. Toledo, 20 C. C. 603; Newton v. Mahoning Co., 26 O. S. 618.

(6) **Manner of executing** a conveyance by a municipal corporation. See Tiffin v. Shawhan, 43 O. S. 178; Young v. Mahoning Co., 7 O. F. D. 324.

(7) **Highest Bidder.**—Under this wording of the law, the contract for sale must be made with the highest bidder, (see Beaver v. Blind Asylum, 19 O. S. 97; Boren v. Darke County, 21 O. S. 311), unless the board exercise its power to reject bids. As to enforcement of right of bidder by mandamus, see same cases.

(8) **Provisions as to advertising** for bids are designed for the protection of the tax payer and are peremptory. Uppington v. Oviatt, 24 O. S. 232.

And advertisement for less than the statutory period would render the sale void. McCloud v. Columbus, 54 O. S. 439.

As to what length of time of publication is necessary to fulfill the requirement "once a week for five consecutive weeks" see Early v. Doe, 16 How. (U. S.) 610; Fenner v. Cincinnati, 8 N. P. 342; Gilfillan v. Koke, 1 W. L. M 704; Harmon v. Whittemore, 1 B. 109.

(9) **Newspaper.**—The requirement of publication in a newspaper of general circulation does not forbid additional publications in other papers. This is not a squandering of funds. Wasem v. Cincinnati, 2 C. S. C. R. 84.

Publication in a newspaper means publication in the English language, in the absence of provisions to the contrary. Cincinnati v. Bickett, 26 O. S. 49. The publication is legal although the newspaper is published only on Sunday. Hastings v. Columbus, 42 O. S. 585.

ORDER OF PROCEDURE IN SELLING OR LEASING REAL PROPERTY OF MUNICIPALITY.

1. *An ordinance by council,* two-thirds of all members concurring, authorizing the sale or lease.

2. *Approval of this ordinance* by proper board or officer, and by the mayor.

3. *Advertisement,* inviting bids for the purchase or lease of the property.

(Approval of sale by board of control in cities, where contract in department of public service or department of public safety, see § 4403.)

4. *Deed or lease* conveying the property sold or leased.

Note.—The steps contemplated to be taken under § 3699 above, are not definitely set out. It seems clear that there are two essential acts required to be taken to consummate the sale of property viz. first, the legislative determination to sell; and second, the carrying out of that determination by the executive or administrative department. Council, with the approval of the board or officer having charge of the property to be sold, finding the property not needed for municipal purposes, authorizes the contract for its sale to be made with the highest bidder upon advertisement. The passage of this ordinance completes the legislative step in the sale. The advertising, or rejection of bids and readvertising, and the execution of the deed, are left entirely to the board or officer having charge of the property, and

council can not control the exercise of these powers, unless, of course, council should repeal its ordinance at some time before the sale authorized to be made is consummated. The steps set out here would seem to satisfy all the requirements of the section, and the forms which follow doubtless would be a sufficient compliance with it. It will be noticed that in the form of deed given provision is made for the signature of the mayor and the affixing of the corporate seal of the municipality by that officer. The section of the code above does not explicitly require either the seal or the mayor's participation in the sale, but since § 4550, makes the mayor the custodian of the corporate seal, and since the proper method of conveying real estate by a municipal corporation is over its corporate seal, the forms here given provide for such signature and seal. (See Dillon on Municipal Corporations, § 581; City of Tiffin v. Shawhan, 43 O. S. 178, 185; Newton *et al.* vs. Commrs., 26 O. S. 618, 622.) It will be noticed also that the form of deed given below does not contain a general warranty. Municipality can not be bound by a warranty. Kerlin Bros. v. Toledo, 19 C. C. (N. S.) 120.

FORM OF ORDINANCE FOR SALE OF REAL ESTATE BY MUNICIPALITY.

An Ordinance No.....

Authorizing the sale of (here insert general description of property) not needed for any municipal purpose.

Be it ordained by the council of the city [*or* village] of....., State of Ohio, two-thirds of all members elected thereto concurring,

Sec. 1. That the following described real estate belonging to the city [*or* village] of.....is not needed for any municipal purpose, to-wit:

(Here insert legal description of property to be sold.)

Sec. 2. That the..... (naming the board or officer having the supervision or management of the property to be sold) be and hereby is authorized to sell said real estate to the highest bidder according to law, upon the following terms: (Here insert terms of payment, whether cash or otherwise) and the said.....(naming the board or officer) and the mayor of the city [*or* village] are hereby authorized to convey said real estate by deed to the highest bidder therefor according to law.

Passed....., 19....

.....
President of Council.

Attest:

.....
Clerk.

(This ordinance must be approved by the board or officer having the supervision or management of the real estate to be sold and must also be presented to the mayor for his approval as other ordinances. As to passage under suspension of rules see § 4224).

FORM OF ADVERTISEMENT FOR BIDS.

LEGAL NOTICE.

Notice is hereby given that sealed bids will be received at the office of the..... (here insert name of the board or officer having supervision or management of the real estate to be sold) until 12 o'clock noon on the.....day of....., 19.... (this day should be not less than five full weeks from the first advertisement) for the purchase of the following described real estate: (Here insert legal description of property to be sold.)

Said property is to be sold and conveyed to the highest bidder (here insert the words "by general warranty deed," if so specified in the ordinance) upon the following terms: (Here insert terms of payment specified in the ordinance.)

The right is reserved to reject any and all bids.

.....

(To be signed by the officer, or by the president of the board, having supervision or management of the real estate to be sold.)

.....

Clerk of Board [or officer].

FORM OF DEED BY MUNICIPAL CORPORATION.

KNOW ALL MEN BY THESE PRESENTS, That whereas, on the..... day of....., 19...., the council of the city [*or* village] of ....., State of Ohio, passed a certain ordinance, two-thirds of all members elected thereto concurring, authorizing the sale of the real estate hereinafter described, and,

Whereas, pursuant to said ordinance advertisement was had in a newspaper of general circulation in said city [*or* village] for five consecutive weeks, inviting sealed bids for said real estate, and,

Whereas, at the time fixed in said advertisement for the receipt of said bids, ...presented his certain bid for said real estate, which was the highest bid therefor, and which said bid has been duly accepted,

Now, therefore, pursuant to the premises, the said city [*or* village] of ....., State of Ohio, by....., its mayor, and....., its..... (here insert title of officer or of the president of the board having charge of the property conveyed), in consideration of..... .....dollars to it paid by....., the receipt of which is hereby acknowledged, does hereby grant, bargain, sell and convey unto the said ....., his heirs and assigns forever, the following described real estate, situate in the city [*or* village] of..... , in the county of ....., and State of Ohio, to-wit: (Here insert legal description of

real estate conveyed), with all the privileges and appurtenances thereunto belonging, to have and to hold the same to the grantee, his heirs and assigns forever, as fully and completely as said city [*or* village] acting by its officers as aforesaid, by virtue of the proceedings hereinbefore set forth, may, can or should convey the same.

In witness whereof, the said city [*or* village] of ....., by its said officers, has hereunto caused to be affixed its name and corporate seal, and the names of its said officers, and the attestation of the auditor of said city [*or* village clerk], this.....day of.....19....

(Seal of city or village.)

The city [*or* village] of.....,

Attest: by....., Mayor.

....., ...

Auditor or Clerk. (Officer or President of Board.)

Signed, sealed, acknowledged and delivered in presence of:

.....

.....

(Witnesses.)

State of Ohio, County of.....ss.:

On this.....day of....., 19...., before me, a.....in and for said county, came....., Mayor of the city [*or* village] of..... ....., State of Ohio, and....., the..... (here insert title of officer or of the President of the Board having charge of the real estate convey), and severally acknowledged the execution of the foregoing deed to be their voluntary act on behalf of the city [or village], and the corporate act and deed of said city [*or* village]. Also came.....auditor [or clerk] of said city [*or* village] and acknowledged the attestation of the foregoing deed to be his voluntary act and deed as such auditor [or clerk].

In testimony whereof, I have hereunto subscribed my name and affixed my official seal the day and year last aforesaid.

.....

(Title of officer taking acknowledgment.)

(The forms for lease of property by the municipality may be adapted from the above.)

Sec. 3699-a. [Declaration of state's rights to waters of Lake Erie and soil under same.] It is hereby declared that the waters of Lake Erie within the boundaries of the state together with the soil beneath and their contents do now and have always, since the organization of the state of Ohio, belonged to the state of Ohio as proprietor in trust for the people of the state of Ohio, subject to the powers of the United

States government, the public rights of navigation and fishery and further subject only to the right of littoral owners while said waters remain in their natural state to make reasonable use of the waters in front of or flowing past their lands, and the rights and liabilities of littoral owners while said waters remain in their natural state of accretion, erosion and avulsion. Any artificial encroachments by public or private littoral owners, whether in the form of wharves, piers, fills or otherwise beyond the natural shore line of said waters not expressly authorized by the general assembly, acting within its powers, shall not be considered as having prejudiced the rights of the public in such domain. Nothing herein contained shall be held to limit the right of the state to control, improve or place aids to navigation in the other navigable waters of the state or the territory formerly covered thereby. [107 v. 587.]

Sec. 3699-1. [Municipalities authorized to use, lease and control waters and soil of Lake Erie, within corporate limits, extending two miles out from natural shore; powers, duties and limitations.] All municipal corporations within the corporate limits of which there is or may hereafter be included part of the shore of the waters of Lake Erie shall have the power, in aid of navigation and water commerce, to construct, maintain, use and operate, or lease the right to construct, maintain, use and operate, piers, docks, wharves and connecting ways, places, tracks and other water terminal improvements with buildings and appurtenances necessary or incidental to such use, on any land belonging to the corporation held under title permitting such use and also over and on any submerged or artificially filled land or lands made by accretion resulting from artificial encroachments, title to which is in the state of Ohio, within the territory covered or formerly covered by the waters of Lake Erie in front of littoral land within the limits of said corporation whether said littoral land is privately owned or not. Any such municipal corporation shall also have power and authority to by ordinance subject to superior federal legislation, establish harbor lines and other regulations for said

territory and to prohibit the placing, maintaining or causing or permitting to be placed therein any unlawful encroachments on said territory. The territory to which the powers hereby granted shall apply shall be limited to that within the existing or future corporate limits of the corporation and extending into Lake Erie to the distance of two miles from the natural shore line; and for all purposes of government and exercise of said powers the corporate limits of any such corporation shall be held to extend out, in, over and under said water and land made or that may be made within said territory. These provisions, however, shall not have the effect of limiting the now existing boundaries of any municipal corporation and in case where two municipal corporations have upland territory fronting on said waters and there should be a conflict on account of the curve of the shore line or otherwise as to said two mile boundary the boundaries of each corporation shall be a line midway between the shore line of each and not exceeding two miles from the shore line of either. Provided, however, that all powers hereby granted shall be exercised subject to the powers of the United States government and the public rights of navigation and fishery in any such territory and all mineral rights or other natural resources existing in the soil or waters in said territory, whether now covered by water or not, are reserved to the state of Ohio and its citizens. [107 v. 587; 101 v. 236.]

Sec. 3699-2. [Limitations of rights of municipality respecting front improved by private owner.] When any part of the territory mentioned in Sec. 3699-1, title to which is in the state of Ohio, is in front of privately owned upland and has been filled in or improved by said private upland owner or his predecessor in title to said upland, then a municipal corporation shall not have the power to take possession of or lease such part of the public domain so filled or improved, without the consent of said upland owner, until said municipal corporation has complied with the laws governing the appropriation of private property for municipal purposes, except that in any such proceeding to appropriate there shall be no compensation allowed to the upland owner for the site of such fill or improvements. [107 v. 587, 588.]

Sec. 3699-3. [Execution of leases; procedure.] Any lease by a municipal corporation, made under the provision of Section 3699-1, for a term of three years or more, shall be made by the passage of an ordinance describing the premises leased and locating by metes and bounds the then existing natural shore line or the last natural shore line, if artificially changed, and fixing the terms and conditions of the lease, and the acceptance thereof in writing by the lessee. But the same shall have no validity unless a true copy of such ordinance and said acceptance certified as correct by the clerk of the council of said municipality is recorded in the office of the recorder of the county where the premises are located. [107 v. 587, 588.]

Sec. 3699-4. [Publication of notice before leasing; bids.] Before a municipal corporation makes a lease for a term of three years or more of any territory mentioned in section 3699-1, title to which is in the state of Ohio, said municipal corporation shall, by resolution of its council, cause public notice to be given in the same manner that the ordinances of said council are published, that on a day named in said notice bids will be received by the clerk of the council for the leasing of the premises, to be described in said notice. Said notice shall specify whether any rental shall be required or name a fixed rental to all bidders or may leave the amount of rental a matter of competition between bidders and shall require all bidders to specify the use they propose to make of the premises described in the notice. Said bids shall be opened only at a regular session of said council and a lease shall be given to the bidder whose offer, in the discretion of the council, is the best considering the amount of rental offered, if made competitive, as well as whose use of the premises under the lease will best advance the water commerce of the port. [107 v. 587, 588.]

Sec. 3699-5. [Control and management of territory.] The council of any municipal corporation may, when not otherwise prescribed by the charter law of the corporation, provide by ordinance for the manner and by what executive officials the ordinances and laws governing the administration

of the territory described in section 3699-1 shall be administered and for the management of said territory and improvements placed thereon. [107 v. 587, 589.]

Sec. 3699-6. [Application of rentals.] All rentals or charges made or collected by a municipal corporation for the use of any part of the territory described in section 3699-1, title to which is in the state of Ohio, or for improvements thereon, shall be used only to maintain, improve or add to improvements in aid of navigation and water commerce. [107 v. 587, 589.]

Sec. 3699-7. [Law shall have no retroactive effect.] Nothing contained in section 3699-1 to section 3699-6, all inclusive, shall be held to have a retroactive effect to validate or add to the effect of any previous act of a municipal corporation concerning such or like territory or public rights, nor shall the provisions of said sections have any effect, except as expressly provided in this act, to give any littoral or riparian owner any rights in any territory covered or formerly covered by the waters of Lake Erie or the other navigable waters of the state. [107 v. 587, 589.]

Sec. 3699-8. [All state rights to certain submerged and filled lands, excepted from provisions of this act.] All right, title and interest of the state of Ohio in and to all submerged and filled lands in the harbor of the city of Cleveland, described in section 3, section 4, section 5, section 7 and section 9 in an ordinance of the city of Cleveland, designated Ordinance No. 37904-A, passed September 13th, 1915, which authorized the mayor of the city of Cleveland to enter into a contract with certain railroad companies for the purpose of securing a union passenger station for the city of Cleveland, together with all other submerged and filled lands within a tract which is bounded westerly by the east bank of Cuyahoga river as it now runs and the east government pier, northerly by the government harbor line as it is now or may hereafter be established, and easterly by a line extended northerly and at right angles or normal to the natural shore line of Lake Erie from a point, on said natural shore line,

one hundred and fifty (150) feet easterly from the easterly line of East 26th street or said easterly line produced northerly, is excepted from the provisions of sections 3699-1 to 3699-7, inclusive, of this act. Nothing herein shall prevent the general assembly from conveying the right, title and interest of the state in any lands described in any agreement now made between a municipality and any railroad company or companies for the purpose of securing railroad terminals and stations, and which land may be a part of the lands described in section one hereof; in any such event the conveyance shall be made in conformity with the provisions of such agreement. [107 v. 587, 589.]

Sec. 3699-9. [Section or part held unconstitutional shall not affect other sections or parts.] Should any of sections 3699-1 to 3699-8, inclusive, or any provision of said sections be decided by the courts to be unconstitutional or invalid the same shall not affect the validity of said sections as a whole or any part thereof other than the part so decided to be unconstitutional or invalid. [107 v. 587, 590.]

Sec. 3700. [Procedure when for passenger railroad station.] When a municipal corporation owns real estate suitable for the location of a passenger railroad station and council by ordinance declares that it is necessary that such land be devoted to such use, the municipality may sell, lease, or exchange such land to such railroad or railroads for such purpose in the manner provided in the next section. [98 v. 165, § 24.]

Sec. 3701. [What ordinance shall contain; election.] An ordinance authorizing the mayor of the municipality to deed or lease the land shall be passed. In the ordinance council shall fix by metes and bounds the amount of land to be sold, leased or exchanged, the quantity of interest sold, leased or exchanged, and the consideration to be paid or exchanged therefor by such railroad or railroads, and in the ordinance shall call thereon a special election, to be held upon a day fixed by such ordinance, not less than thirty days from the passage thereof. [98 v. 165, § 24.]

Sec. 3702. [How such election conducted.] A majority of all the votes cast on such proposition shall be necessary to its ratification. When so ratified, the ordinance shall be effective, and the mayor shall proceed to execute a deed of conveyance or lease of the property as therein provided. In holding such special election, the provisions of law for submission of the question of issuing bonds in excess of four per cent of the taxable property of the municipality, shall apply. [98 v. 165, § 24.]

Sec. 3703. [Sale of personal property.] Personal property not needed for municipal purposes, the estimated value of which is less than five hundred dollars, may be sold by the board or officer having supervision or management thereof. If the estimated value of such property exceeds five hundred dollars, it shall be sold only in the manner herein provided for the sale or lease of real estate.[1] [96 v. 30, § 25.]

(1) **Forms.**—See notes and forms under § 3699 *ante*.

Sale by piecemeal.—As to whether division into parts may be made of personal property to be sold at one time, so that the estimated value of the part sold will be less than $500, see Lancaster v. Miller, 58 O. S. 558, 573.

Authorization sales of personal property of less value than $500, by Board or Officer in charge thereof, must first be authorized by council. Op. Atty. Gen. (1912) p. 190.

Sec. 3704. [Disposition of money arising from sale or lease of corporate property.][1] Money arising from the sale or lease of real estate, or a public building or from the sale of personal property, belonging to the corporation, shall be deposited in the treasury in the particular fund by which such property was acquired, or is maintained, and if there be no such fund it shall be deposited in the general fund. If the property was acquired by an issue of bonds the whole or a part of which issue is still outstanding, unpaid and unprovided for, such money, after deducting therefrom the cost of maintenance and administration of the property, shall on warrant of the city auditor be transferred to the trustees of the sinking fund to be applied in the payment of the principal of the bond issue. [97 v. 516, § 26.]

(1) Money received for cemetery purposes—how held and disposed of. Op. Atty. Gen. (1918) p. 219.

Sale of property; disposition of proceeds. See Op. Atty. Gen. (1923) No. 199.

Sec. 3705. [Sale of refuse.] Refuse, street scrapings, or ashes not necessary for the improvement of municipal property, and other personal property in charge of the street cleaning department no longer necessary for the purposes of such department, shall be sold in the manner herein provided for the sale of other personal property, by the board or officer having the supervision or management of such department. [98 v. 43, § 25a.]

Sec. 3706. [Disposition of money arising therefrom.] Money arising from a sale under the next preceding section shall be deposited in the treasury in the street cleaning fund and shall be immediately available, in addition to the appropriations by council, for the current expenses of the street cleaning department, and may be withdrawn from the treasury upon the warrant of the city auditor or clerk for such purpose. Such money shall not be considered a source of revenue subject to appropriation by council, and may be expended as herein provided without having been appropriated by council. [98 v. 43, § 25a.]

Sec. 3707. [Exchange of lots for school purposes.] When any lot or lots of land lying within the limits of a municipality have been dedicated, given or granted thereto, and set apart for the use and support of schools, on application of the mayor or council thereof, the court of common pleas may authorize an exchange of such lot or lots for such other lot or lots within the limits of such municipality as the interest of the schools therein require. All lots so taken in exchange, shall be held for the same purposes and subject to the same conditions as the original lots. [70 v. 193, § 1; Bates § 2675-1.]

Sec. 3708. [Petition, what shall contain.] Each application for such exchange of lots shall be by petition verified by the mayor. The board of education of the municipality and such

other persons as the court orders shall be made party defendants. The petition shall set forth an accurate description of each lot proposed to be given or taken in exchange, the specific circumstances which render the exchange necessary, and a prayer for such order as may be required. [70 v. 193, § 2; Bates § 2675-2.]

Sec. 3709. [Notice of petition to be published.] Notice of the filing, pendency, and prayer of the petition shall be published for four consecutive weeks, prior to the day of hearing, in a newspaper printed in such municipality, or if there is none, in a newspaper printed in the county, and of general circulation in such municipality. [70 v. 193, § 3; Bates § 2675-3.]

Sec. 3710. [Hearing and order.] If upon the hearing of the petition it appears to the court that notice of the filing, pendency, and prayer thereof has been so given, and that such exchange of lots is necessary and will promote the interests of such schools, and that such an order would not be inconsistent with the terms and conditions of the original grant or devise, the court shall authorize the exchange to be made, and order the mayor of the municipality to execute and deliver such deed or deeds in fee simple, as are necessary to effect the exchange. [70 v. 193, § 4; Bates § 2675-4.]

Sec. 3711. [Transfer of public property to library trustees.] A municipal corporation may transfer, lease, or permit the use of, by ordinance duly passed, any property, real or personal, acquired or suitable for library purposes, to the trustees of any public library for the school district within which such municipal corporation is situated, or it may lease or permit the use of such property to any library association providing free library service to the citizens of the municipality, upon such lawful terms and conditions as are agreed to between the municipal corporation and trustees.[1] [110 v. 407, 408; 97 v. 133, § 1; Bates § 1536-124a.]

(1) **Condition as to type of building.**—A transfer of real estate by a municipality upon condition that the library trustees will erect a building of certain type and clear certain adjacent land for park purposes and providing for a reversion of the

property to the municipality when it is no longer used for library purposes was upheld in Cleveland v. Library Board, 94 O. S. 311.

Sec. 3712. [Trustees may accept such or other suitable property.] The trustees of a public library in such district may receive and accept such transfer, and receive and accept from any other source or acquire in any other manner, any property, real or personal, for library purposes, and use and apply it for such purposes, and enter into any contract relating thereto. [97 v. 133, § 2; Bates § 1536-124b.]

Sec. 3713. [Council may permit use of public buildings.] The councils of municipal corporations may permit the use of public buildings under their control, upon such terms and conditions as they by ordinance provide. [97 v. 278, § 1; Bates § 1536-130a.]

CHAPTER 3.

STREETS AND PUBLIC GROUNDS.

CONTROL.

Sec. 3714. [Council to have care, supervision and control.][1] Municipal corporations shall have special power to regulate the use of the streets, to be exercised in the manner provided by law. The council shall have the care, supervision and control of public highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts, and viaducts, within the corporation, and shall cause them to be kept open, in repair, and free from nuisance.[2] [96 v. 26, § 9; 96 v. 31, § 28.]

(1) **Old section** 2640 R. S. (repealed).

Other provisions relating to streets not contained in Title XII, will be found under heading *Streets and Public Grounds*, in Part II.

(2) **Scope of words used.**—*Highway* is a generic name and means a thoroughfare open to all people. Sullivan v. Columbus, 12 Dec. 650.

Parks.—"Public grounds" includes parks and same obligation is imposed on the city with reference to parks as with reference to streets. Harff v. Cincinnati, 11 N. P. (N. S.) 41; Columbus v. Biederman, 16 N. P. (N. S.) 140.

Defective street in public park.—Liability of city for injuries from defects in a street in a public park not under control of council, see Krause v. Springfield, 18 N. P. (N. S.) 129.

Roads in municipal limits.—Public highways over which council has control, would include part of pike within limits of municipality, although county commissioners may also have power to improve this part. Commissioners v. State, 50 O. S. 653, 658; and the commissioners would have this power under the two-mile-pike act. Lewis v. Laylin, 46 O. S. 663; see also State v. Craig, 22 C. C. 135; State ex rel. v. Lewis, 13 Dec. 188.

These terms would also include a public roadway connecting with streets of a city, coming within limits of a municipality as part of territory annexed, if it continues to be used as a street, although never accepted and confirmed by ordinance. Steubenville v. King, 23 O. S. 610; and generally roads brought within a city by annexation would be included. R. R. Co. v. Defiance, 10 C. C. 27, 32; 52 O.

S. 262; Slusser v. Sidney, 11 N. P. (N. S.) 297. See also Burrows v. Cosler, 33 O. S. 567.

Bridges, etc., constructed by county.—"Bridges, viaducts, etc.," would include a bridge constructed by county commissioners within limits of a municipality. Newark v. McDowell, 16 C. C. 556; State ex rel. v. C. and H. St. Ry. Co., 19 C. C. 79, 90.

And this is true, even though the municipality was not entitled to receive any part of the bridge fund levied therein. Piqua v. Geist, 59 O. S. 163; and though the county had no authority to construct the bridge. Newark v. Jones, 16 C. C. 563.

They would include a viaduct constructed by county commissioners within a city, under statute authorizing such construction. State ex rel. v. Cincinnati, 4 N. P. 313.

As to the power of county commissioners over bridges within the limits of municipalities, see Com'rs v. Ry. Co., 45 O. S. 401; State v. Com'r, 49 O. S. 301, 304; Jones v. Franklin Co., 25 C. C. 510.

Where a bridge is built by a railway company under a contract with county commissioners, which contract provided for the maintenance of the bridge by the company under the direction of "the county engineer and county commissioners," and the territory embracing the bridge was subsequently annexed to a municipality, it was held in Railway & Terminal Co. v. Cincinnati, 94 O. S. 269, that the municipality, while not free from all duty with respect to the condition of such bridge, has no right to recover under the contract for expenditures made by it in repairs after notice to the company by the municipal officers.

This section is not in conflict with §§ 2421 and 7557. Cincinnati v. Railway, 18 N. P. (N. S.) 553 (aff'd by Sup. Ct. without report.)

See also §§ 2421 and 7557 under *Streets and Public Grounds*, in Part II.

The general provision of old § 2640 R. S., was held to be qualified by § 860 R. S. (now 2421 G. C.) which required county commissioners to keep in repair bridges except those wholly within the municipality where such municipality had the right to receive a portion of the bridge taxes levied therein and also by § 4938 R. S. (now 7557 G. C.) which imposed upon the commissioners the repair of bridges in cities not having a right to receive a part of the bridge fund levied therein. Dayton v. Harmon, 12 C. D. 574. See also State ex rel. v. Carlisle, 15 Dec. 165; 2 N. P. (N. S.) 627.

Street defined.—A street over which council has control, includes the surface with so much of what underlies it as is requisite for all street uses known to the period in which the street is occupied, not merely for travel, but for sewerage, gas pipes, etc., within whatever depth is necessary and proper, and as much of the space above the street as is necessary for the proper use of the street as a highway. Henry v. Cincinnati, 25 C. C. 178; 1 C. C. (N. S.) 289.

Land under city bridge used by the city as support for abutments of the bridge, which the city had not invited the public to use as a highway, and which was not adapted for

that purpose, is in no sense a public street, and city may lease such property for any purpose not inconsistent with its use as a support for the bridge. Ricard Boiler & Engine Co. v. Toledo, 25 C. C. 64.

Character of municipality's title.—The fee of the streets is in the municipality, in trust for street purposes. St. Ry. v. Cumminsville, 14 O. S. 523; Columbus v. Agler, 44 O. S. 485; Callen v. Elec. Light Co., 66 O. S. 166; H. G. & C. Traction Co. v. Parrish, 67 O. S. 181, 190; Butler v. Cincinnati, 2 C. C. (N. S.) 377; Wenzel v. St. Ry. Co., 14 N. P. 126; but see Henry v. Cincinnati, 1 C. C. (N. S.) 289; 25 C. C. 178. And this is true, although the street became such by annexation of territory embracing a county road. Akron & C. F. Rapid Transit Co. v. Erie Ry., 28 C. C. 36; 7 C. C. (N. S.) 199. But see Reese v. Cleveland, 18 Dec. 12; 5 N. P. (N. S.) 193.

The municipal corporation is an agent of the state in the preservation of public rights in the streets and its ownership is of the fee subject to the right of the state to direct the mode of administering such trust and of keeping the streets in repair and free from nuisance. Raynolds v. Cleveland, 2 C. C. (N. S.) 139; 24 C. C. 215, (aff'd, 76 O. S. 619).

Acquisition from state.—The transfer to a city for street purposes, by the state, of property acquired for canal purposes, gives the control to the city without making a reversion in favor of the owner of the soil. Malone v. Toledo, 28 O. S. 643.

Compensation for use of streets.—Revenues for the use of the streets by vehicles in general is held to be a license fee for the special burden imposed and not a tax upon property. Marmet v. State, 45 O. S. 63, 68.

Under §3461 R. S., (§ 9178 and § 9179 G. C.) providing for the use of streets by a telegraph or telephone company, it was held that "a municipal corporation, though holding the title to its streets, has no private proprietary interest in them which entitles it to compensation when they are subjected to an authorized additional public burden by the construction of a telephone line therein. But being charged with the duty of keeping the streets under its control in repair, it may be allowed compensation to an amount sufficient to make the repairs rendered necessary by such additional use." Zanesville v. Telegraph and Telephone Co., 64 O. S, 67, 81,

As to right to exact a revenue from gas company using the streets, see Columbus v. Columbus Gas Co., 76 O. S. 309.

Prior to the constitutional amendments of 1912, municipalities in Ohio, under favor of Sections 3714 and 10129, General Code, had the power to contract with a gas company, or other public utility, for the use and occupation of the streets in laying its gas lines, maintaining the same and keeping the same in repair, by providing compensation to the municipality, either in a lump sum or based on a certain percentage of its gross receipts. Federal Gas Co. v. Columbus, 96 O. S. 531. See note to Sec. 10129, Part II.

A municipality has the power to demand and receive from a

telephone company, for the privilege of laying and maintaining subsurface conduits for its wires, compensation beyond what is necessary to restore the pavement to its former state of usefulness and a provision requiring payment among other considerations of a proportion of the company's gross annual receipts is valid. Telephone Co. v. Columbus, 88 O. S. 466.

As to revenue from use of streets by street railways, see Cincinnati St Ry. Co. v. Smith, 29 O. S. 291, 306.

Power of council over use of streets.—The power is limited only by the rule that it holds the streets in trust for the public for purposes of travel. Ry. Co. v. Elyria, 14 C. C. 48; Transit Co. v. Hamilton, 1 N. P. 366.

It may authorize any use of a street not subversive of or impairing the original use, but the rights of the public to use it as a street, and of the adjacent lot owner to enjoy it as a means of access to his property, must not be materially interfered with. Branahan v. Hotel Co., 39 O. S. 333.

A city ordinance making it unlawful for any person to hold a public meeting for the purpose of speaking whereby a number of people are gathered together so as to delay traffic or interfere with the free and uninterrupted use of the streets of a city, unless such person shall first have obtained a permit so to do from the director of public safety of said city, is a valid ordinance. Canton v. Robertson, 20 N. P. (N. S.), 241.

Council has discretion as to the manner in which streets shall be used, and this power can not be judicially interfered with unless a manifest invasion of private rights is shown. Mill Creek Valley R. R. Co. v. St. Bernard, 8 N. P. 288, 294.

Municipality has the right to determine the width of its streets which shall be devoted to lawful public uses, the parts to be devoted to sidewalks, to shade trees, to gutters, drainage, etc., and to the use by vehicles and cars; and it is not an unlawful use in itself, to devote a part assigned for drainage, to electric light poles. Norwalk v. Jacobs, 29 C. C. 123; 9 C. C. (N. S.) 153.

Where streets are sufficiently wide, municipalities may maintain park strips between the curb and pavement and proper barriers to protect trees, shrubs and grass planted therein. Village of Barnesville v. Ward, 85 O. S. 1.

Council may provide by ordinance that all drivers shall keep to the right in passing over bridges within municipal limits. Platt v. Toledo, 6 C. C. (N. S.) 403; 28 C. C. 832, (aff'd, 75 O. S. 590).

It may by ordinance prohibit sales at auction in the streets, and such ordinance would not be unreasonable nor in restraint of trade. White v. Kent, 11 O. S. 550.

It may summarily abate a nuisance erected upon a public street which interferes with the free use of the street by the public. Evans v. Cincinnati, 2 Handy, 236.

But hedges, shrubs, and herbage belong to the owner of the fee and can not be summarily destroyed unless they interfere with public travel. Phifer v. Cox, 21 O. S. 248.

It may impose upon one who has

been granted the privilege of temporarily obstructing a street for building on abutting property the duty to save the city from loss and travelers from injury. Reuben v. Swigart, 15 C. C. 565.

Municipality may grant franchise to street railroad to use a bridge within its limits although the bridge was built by the county. State ex rel. v. R. R. Co., 19 C. C. 79, 90.

It may regulate the use of streets and sidewalks by bicycles and prohibit riding of bicycles on sidewalks, as well as fix by ordinance, restrictions on speed, use of bells, lights, etc. Thomas v. Fremont, 12 Dec. 604.

It may regulate the operation of jitney busses. Such regulation should be reasonable, but ought to be sufficiently effective to provide for the safety of the public and protect property rights. Kaczmarek v. Independence, 18 N. P. (N. S.) 81.

It is not unreasonable to require that one who operates jitney busses shall execute a bond in the sum of $10,000 securing payment of damages to any person or for any property injured through his negligence; that he provide continuous service at regular intervals in bad weather as well as good; that he shall be held to the same degree of care as the law imposes on other common carriers, and that he employ no chauffeur who can not speak the English language. *Ib.*

It may improve and ornament a public square for health, public buildings or the transaction of public business of the people or for both the purposes of pleasure and business if there is no special limitation or use described by the dedication. Langley v. Gallipolis, 2 O. S. 107.

But the municipality can not permit the permanent occupancy of the streets, cutting off access to the property of abutting lot owners for the convenience and benefit of a private business. Branahan v. Hotel Co., 39 O. S. 333.

Where an ordinance of a municipal corporation in terms authorizes the owner or occupant of any store or premises abutting on a sidewalk to occupy, for the purpose of exhibiting his wares or merchandise, three feet of the sidewalk in front of said store or premises, which space to be so occupied shall be immediately adjoining the line of said premises, such use is not made lawful by the ordinance if such occupancy of the sidewalk materially interferes with its use by the public or with special easements of the owners of property abutting thereon. Salzer v. Bolus-Hackett Co., 16 N. P. (N. S.) 358.

Classification of street obstructions, whether temporary or permanent, and providing that the ordinance shall operate only upon temporary obstructions, is a real and reasonable classification and does not violate any provision of State or Federal Constitution. Xenia v. Schmidt, 101 O. S. 437; reversing s. c. 12 Oh. App. 359.

It can not surrender the street by permitting encroachments which lessen its width. L. S. & M. S. Ry. Co. v. Elyria, 69 O. S. 414.

It was held that a municipality can not change the name of a street at will, without good cause, except

on petition of abutting property owners. Miller v. Cincinnati, 21 B. 121.

A section such as this gives the municipality no power to grant to a lighting company the power to erect poles in the street. Brush Co. v. Jones Bros. Co., 5 C. C. 340, 341.

Nor does it give power to grant to a railroad company the right to occupy the streets; though this power is in express terms given elsewhere. L. & N. Railroad Co. v. Cincinnati, 76 O. S. 481.

The power to improve streets in its own way, is not limited by the voluntary improvement of an abutting proprietor in a different way. Parsons v. Columbus, 50 O. S. 460; nor by an improvement of a street which is part of a road within the municipality, by a county, having this authority. Mills v. Norwood, 6 C. C. 305, 308.

The general authority of council over the streets, duly exercised, will override any license by which the control of the street has been surrendered to a company or individual. Railroad Company v. Defiance, 10 O. F. D. 480; 52 O. S. 262.

The power of council to authorize the tearing up of streets by street railway company or sewer contractor is not restricted because of a previous contract with the construction company to keep the street which the company has made in repair. Union Savings Bank, etc., Co. v. Norwood, 12 Dec. 623.

As to council's power over construction of sidewalks, see note under § 3853, *post*.

Exclusive use.—Council is without power to grant exclusive use of its streets, unless expressly granted the power. State, ex rel. v. Gas Light & Coke Co., 18 O. S. 262; Cincinnati Street Railway Co. v. Smith, 29 O. S. 291; State, ex rel. v. Columbus Ry. Co., 24 C. C. 609, 623.

The placing of two railway tracks on a street thirty-six to forty feet wide does not constitute an "exclusive occupancy" of the street. Gas Coke, etc., Co. v. Railway Co., 14 C. C. (N. S.) 196.

Perpetual use may be granted if no limitation of time in power given to municipality by legislature. State, ex rel. v. Columbus Ry. Co., 24 C. C. 609, but see 73 O. S. 363.

Processions and assembly.—An ordinance pertaining to street processions and assembly in the streets must be regarded as merely regulatory, its chief purpose being to advise the city authorities when, where, and in what manner it is proposed to assemble or parade; and the action of the authorities in granting or refusing permits for such use of the streets must be reasonable, and not arbitrary or governed by whim or caprice. State *ex rel.* Bigelow v. Spiegel, 22 C. C. (N. S.) 337.

Use granted to railroad.—*Municipal control.*—Though a municipality has by ordinance authorized a railroad company to lay tracks in a street, its supervision of, and responsibility for the street continues subject only to the use of the company as authorized. Steubenville v. McGill, 41 O. S. 235; Cincinnati v. Kirchner, 13 Dec. 727; Zanesville v. Fannan, 53 O. S. 605; Railroad Co. v. Defiance, 52 O. S. 262; 167 U. S. 88; L. S. & M. S. Ry.

Co. v. Elyria, 69 O. S. 414, 430. A municipality has no power to authorize permanent obstruction or encroachment upon the street which excludes the public from the use of that portion of the highway. L. S. & M. S. Ry. Co. v. Elyria, 69 O. S. 414; Zanesville v. Fannan, 53 O. S. 605; Railroad Co. v. Defiance, 52 O. S. 262; L. & N. R. R. Co. v. Cincinnati, 76 O. S. 481. An agreement with a railroad company for an obstruction in the street that excludes the public can operate only as a license until public convenience requires its removal. L. S. & M. S. Ry. Co. v. Elyria, 69 O. S. 414.

A municipal corporation has authority to pass an ordinance regulating the time railroad trains may stand across street crossings. Akron v. Temple, 16 C. C. (N. S.) 327.

Where a railroad company has the duty of maintaining a bridge as part of the street, and of keeping it in repair, the railroad company would have the same right as the municipality to close the bridge when it became dangerous to public travel. Toledo Street Ry. Co. v. Mammet, 13 C. C. 591.

When sewer is being constructed in public street beneath tracks of railway company crossing such street, such company is liable for supports while sewer is being constructed. Op. Atty. Gen. (1919), p. 445.

Contract for use of street by railroad tracks construed, see Cleveland v. C. C. C. & St. L. Ry. Co., 19 Dec. 372.

As to rights of abutting owner to enjoin construction of railroad when his easement in street is interfered with, see *"Abutting Owners' Rights," infra.*

Municipal liability.—The duty of keeping the streets in repair and free from nuisance not being taken away by a grant of the use of the street to a railroad company, the municipality is liable to an abutting owner for damages caused by the railroad company to abutting property and not incidental to the ordinary construction of a railroad in the street, notwithstanding the railroad company may also be liable to the property owner. Zanesville v. Fannan, 53 O. S. 605. But see Dillenbach v. Xenia, 41 O. S. 207. Thus a municipality was held liable for obstruction to drainage caused by a railroad company. Zanesville v. Fannan, 53 O. S. 605. But the municipality is not liable for damages which are in the nature of compensation for an additional burden in the street arising from the location or construction of railroad tracks therein. Zanesville v. Fannan, 53 O. S. 605. A municipality is held liable for injury caused to person falling into a ditch between tracks of railroad in the street. Steubenville v. McGill, 41 O. S. 235.

As to rights of abutting owner against railroad company for damages, see note under § 8763 in Part II.

As to the statute of limitations in case of encroachment of abutments of a steam railroad in a highway, see L. S. & M. S. Ry. Co. v. Elyria, 69 O. S. 414, 435.

What uses impose additional burdens.—*Sewers.*—A sewer is an authorized use of a street. Elster v. Springfield, 49 O. S. 82; Cincinnati v. Penny, 21 O. S. 499.

Grading.—Grading and changing

of grade are authorized uses of streets. R. R. Co. v. Defiance, 52 O. S. 262, 300; 167 U. S. 88; East End B. & C. Co. v. Cleveland, 1 N. P. (N. S.) 493.

Street railways are not an additional burden on the street, see note to § 3768, *post.*

Electric light poles and wires in the streets at the curb, though with the consent of municipality, have been held to be a diversion of the street from the purposes for which it was dedicated, and an abutting owner injured thereby has been given the right to enjoin the same. Callen v. Electric Light Co., 66 O. S. 166; but a private company may erect and maintain in the streets of a municipality electric light poles and wires for lighting the public streets under a contract with the city; such construction does not invade the rights of an abutting owner, and such owner can not maintain injunction proceedings, even though a portion of the current carried is for private purposes, provided such additional use does not impair the abutter's property in any essential degree. Huss v. Railway & Light Co., 25 C. C. (N. S.) 44.

Additional cross arms and wires on poles used for street lighting, held not an additional burden on abutting property. Smith v. Power Co., 23 N. P. (N. S.) 55.

Telephone and telegraph poles have been held an interference with abutting owner's easement. Tannian v. Telegraph Ass'n, 13 Dec. 730; 1 N. P. (N. S.) 81 (aff'd, 71 O. S. 478); Daily v. State, 51 O. S. 348, 358, 364; Mantell v. Telephone Co., 20 C. C. 345; but see Auerbach v. Telephone Co., 7 N. P. 633; Hayes v. Telephone Co., 21 C. C. 480; see further Zanesville v. Telegraph & Telephone Co., 64 O. S. 67, 82.

Gas pipes laid longitudinally under sidewalk have been held an additional burden on the street. Federal Gas & Fuel Co. v. Townsend, 14 Dec. 5; 1 N. P. (N. S.) 289; Webb v. Ohio Gas Fuel Co., 16 B. 121.

Conduits for telephone and telegraph wires are additional servitude. Burns v. Telephone Co., 30 C. C. 74; 10 C. C. (N. S.) 307 (aff'd, 76 O. S. 589).

Pipes to carry steam for heat and power to public generally, under statutory authority, held legitimate street use. Stone v. Cuyahoga Light Co., 9 N. P. (N. S.) 545; 20 Dec. 130.

Steam railroads are an additional burden on the street, see note *"Abutting Owner's Rights," infra.*

Scales in street.—A municipal council is without authority to grant the right to place wagon scales in a public street for the benefit of an abutting owner or any private interest. Minnich v. Lutz *et al.*, 18 N. P. (N. S.) 601; (aff'd by Court of Appeals without report).

Abutting owner's rights.—An owner of a lot abutting on a street has a property interest in the street in front of his lot which can not be taken except after payment or deposit of compensation. Callen v. Electric Light Co., 66 O. S. 166; Crawford v. Delaware, 7 O. S. 459; Street Ry. v. Cumminsville, 14 O. S. 523.

But see discussion by court in Smith v. Central Power Co., 103 O. S. 681.

An abutting owner's easement in a street consists not only in hav-

ing the surface free and unobstructed for ingress and egress, but he also has the right to light and air above the surface. Lloyd Booth Co. v. Mahoning Co., 12 C. D. 706; and an obstruction to his light and air is an infringement on his easement in the street. Hayes v. Telephone Co., 21 C. C. 480. So an erection of a viaduct in the street may be an injury to the easement, although it does not materially interfere with the surface use of the street. Lloyd Booth Co. v. Mahoning Co., 12 C. D. 706.

Whether abutting owner's easement immediately in front of his lot extends only to center of street or all the way across street, see Smedes v. Railroad Co., 16 Dec. 743; Madden v. Ry. Co., 21 C. C. 73.

Abutting owner consenting to the use of the street in front of his property by telephone wires would not be entitled to injunction to restrain putting these wires under ground without his consent. Burns v. Telephone Co., 3 N. P. (N. S.) 257; 30 C. C. 74; 10 C. C. (N. S.) 307; (aff'd, 76 O. S. 589).

An abutting owner's right to have the street kept open and free from nuisance may be barred by the lapse of time. Kuhn v. Cleveland, 25 C. C. 272; 1 C. C. (N. S.) 384.

So delay may forfeit right to reclaim property except by way of compensation. Ritter v. The Cleveland Short Line Ry. Co., 17 C. C. (N. S.) 4.

An abutting owner's interest in the street is a property right, and he may use the surface or the space above or below the surface of the street in any manner permissible by municipal ordinance where such use contravenes, no right of the municipality to its actual use for street and municipal purposes. Kellogg v. Traction Co., 80 O. S. 331; Henry v. Cincinnati, 25 C. C. 178; 1 C. C. (N. S.) 289; Reese v. Cleveland, 18 Dec. 12; 5 N. P. (N. S.) 193.

So an abutting owner may string a wire above the street eighty feet above the surface. Henry v. Cincinnati, 25 C. C. 178; 1 C. C. (N. S.) 289; but see Butler v. Cincinnati, 25 C. C. 772.

In the absence of municipal regulation or in accordance therewith, abutting owners may erect electric signs in front of their property and above the sidewalk, not amounting to actual obstruction or menace to the public. Reese v. Cleveland, 18 Dec. 12; 5 N. P. (N. S.) 193.

Abutting owners on opposite sides of street may, under permit from municipality, construct an overhead bridge for transporting freight, where no supports rest in the street and light and air of adjoining owners are not interfered with. Kellogg v. Traction Co., 80 O. S. 331; and adjoining owners can not enjoin such erection. Offutt v. Packing Co., 31 C. C. 58; 11 C. C. (N. S.) 357.

And the right of abutting owner to maintain shade trees, carriage blocks, lamp posts, cellar ways, stair ways, bay windows and other conveniences, is recognized. Elster v. Springfield, 49 O. S., 32; Kellogg v. Traction Co., 80 O. S. 331.

Municipality is liable in damages for destruction of shade trees in making a street improvement, unless it was necessary to destroy the trees to use the ground for street purposes. Newcomerstown v. Dickensen,

32 C. C. 311 (aff'd, 77 O. S. 597); Massillon v. Huff, 32 C. C. 333; 14 C. C. (N. S.) 193.

Abutting owner may excavate and make areaways under the sidewalk. Iroquois Hotel Co. v. Columbus, 18 Dec. 662; 5 N. P. (N. S.) 357; but municipality is not liable for failure to prevent surface water from collecting and flowing into openings in such area way. *Ib.*

There can be no recovery from a municipality on account of the flooding of a basement or cellar by reason of the obstruction of a sewer, where notice of the obstruction is not shown and no negligence appears in the construction, maintenance or care of the sewer. Norwood v. Gobrecht-Geyer Co., 2 Oh. App. 18.

Dirt and gravel excavated by a municipality in making a street improvement may be appropriated by the municipality so far as necessary to be used in making such improvement. A property owner upon demand is entitled to surplus dirt and gravel so excavated. Dayton v. Haines, 12 Oh. App. 439.

As to what use by abutting owner would amount to a nuisance, see Reese v. Cleveland, 18 Dec. 12; 5 N. P. (N. S.) 193.

Abutting owner is not guilty of maintaining a nuisance, by allowing dirt and stones, loosened by rain and frost, to fall over a retaining wall built by city, in front of his property. State v. Langdon, 54 B. 377.

Steam railroads in street—Injunction.—An abutting owner may enjoin the construction of a railroad until the right to construct such road shall first be acquired. Railway Co. v. Lawrence, 38 O. S. 41; Toledo Bending Co. v. Railway, 2 N. P. 317; Weber v. Electric Railway Co., 13 Dec. 194; Sommer v. Pennsylvania Co., 23 C. C. (N. S.) 33; 4 Oh. App. 340.

Even after ordinance to construct railroad in street is obtained, an abutting owner may enjoin such construction if it materially interferes with his access to his property, until his easement is properly appropriated or purchased. Burial Case Co. v. Railway Co., 24 C. C. 107; 4 C. C. (N. S.) 365.

Where railroad track is not constructed on part of the street immediately in front of plaintiff's property, there is no such material interference with access as to constitute the taking of property and entitle the owner to enjoin the construction, even though the owner suffers in common with the public some inconvenience in travel along the street. Mitchell Furniture Co. v. Railroad, 7 N. P. 639 (aff'd, 65 O. S. 571); Herzog v. Railway, 25 C. C. 702 (aff'd, 74 O. S. 440); L. & N. R. R. Co. v. C. N. O. & T. P. Ry. Co., 3 N. P. (N. S.) 109; 16 Dec. 777; see also Hatch v. R. R. Co., 18 O. S. 92; Hall v. Railway Co., 30 C. C. 718; 11 C. C. (N. S.) 97.

But where the railroad obstructs the only means of access to his property, even though the track is not laid immediately in front of his lot, there is a taking of property rights and the construction may be enjoined. Mitchell Furniture Co. v. Railroad, 7 N. P. 639 (aff'd, 65 O. S. 571); Cleveland Furnace Co. v. Railway Co., 9 N. P.

(N. S.) 426; 20 Dec. 188; Hall *et al.* v. The Pittsburg, Cincinnati, Chicago & St. Louis Ry. Co., 85 O. S. 148.

Laying of track across street which forms a cul-de-sac on which plaintiff's property abuts and constitutes an injury to his property, may be enjoined if substantial and material. Doppes Sons' Co. v. Ry. Co., 11 N. P. (N. S.) 289.

So, where construction of railroad tracks in street causes sewer to be closed up and to form gulleys in front of plaintiff's property, constituting continuing nuisance, injunction would lie. Hall v. Railway Co., 30 C. C. 718; 11 C. C. (N. S.) 97.

A railroad trestle in the street was not enjoined where the street was unimproved and far below the established grade, and abutting owner would not be injured in future when the street was filled. C. C. C. & St. L. Ry. Co. v. C. & I. W. Ry,, 15 Dec. 112; 2 N. P. (N. S.) 237.

The abutting owner can not enjoin because the municipality might have a right to injunction. The municipality's rights can not be worked out through an abutting owner, and *vice versa*. C. C. C. & St. L. Ry. Co. v. C. & I. W. Ry. Co., 15 Dec. 112; 2 N. P. (N. S.) 237; Worthington v. Akron, 18 C. C. (N. S.) 208.

As to right to enjoin additional track where condemnation proceedings for abutting property pending, see Cincinnati Gas, etc., Co. v. B. & O. Ry. Co., 14 C. C. (N. S.) 195.

Where because of peculiar conditions the laying of track will enhance the value of plaintiff's property, see Doppes Sons' Co. v. Ry. Co., 11 N. P. (N. S.) 289.

Remedy under § 11084 of abutting owner whose business is injured by construction of railroad track in street, for impairment of easement, see Hall v. Railway Co., 30 C. C. 718; 11 C. C. (N. S.) 97.

As to right of abutting owner to damages from railroad company, for injuries due to construction of railroad in street, see § 8763 and note (2) thereunder, Part II.

Street railways.—As to rights of abutting owner where street railway is constructed in street, see generally title "Street Railroads," § 3768 *et seq.*

City and county highway—distinction.—Owner of land abutting on country highway has fee to the center of highway and public has easement, while owner of land abutting on city street has easement and public owns the fee, but in each situation the respective rights are substantially the same. Callen v. Electric Light Co., 66 O. S. 166.

Damages for injury caused by improvements.—As to owner's rights for damages to his property caused by improvements, see § 3823 and notes.

No extraordinary use without consent of council.—The care, supervision and control over streets and highways having been given to council, none of these can be used for extraordinary purposes without the consent of council. Illuminating Co. v. Mt. Gilead, 8 N. P. 669.

But temporary obstructions in streets, such as are occasioned in rebuilding and repairing houses,

are not prohibited and do not require special license. Clark v. Fry, 8 O. S. 358; Columbus v. Penrod, 73 O. S. 209; although council can regulate them, *Ib.;* and can impose the duty to save the city from loss and travelers from injury. Reuben v. Swigart, 15 C. C. 565.

The moving of a building across a street is an extraordiary use of the street, and requires consent of proper authorities. Toledo, etc., Traction Co. v. Sterling, 29 C. C. 227; 9 C. C. (N. S.) 200.

As to rights of street railway company in case of moving buildings across tracks, see *Ib.*

Relative rights of telephone lines and house mover in streets, see Clyde Telephone Co. v. Parmenter, 19 Dec. 471; 8 N. P. (N. S.) 147.

Probate court, in fixing mode of use by telephone company, can not fix duties of such company with reference to moving of buildings. Cleveland Telephone Co. v. South Newburgh, 4 N. P. (N. S.) 624; 52 B. 173.

The license granted by municipality to abutting owner as to use of street in a way consistent with street use, is not a contract and is revocable by the municipality. Kellogg v. Traction Co., 80 O. S. 331.

Council is the only authority to give consent to the use of streets, and a direction assumed to be given by the mayor, without authority of council, is inoperative. Ry. Co. v. Carthage, 36 O. S. 631.

Where an ordinance grants to a gas company the right to lay its pipes in the streets, no special permit from the municipal authorities could be required. Defiance v. Gas and Electric Co., 12 Dec. 424. Such a right can not be revoked by the municipal authorities, and it includes the right to repair and extend the pipes. *Ib.*

See further §§ 12644 and 12645 providing penalties for erecting poles or wires in streets, without consent of municipality, under "*Streets and Public Grounds*" in Part II.

As to powers of director of public service over streets, see § 4325 and notes, *post.*

Remedy for obstructions.—Action for mandatory injunction by the municipality to compel removal of obstruction, see Columbus v. Philbrick, 5 N. P. (N. S.) 449; 18 Dec. 145; L. S. & M. S. Ry. Co. v. Elyria, 69 O. S. 414. See also Trumbell Co. v. Penna. Co., 24 C. C. 550; Little Miami Ry. Co. v. Green Co., 31 O. S. 338; State v. Railway Co., 36 O. S. 434; but see Cincinnati v. Bridge Co., 20 C. C. 396. Parties and service by publication, see Columbus v. Philbrick, 18 Dec. 145; 5 N. P. (N. S.) 449. Action of ejectment, see Cleveland v. C. C. C. & St. L. Ry. Co., 19 Dec. 372.

Summary abatement, see Cincinnati v. Evans, 5 O. S. 594; 2 Handy, 236; Phifer v. Cox, 21 O. S. 248.

In prosecutions for allowing building to project into street, as to admissibility of evidence of other buildings projecting, see Philbrick v. State, 8 N. P. (N. S.) 374.

Action by individual whose property rights are injured, see Kuhn v. Cleveland, 1 C. C. (N. S.) 384; Herrick v. Cleveland, 7 C. C. 470; Mondle v. Plow Co., 6 N. P.

294; see also note *"Abutting Owner's rights," ante.*

Ejectment will lie to recover parts of a street. Railroad Co. v. Cleveland, 15 C. C. (N. S.) 193; aff'd 87 O. S. 469.

Adverse possession.—It has been held that a municipality's rights in a street or public square may be lost by adverse possession by a private individual for more than twenty-one years where the possession is by a building or other permanent and substantial structure. Cincinnati v. Presbyterian Church, 8 O. 298; Cincinnati v. Evans, 5 O. S. 594; Williams v. Presbyterian Society, 1 O. S. 478, 510; Lane v. Kennedy, 13 O. S. 42, 46; McClelland v. Miller, 28 O. S. 488, 502; Seese v. Maumee, 7 C. C. (N. S.) 497. See also Cincinnati v. Columbia, 17 B. 192; Railroad Co. v. Hambleton, 40 O. S. 496; Cleveland v. C. C. C. & St. L. Ry. Co., 19 Dec. 372.

But the erection of fences, planting of shade trees and like occupation of a part or all of a public street do not constitute such adverse possession as to bar the municipality. Lane v. Kennedy, 13 O. S. 42; McClelland v. Miller, 28 O. S. 488; Heddleston v. Hendricks, 52 O. S. 465; Sullivan v. Columbus, 12 Dec. 650; Ashley v. Toledo, 13 C. C. 9.

But as to the case where fences and like unsubstantial structures exclude the public from the entire street, see Mott v. Toledo, 17 C. C. 472, (aff'd 60 O. S. 601); Drucker v. Home City, 31 C. C. 466; 12 N. P. (N. S.) 309, (aff'd, 81 O. S. 507); Seese v. Maumee, 7 C. C. (N. S.) 497 (holding there is a distinction between encroachment on part of a street and entire occupation of street); see also Hermann v. Spitzmiller, 24 C .C. (N. S.) 20.

On the other hand, it has been held that since the encroachment on a public street by a permanent or other structure is a public nuisance, no right by adverse possession can be acquired by such an obstruction. Elster v. Springfield, 49 O. S. 82, 98; Wright v. Oberlin, 23 C. C. 509; Heddleston v. Hendricks, 52 O. S. 465; Ry. Co. v. Elyria, 69 O. S. 414; Sullivan v. Columbus, 12 Dec. 650; Lawrence Railroad Co. v. Commissioners, 35 O. S. 1; Railroad Co. v. Commissioners, 31 O. S. 338, 349; County Commissioners v. Railway, 12 N. P. (N. S.) 129. And whatever right against the municipality may be acquired by the encroachment upon the street with a permanent structure has been placed upon the ground of equitable estoppel of the municipality. Lane v. Kennedy, 13 O. S. 42, 46; Elster v. Springfield, 49 O. S. 82, 98; Wright v. Oberlin, 23 C. C. 509; Sullivan v. Columbus, 12 Dec. 650; Winslow v. Cincinnati, 6 N. P. 47; and, see Mondle v. Toledo Plow Co., 6 N. P. 294; Lane v. Kennedy, 13 O. S. 42; Mooren v. Cleveland, 15 Dec. 456; Philbrick v. State, 8 N. P. (N. S.) 374; Hermann v. Spitzmiller, 24 C. C. (N. S.) 20.

See § 13421 under *"Streets and Public grounds"* in Part II, where the obstruction of any public ground, highway, street or alley of a municipality by fences, buildings, structures or otherwise is made an indictable nuisance.

Streets not opened and used.—By § 11220 G. C., the whole

or any part of streets which have been dedicated, but not opened or used by the public, may be lost by the municipality to abutting owner if fenced in and held for twenty-one years. See also Stevens v. Shannon, 6 C. C. 142; Seese v. Maumee, 7 C. C. (N. S.) 497; 28 C. C. 768; Simpson v. Johnstown, 29 O. C. A. 219; 9 Oh. App. 102.

Abandonment.—Statutory method of vacating streets is exclusive, and municipality can not lose its rights to a street by abandonment. See § 3725 and note (2) thereunder.

Liability.—Abutting owner has no redress for abandonment of part of street or alley where reasonable access to his property remains, although by a greater distance. Anderson v. Cleveland *et al.*, 17 C. C. (N. S.) 13; aff'd 79 O. S. 451.

Municipal liability — General Principles.—The rule of municipal liability would seem to be that the municipality is not liable for the *unlawful use* of its streets, but is liable for any *defects in their state or condition.* Custer v. New Philadelphia, 20 C. C. 177. And it is not liable for failure to prevent a use of the streets by neglect to pass proper ordinances, or otherwise. *Ib.*

In exercising care and control over the streets, the municipality acts as the agent of the state and is exempt from liability for failure or neglect to perform duties in that respect. Robinson v. Greenville, 42 O. S. 625; Custer v. New Philadelphia, 20 C. C. 177; Zanesville v. Fannan, 53 O. S. 605; Wilhelm v. Defiance, 58 O. S. 56, 65.

Thus a municipality is not liable for injury caused by fast riding of bicycles on its sidewalks because it has not forbidden the same by ordinance or otherwise. Custer v. New Philadelphia, 20 C. C. 177.

It is not liable for injury caused by disorderly persons discharging a cannon for several hours in the street. Robinson v. Greenville, 42 O. S. 625; but see O'Grady v. Newark, 26 C. C. (N. S.) 47, 28 C. D. 69, where it is held that a city may be liable for negligence in permitting the operation in the street of a peanut roaster, which exploded, causing a personal injury.

But the provision requiring the municipality to keep the streets open and in repair and free from nuisance implies a duty for the breach of which, to the injury of any one, the municipality is liable. See Cleveland v. King, 132 U. S. 295, 302; Cardington v. Admr. of Fredericks, 46 O. S. 442, 447; Zanesville v. Fannan, 53 O. S. 605; Wilhelm v. Defiance, 58 O. S. 56, 65; Herrick v. Cleveland, 7 C. C. 470; Kleister v. Dayton, Ohio Dec. (Dayton), 215; and it is liable even though the defect or obstruction arose from construction in accordance with plans for improvement adopted by municipal authorities. Circleville v. Sohn, 59 O. S. 285.

When the corporation is performing this duty it is acting in its proprietary capacity, and its liability is largely, if not entirely, measured by the liability of an individual for similar acts. Robinson v. Greenville, 42 O. S. 625.

The law exacts from the municipality, however, only what is practicable and reasonable in regard to keeping its streets open and in repair and free from nuisance. Chase

v. Cleveland, 44 O. S. 505, 515; Van Dyke v. Cincinnati, 1 Disney, 532; and it is not bound to anticipate improbable and unprecedented events, and provide against their possible results. Village v. Kallager, 52 O. S. 183; Fremont v. Dunlap, 69 O. S. 286.

It is only required to keep the streets in such condition that a person exercising ordinary care in passing over them, may be reasonably safe from injury arising from their condition. Durbin v. Napoleon, 21 C. C. 160; Norwalk v. Jacobs, 29 C. C. 123.

Trees, grass and flowers growing on parking strip and proper barriers to protect same are not *per se* nuisances. Village of Barnesville v. Ward, 85 O. S. 1.

Municipality is not an insurer of the safety of persons using the streets, and when the streets are in a reasonably safe condition for travel in the usual modes, it is not chargeable with negligence, though an accident happen in the use of the streets. Dayton v. Glazer, 76 O. S. 471; Cardington v. Fredericks, Admr., 46 O. S. 442; Zanesville v. Fannan, 53 O. S. 605; Cincinnati v. Sohn, 59 O. S. 285; Cincinnati v. Fleischer, Admr., 63 O. S. 229; Troy v. Brady, 67 O. S. 65.

Not liable where injury is caused by runaway team. Drake v. East Cleveland, 101 O. S. 111.

One who, with knowledge of a defect or obstruction in a city street, voluntarily assumes the risk and ventures upon the obstruction cannot hold the city for resulting damages. Herig v. Cleveland, 16 C. C. (N. S.) 209. To same effect see Adams v. Zanesville, 30 O. C. A. 319.

But the liability of the municipality is not affected by the fact that the person who caused the nuisance which resulted in injury, is responsible over to the municipality. Zanesville v. Fannan, 53 O. S. 605; nor by the fact that the statutes give a remedy to the person injured against the one directly causing the injury. *Ib.*

In what cases liable.—*Generally.*—A municipality by allowing a street to become dangerous, maintains a nuisance, and is liable for personal injury caused thereby. Cardington v. Admr. of Fredericks, 46 O. S. 442.

A municipality is not liable in the ordinary case for injury caused by falling on slippery sidewalk where snow and ice had been allowed to accumulate, for it is not the duty of the municipality to remove immediately all snow and ice from sidewalks in all parts of the city. Chase v. Cleveland, 44 O. S. 505; Stamberger v. Cleveland, 22 C. C. 65; Van Dyke v. Cincinnati, 1 Disney, 532; Norwalk v. Tuttle, 73 O. S. 242; Burlinghouse v. Laisy, 11 N. P. (N. S.) 348. And see Bloom v. Toledo, 25 C. C. 235; 2 C. C. (N. S.) 108; reversed 72 O. S. 652. See also Ritter v. Toledo, 39 O. C. C. 233. But see Bretsch v. Toledo, 1 N. P. 210; Cincinnati v. Grebner, 25 C. C. 700; 7 C. C. (N. S.) 11. When the slippery condition is apparent it would be negligence to go upon the sidewalk. Conneaut v. Naef, 54 O. S. 529; Schaefler v. Sandusky, 33 O. S. 246; Schneider v. Cincinnati, 16 Dec. 206; 4 N. P. (N. S.) 57.

In an action for injuries due to a fall caused by a hole in the street, the question whether the

hole was of sufficient size to constitute a dangerous defect, if it appears to be one as to which reasonably prudent men might disagree, will be left to the jury for determination under all the circumstances of the case. Wuest v. Cincinnati, 13 N. P. (N. S.) 249.

The fact that the evidence indicates that the hole was large does not preclude recovery on the ground of contributory negligence, where it appears that at the time of the accident the hole was filled or partly filled with freshly fallen snow. *Ib.*

Municipality is not liable for injury to plaintiff from falling on sidewalk where ice had formed from break in water main where municipality repaired break as soon as possible and had no actual knowledge of forming of ice. Cincinnati v. Renner, 13 C. C. (N. S.) 407.

Negligence of municipality in leaving snow and ice on sidewalk, when a question for the jury, see Russell v. Toledo, 19 C. C. 418; Barry v. Akron, 7 C. C. (N. S.) 575; 28 C. C. 728; see reversal, 76 O. S. 625.

Municipality is not liable for injuries from slipping on steps maintained by it in public street, caused by a natural accumulation of ice and snow. Village of Nottingham v. Hoffman, 16 C. C. (N. S.) 238; aff'd 85 O. S. 447.

City is negligent if it leaves an excavation unguarded on a public way established by user through a market building. Nitz v. Toledo, 22 C. C. 454; Toledo v. Nitz, 3 C. C. (N. S.) 532; 23 C. C. 350.

City is liable for injury caused by a bridge on a street crossing a stream, being without rails or guards, whereby a child falls in and is drowned. Boyd v. Cambridge, 4 C. C. 519.

A municipal corporation is not liable for an injury caused by a fall upon a sidewalk rendered slippery by a deposit of mud and rock which were washed down upon it from an adjacent hillside during a heavy rain, where it appears that there was no opportunity after the cessation of the rain to remove the deposit. Rucker v. Cincinnati, 15 N. P. (N. S.) 252.

The municipality is not required to go outside the line of the street and sidewalk, upon private property, and construct retaining walls or other devices for the purpose of preventing mud and rock from washing down upon the sidewalk. *Ib.*

Liability of municipality for sidewalks not constructed in usual or customary manner. See Baker v. Addyngton, 22 N. P. (N. S.) 41.

Where a sidewalk is so constructed as to make in effect two curbs, with a step between, see as to question of negligence causing personal injury, East Cleveland v. Wald, 103 O. S. 373.

City is not liable for dangerous condition of land adjacent to street, but not so near as to menace ordinary travelers. Kelley v. Columbus, 41 O. S. 263.

City's liability for steam roller loaned by city contractor and left in street, see Pears v. Cleveland, 1 Clev. 328.

City is liable for injury due to a part of a sidewalk not conforming to the grade of the street, this condition remaining for a long

time to the knowledge of the city. Toledo v. Higgins, 12 C. C. 541.

A building permit authorizing temporary obstruction of a street and requiring a light at night, does not relieve the city of liability. Cleveland v. King, 132 U. S. 295.

But city is not liable, without express or implied notice, for injuries caused by failure to guard such temporary obstructions, unless the permit given was to do something intrinsically dangerous. Columbus v. Penrod, 73 O. S. 209; Horner v. Spence, 17 C. C. (N. S.) 28.

Where city grants permission to make a dangerous excavation in a street, and the excavation is properly guarded, but subsequently the protection is removed, the city would not be liable for injury due to unprotected excavation, in the absence of actual or constructive notice of the removal of the protection. Hewitt v. Cleveland, 67 O. S. 534 (without report, reversing 21 C. C. 505).

City is liable for injury resulting from unguarded excavation left by the removal of platform scales in a market place, with knowledge of the city. Nitz v. Toledo, 22 C. C. 454.

The test whether it is necessary that a barrier be erected on sidewalk to protect travelers from excavation or dangerous place near sidewalk, is not the distance from the highway of the dangerous place but whether a traveler in passing along the highway and exercising ordinary care would be subjected to such imminent danger that it would require a barrier to make the highway safe. Mineral City v. Gilbow, 81 O. S. 263.

Where a dangerous condition exists in a street due to repairs of pavement being made by the city, and plaintiff, who has knowledge of the conditions, while alighting from a car at night, thinking he was alighting upon a cross-walk a short distance from the place being repaired, is injured by stepping into a hole which he could not see by reason of the city's neglect to place red lights or to keep an arc light overhead burning, the city will be liable. Shields v. Cleveland, 21 C. C. (N. S.) 257. *Contra*, Cincinnati v. Hiles, 20 C. C. (N. S.) 106; 3 Oh. App. 319; 28 C. D. 568.

City is liable for injury from iron standard used for regulation of traffic and left in the street on a very dark night without light. McMillen v. Akron, 29 O. C. A. 271.

Municipality is liable to injury to pedestrian from unguarded retaining wall, though not within sidewalk line, if so near thereto as to appear within. Cavey v. Cincinnati, 12 C. C. (N. S.) 285; 32 C. C. 397; aff'd Cincinnati v. Cavey, 85 O. S. 450.

Municipality not liable for injury to pedestrian by tripping over wire stretched to protect grass between curb and sidewalk. McCurdy v. Newark, 10 N. P. (N. S.) 526; but such wire must not constitute a dangerous barrier to trip a pedestrian exercising due care. Village of Barnesville v. Ward, 85 O. S. 1.

Street is not in unsafe condition because of slight depression in side-

walk, unless there is something in condition of the depression specially calculated to cause injury. Gibbs v. Girard, 14 C. C. (N. S.) 81; but what is ordinary care, what is reasonable safety and the like, are, in the first instance, usually questions for the determination of the jury; reversing Circuit Court and Court of Common Pleas in directing verdict where plaintiff's testimony showed a two-inch depression or break in sidewalk. Gibbs v. Village of Girard, 88 O. S. 34.

Municipality is liable for damages resulting from cistern negligently constructed in street. Circleville v. Neuding, 41 O. S. 465.

Where a telephone pole in the street has, subsequent to its erection, become dangerous, municipality may be liable for injury caused thereby, after notice of dangerous condition. Norwalk v. Jacobs, 27 C. C. 691; 7 C. C. (N. S.) 229.

Injuries to property.—Liability for destruction of shade trees by street improvement, see Newcomerstown v. Dickinson, 32 C. C. 311; 14 C. C. (N. S.) 191; Massillon v. Huff, 32 C. C. 333; 14 C. C. (N. S.) 193; liability of municipality for unnecessary injury to shade trees planted by property owner within the lines of the public highway, by reckless and unnecessary trimming of trees for purpose of stringing wires, see Village of Amelia v. Hicks, 28 O. C. A. 582; 7 Oh. App. 132.

Municipality is liable for injury resulting from defective service pipe causing water to leak into plaintiff's cellar, if municipality has notice, Cincinnati v. Jacob, 18 B 65; for damages caused by preventing surface water from escaping into catch basins, in course of grading a street, and injuring plaintiff's house, Toledo v. Lewis, 32 B. 378; for injury caused by overflow of surface water in making side streets, McBride v. Akron, 12 C. C. 610. Such overflow causing damage is a continuing nuisance for which actions will lie from time to time. Toledo v. Lewis, 17 C. C. 588.

Owner of lot situated lower than street can not complain of overflow of surface water because of raising of street, if he has received or waived compensation for the change of grade. Sharp v. Cincinnati, 26 C. C. 59; 4 C. C. (N. S.) 19. See also Hamilton v. Ashbrook, 62 O. S. 511.

A municipal corporation is liable to a land owner for damages resulting from an increased flow of surface water upon his land, caused by a change in street grades by which water is brought from another street to that upon which the land abuts and from which it flows upon the land. Evers v. Akron, 23 C. C. (N. S.) 168.

An action by a property owner for damages resulting from the bursting of a sewer during high water does not lie against a municipality on the allegation that the collapse of the sewer was due to the building of an embankment upon which a street is carried over low ground, unless it is made to appear that the embankment turned the rising water into the basin in which the sewer was located and from which basin the embankment prevented the water from escaping. McWilliams v. Cincinanti, 13 N. P. (N. S.) 467.

In the construction and main-

tenance of a hydraulic, or similar work, a municipality is required to use ordinary skill and foresight to prevent injury to others in times of floods to be reasonably anticipated; and if injury is caused by its negligence, it is liable in damages, provided its negligence is one of the proximate causes of the injury, although it concurred with other causes, including the act of God. Piqua v. Morris, 98 O. S. 42.

Where no negligence is shown, city is not liable for settling of a building caused by excavation for a sewer constructed by it. Columbus v. Jaeger, 36 B. 191.

Municipality is liable for injuries resulting from break in water main caused by its negligence. Werner v. Cincinnati, 23 C. C. 475; 3 C. C. (N. S.) 276 (affirmed, 70 O. S. 455).

General principles of municipal liability for damages resulting from improvement of streets, see Cincinnati v. Penny, 21 O. S. 499.

Liability for damages for change of grade, see notes to § 3823, *post.*

Liability for damages resulting from construction of sewer, see notes to § 3871, *post.*

Liability for damages for injury caused by railroad constructed in street, see note "Use Granted to Railroad," *ante.*

Where duty of county to repair.—A village having notice thereof is liable for injury caused by a dangerous excavation left in building a bridge within the corporation, although built by the county, and although the village receives no part of the bridge fund. Newark v. McDowell, 16 C. C. 556.

And so, though the county had no authority to construct the bridge. Newark v. Jones, 16 C. C. 563.

The fact that it was the county's duty to repair a defect in a bridge within the city, does not relieve the city of liability. Mooney v. St. Marys, 15 C. C. 446.

As to liability of city to repair bridge within its limits, but on state or county road where city receives no part of the bridge fund, see Brink v. Columbus, 37 B. 22; Sullivan v. Newark, 7 N. P. 556.

The obligation of council under this section applies to a sidewalk of a street which forms an abutment to a county bridge. Commissioners vs. Shurts, 10 Oh. App. 219.

The municipality is liable for injury caused by a hole in a bridge within its limits notwithstanding the duty of the county commissioners to construct and keep in repair such bridge. Mooney v. St. Marys, 15 C. C. 446; Piqua v. Geist, 59 O. S. 163.

Where a bridge has been constructed by county commissioners upon a state or county road within the limits of a city, the city is nevertheless liable under this section for damages to any person suffering injuries by reason of a nuisance being maintained upon any such bridge or the approach thereto. Youngstown v. Sturgess, 102 O. S. 480.

But the right of action for destruction of a bridge built by county, but within a village, is in the county commissioners. Perry Co. v. R. R. Co., 43 O. S. 451.

Where injury is caused through acts of agent of municipality.—The wrongful act causing injury may not be done directly by

the municipality, but indirectly under its authority. The city is equally liable in such case. Thus a city is liable for the neglect of a city board making a street under a special act. Johns v. Cincinnati, 45 O. S. 278.

It is liable for injury caused in the improvement of a vault by trustees of a cemetery belonging to a city. Toledo v. Cone, 41 O. S. 149.

The city of Cincinnati was held liable for damages for obstruction of access resulting from laying of tracks in the streets by trustees of Cincinnati Southern Ry. English v. Trustees So. Ry., 8 B. 15.

But the city is not liable for the acts of the Board of Education in allowing a schoolhouse to become dangerous. The board of education is not an agent of the city. Diehm v. Cincinnati, 25 O. S. 305. Firemen are not the agents of the city so as to make the city liable for their acts. Thomas v. Findlay, 6 C. C. 241. Nor will a health officer's act make the city liable. Turner v. Toledo 15 C. C. 627.

Municipality can not shift the responsibility because the work was done by a property owner for it. Alliance v. Campbell, 17 C. C. 595; as where a property owner has constructed, under permission of municipality, a sidewalk or sewer which causes damage. Mansfield v. Bristor, 76 O. S. 270; Alliance v. Campbell, 17 C. C. 595. Though where the injury has been thus caused by a property owner the city may have an action over against the person directly responsible. Zanesville v. Fannan, 53 O. S. 605.

A municipal corporation is bound by statute to keep its sidewalks in repair and free from danger and is liable to a pedestrian for injuries received from falling through an areaway extending out into the sidewalk and leading to the basement of an adjoining building, which was constructed in a safe and substantial manner, but allowed to become unsafe and out of repair through natural wear and decay of the sidewalk produced by usage and time. Cleveland v. Hanson, 15 Oh. App. 409.

The city cannot set up as a defense to an action brought against it by such pedestrian for the injuries thus sustained a written release and covenant not to sue executed by the plaintiff in consideration of a sum of money received by him from the abutting property owner releasing such property owner from all claims that plaintiff might have against him arising out of such accident. *Ib.*

Independent contractor. — Where the work in the course of which injury is caused, is done not by an agent of the city, but by an independent contractor, the city is not liable unless the character of the work contracted for is necessarily dangerous or unless the city has retained control over the mode and manner of doing the work. See Cincinnati v. Stone, 5 O. S. 38; Chicago v. Robbins, 4 Wall, 657; see also Cincinnati v. Tilser, 19 C. C. (N. S.) 112; 2 Oh. App. 394.

The city is liable where there was a defect in the plan made by the city engineer and being carried out by the independent contractor. Dayton v. Pease, 4 O. S. 80.

The city is liable where its agreement with the independent contractor provides that the work shall be done under the direction of the civil

engineer or other person appointed by the city council for that purpose. Cincinnati v. Stone, 5 O. S. 38. See Steubenville v. McGill, 41 O. S. 235. See also Bridge Co. v. Steinbrock, 61 O. S. 215; Massillon v. Huff, 32 C. C. 333; 14 C. C. (N. S.) 193; Morrissey v. Cincinnati, 14 C. C. (N. S.) 17; Williams v. Eaton, 12 N. P. (N. S.) 183.

The fact that the city gave a permit to use part of a street for placing building materials, etc., would not make it liable to one injured by failure to guard the obstruction, unless the city had notice and was guilty of negligence. Columbus v. Penrod, 73 O. S. 209; or unless the permit is to do something necessarily dangerous. Gable v. Toledo, 16 C. C. 515; District of Columbia v. Woodbury, 136 U. S. 450; Chapman v. Lepotsky, 23 C. C. (N. S.) 90.

Municipality is liable for injury caused by failure to guard hole dug in a street by telephone company with understanding that municipality would immediately erect a pole therein. Central Union Tel. Co. v. Conneaut, 16 O. F. D., 259.

Insufficient settlement by a negligent contractor for an injury suffered on a defective sidewalk is not a bar to further recovery from the city on account of the same accident. See Semeraro v. Cleveland, 21 N. P. (N. S.) 26.

In the case of such an accident the city and the contractor are not joint tort feasors, and their concurrent acts of negligence, the one of commission and the other of omission, do not permit of their being joined either with or without the abutter in the same action. *Ib.*

Notice as a condition precedent to liability.—The liability of municipality growing out of its duty to keep the streets, etc., in repair and free from nuisance may arise either from actual wrongful acts on the part of the municipality or its agents, such as an improper construction of a street or sidewalk or dangerous excavation, or from its neglect to act, such as its failure to remove obstacles or to make repairs. In the former case the liability of municipality arises without any notice to it. Middleport v. Taylor, 2 C. C. 366; Hewitt v. Cleveland, 21 C. C. 505; McGovern v. Mt. Vernon, 22 B. 363; Taft v. Cincinnati, 52 B. 350. In the latter case the liability arises only after notice, actual or constructive, to the municipality of the dangerous obstruction or condition and its failure thereafter to remove it. Alliance v. Campbell, 17 C. C. 595; Groveport v. Bradfield, 2 C. C. 145; Chase v. Cleveland, 44 O. S. 505.

Notice or knowledge requisite.—The liability of a municipality under this section can only be established by proof of notice or knowledge of a dangerous condition in a street, or other public place as therein enumerated, or of its existence for such length of time as to impute notice or knowledge, or by proof that the agents and officers of the municipality actively caused such condition. Bello v. Cleveland, 106 O. S. 94.

Such notice or knowledge is not established by proof that an agent or officer of the municipality knew of certain acts of an abutting property owner, which had previously caused another nuisance in the same vicinity; nor under such circumstances is the municipality rendered liable. *Ib.*

Same as to pile of bricks left in street. Horner v. Spence 17 C. C. (N. S.) 28; 39 O. C. C. 523.

As to notice where defect is caused though work is done in accordance with plan adopted, see Circleville v. Sohn, 59 O. S. 285. See further as to latent defect in street, McGovern v. Mt. Vernon, 22 B. 363.

Actual notice means notice to the officers having authority over the removal of such nuisances. McGovern v. Mt. Vernon, 22 B. 363; Cleveland v. Payne, 72 O. S. 347.

So notice to lighting superintendent is notice to the city of unguarded excavation for electric light pole. Central Union Tel. Co. v. Conneaut, 16 O. F. D. 259.

So where platform scales in a market place were removed, leaving a dangerous excavation, the fact that the city auditor knew of the excavation, notified new lessee of market space and that superintendent of market was present at the time of removal would show notice to municipality. Nitz v. Toledo, 22 C. C. 454; Toledo v. Nitz, 3 C. C. (N. S.) 532; 23 C. C. 350.

Notice to policeman would not be actual notice to the municipality unless municipality was authorized to and did prescribe duties of policemen such as to make them its agents "in respect to its duty to keep the streets open and in repair." Cleveland v. Payne, 72 O. S. 347.

Constructive notice is shown by evidence of facts from which it would arise. Toledo v. Radbone, 3 C. C. (N. S.) 382; 23 C. C. 268 (affirmed, 68 O. S. 687). As to what facts show constructive notice, see generally Shelby v. Clagett, 46 O. S. 549 (knowledge of general defect in sidewalk not notice of particular defect).

As to when constructive notice is shown because the defect or obstruction remains for such a length of time that the municipal authorities in the exercise of ordinary care ought to have known of it, see Cincinnati v. Frazer, 18 C. C. 50; Groverport v. Bradfield, 2 C. C. 145 (affirmed, 30 B. 351); Fremont v. Dunlap, 69 O. S. 286. As to actual notice shown by the character of the defect, see Toledo v. Higgins, 12 C. C. 646.

The determination of question of sufficiency of lapse of time to operate as notice of a defect in street, will depend upon location thereof and the circumstances of each particular case. Kittredge v. Cincinnati, 28 C. C. 100; 6 C. C. (N. S.) 646.

But in the absence of evidence of length of time defect in street existed, jury must not be left to guess that it existed long enough to infer constructive notice. Cincinnati v. Klein, 30 C. C. 236; 10 C. C. (N. S.) 296.

To charge a municipality with negligence in failing to repair a defect in street, it must be shown that the actual or constructive notice thereof was received in time to make the repair or provide against accident. Kittredge v. Cincinnati, 28 C. C. 100; 6 C. C. (N. S.) 646; so municipality was held not liable for accident due to slippery sidewalk, where sidewalk became slippery over night and accident happened in early morning. Leipsic v. Gerdeman, 68 O. S. 1.

And where dangerous condition of street crossing was caused by a hard rain and injury occurred same day,

municipality was not charged with notice. Schneider v. Cincinnati, 16 Dec. 206; 4 N. P. (N. S.) 57.

Contributory negligence. — Where plaintiff's want of ordinary care contributed to the accident, the resulting injury must be borne by him, even though the city was guilty of negligence in allowing the danger to exist. Clemens v. Dayton, Ohio Dec. Dayt. 76; Ohliger v. Toledo, 20 C. C. 142.

Where a pedestrian leaves the sidewalk and resorts to the street, without necessity, and for his own pleasure or convenience, and meets with an accident, he is guilty of contributory negligence which would bar his recovery. Groveport v. Bradfield, 2 C. C. 145.

As to contributory negligence in going upon slippery or defective sidewalk or gutter, where the dangerous condition is apparent, see Schaeffer v. Sandusky, 33 O. S. 246; Conneaut v. Neaf, 54 O. S. 529; Peat v. Norwalk, 26 C. C. 161; 5 C. C. (N. S.) 614; Cleveland v. Stofer, 1 O. S. C. D. 300; Toledo v. Center, 1 O. S. C. D. 359; Puccine v. Cincinnati, 15 Dec. 608; 3 N. P. (N. S.) 362; Toledo v. Fuller, 27 C. C. 729; 7 C. C. (N. S.) 598; Akron v. Keister, 27 C. C. 809; 6 C. C. (N. S.) 603, (aff'd, 75 O. S. 596); Lalond v. Toledo, 6 C. C. (N. S.) 241 (rev. 75 O. S. 577); Buerger v. Cincinnati, 18 Dec. 317; 6 N. P. (N. S.) 248, (aff'd 80 O. S. 742); Toledo v. Smith, 32 C. C. 141; 13 C. C. (N. S.) 504; but where necessary to use defective sidewalk, because other parts of street unsafe, contributory negligence not shown, see Cincinnati v. Guth, 30 C. C. 384; 11 C. C. (N. S.) 382; Smith v. Toledo, 30 C. C. 454; 11 C. C. (N. S.) 167.

A person traveling along a highway is not chargeable with contributory negligence in permitting the wheels of one side of his vehicle to get just outside of the macadamized part of the road, where a hole existed into which the wheels dropped, causing the accident complained of. Guernsey County v. Black, 25 C. C. (N. S.) 415 (aff'd 88 O. S. 587).

As to contributory negligence in departing from the sidewalk and going beyond the limits upon land of abutting owner and falling into dangerous excavation, see Mineral City v. Gilbow, 81 O. S. 263.

Contributory negligence in alighting from car and stepping into hole in street, which might have been seen by exercise of care, see Cincinnati v. Ryan, 13 C. C. (N. S.) 513.

As to contributory negligence in running into snow piled up in street, see Donald v. Toledo, 8 O. F. D. 261.

A charge that if plaintiff's own negligence contributed "in any degree" to the injury he can not recover, is erroneous. Nitz v. Toledo, 22 C. C. 454; see also Toledo v. Nitz, 3 C. C. (N. S.) 532; 23 C. C. 350; Matthews v. Toledo, 21 C. C. 69 (aff'd, 65 O. S. 561); Schweinfurth v. R. R. Co., 60 O. S. 215; Johnson v. Cincinnati, 20 C. C. 657; Werner v. Cincinnati, 23 C. C. 475; 3 C. C. (N. S.) 276, (aff'd, 70 O. S. 455).

A mistake in treatment, due to error as to nature or extent of injuries will not bar recovery or mitigate damages. Toledo v. Radbone, 3

C. C. (N. S.) 382; 23 C. C. 268, (aff'd, 68 O. S. 687).

Indemnity from property owner causing injury.—As to the right of the municipality when compelled to pay damages for negligent construction or nuisance in the street, to recover indemnity from the lot owner who directly caused the injury, see Wilhelm v. Defiance, 58 O. S. 56. When the injury is caused by a defect in construction, as in case of a sidewalk negligently laid, the city is liable and can not recover indemnity, although the lot owner constructed the sidewalk pursuant to a notice from the city. Wilhelm v. Defiance, 58 O. S. 56; but where the injury is caused by defect or obstruction, placed there after construction, the lot owner who caused the same is liable. Morris v. Woodburn, 57 O. S. 330; and the city, if compelled to pay the damages therefor, may recover indemnity. Wilhelm v. Defiance, 58 O. S. 56, 63; Chicago v. Robbins, 4 Wall, (U. S.) 657; Cincinnati v. Boston, 28 C. D. 304.

Where a dangerous condition in one of the highways of a municipality has been caused solely by negligent acts of an abutting property owner, resulting in injury to a person lawfully traversing the highway, and such person first pursues the abutting owner on the ground of negligence, and in settling such claim covenants to abstain from bringing any further action against him by reason of such injuries, such covenant will preclude any action against or recovery from the municipality thereafter. (Zanesville v. Fannan, 53 Ohio St., 605 and Morris v. Woodburn, 57 Ohio St., 330, approved and followed.) Bello v. Cleveland, 106 O. S. 94.

See further as to liability of abutting owner for defect in sidewalk, Grunkemeyer v. Johnston, 47 B. 413.

Pleading, practice and evidence.—A mere allegation that it was the duty of the municipality to keep the sidewalk in repair and that it negligently omitted to do so without alleging notice of defect before the injury, or that defect was occasioned by positive misfeasance of municipality or its agents, or constructive notice, is not sufficient to sustain action. Middleport v. Taylor, 2 C. C. 366.

A petition to recover damages for personal injuries caused by slipping on an icy sidewalk, where the only complaint made against the walk is that it has an incline of ten inches in seven feet, and was covered with ice produced by natural causes, does not state a cause of action. Ritter v. Toledo, 27 O. C. A. 443; 6 Oh. App. 72.

In an action for injury from falling into a street excavation, an engineer's prior report as to what excavation is necessary and the specifications given to the contractor, are not admissible to show the depth of the excavation. Moon v. Middletown, 14 C. C. 498.

A charge that "a city owes no duty to a negligent person" does not correctly state the law and is misleading. A city owes the duty of exercising ordinary care in its control over the streets, although if a person directly contributes to his injury he is not entitled to recover. Ohliger v. Toledo, 20 C. C. 142.

Evidence must show that plaintiff exercised that degree of care that an ordinary careful and pru-

dent person under the same circumstances would have exercised. Circleville v. Sohn, 20 C. C. 368.

An instruction which makes the degree of care to be used dependent on the apprehension of danger entertained by the plaintiff is misleading. *Ib.*

Evidence of repairs by a municipality of a defective sidewalk after accident in question, held admissible for the purpose of showing municipal control and the changed condition of the walk, but not as proof of negligence. Lebanon v. Schwartz, 25 C. C. (N. S.) 273; 4 Oh. App. 173.

Evidence that rules required police to report dangerous condition of sidewalks is admissible in showing notice to city. Cleveland v. Payne, 72 O. S. 347.

In an action against a municipality for personal injuries alleged to have been suffered by reason of defect in a street, the question whether the defect complained of was of such a nature as to render the city liable is one for the jury under proper instructions by the court. Zanesville v. Goodrich, 32 O. C. A. 142; 14 Oh. App. 228.

Where icy condition of the sidewalk which caused the accident was produced by ice which had gathered over night, the accident occurring early in the morning, it was held error to submit to the jury whether the village might by the exercise of reasonable care and diligence, have had knowledge of the defect in time to have remedied it, no knowledge being shown. Leipsic v. Gerdeman, 68 O. S. 1.

It is error to charge the jury that it must bear in mind "the extent of territory covered by the city and the number of crossings demanding care, and the number and nature of the duties devolving upon the city and also claiming its care and attention." Cincinnati v. Frazier, 19 C. C. 604.

This section may properly be read to jury as part of the court's charge in defining the municipality's duty. Toledo v. Nitz, 3 C. C. (N. S.) 532; 23 C. C. 350.

When allegation of portion of street where accident occurred was slightly different from that shown by proof, there is not a fatal variance. Toledo v. Willinger, 27 C. C. 512; 6 C. C. (N. S.) 641.

The burden of proof is not on plaintiff to prove the exercise of due care, even when petition alleges that plaintiff exercised due care, unless averments of petition suggest the implication of contributory negligence. Armleder v. Cincinnati, 16 Dec. 180.

As to instructions upon value of hypothetical question, see McLean v. Cincinnati, 16 Dec. 459; 3 N. P. (N. S.) 676.

Not error to exclude ordinance requiring street cars to stop at further cross walk, in suit against city for injuries sustained in stepping from car into unguarded excavation. Toledo v. McNamara, 31 C. C. 383, (aff'd 82 O. S. 438).

In an action against a municipality for injuries from falling into a manhole alleged to have been covered with a lid which tilted when stepped upon, it is prejudicial error to charge the jury that evidence to the effect that other persons had fallen into the same hole, previous to the accident to plaintiff, could not

be considered for the purpose of showing constructive notice to the city of the defective and dangerous condition of said lid. Dietz v. Cincinnati, 25 C. C. (N. S.) 506; 28 C. D. 350.

Evidence of prior accidents at same place admissible to charge municipality with notice. Elyria v. Good, 17 C. C. (N. S.) 127; aff'd 85 O. S. 471.

An action will not lie against a municipality for damages growing out of the closing of a street where the plaintiff sues on behalf of all the residents of that part of the city affected thereby. Beckman v. Newark, 13 N. P. (N. S.) 519.

Definiteness of charge as to contributory negligence in going on defective sidewalks, see Toledo v. Strassel, 31 C. C. 432; 12 C. C. (N. S.) 212 (aff'd, 82 O. S. 438).

Where special findings of a jury, in damage suit against the city for personal injuries, are inconsistent with general verdict, the former will control. Middleport v. Taylor, 2 C. C. 366.

When special finding of jury was that the street or bridge was in reasonably safe condition for public travel in the ordinary mode, the city is entitled to judgment, notwithstanding a general verdict against the city. Troy v. Brady, 67 O. S. 65.

In an action for injuries caused by a defective sidewalk it is better practice to set out in the petition the dangerous character of the sidewalk. Middleport v. Taylor, 2 C. C. 366.

The city is the proper party defendant in an action for damages for failure to keep the streets in repair. Herrick v. Cleveland, 7 C. C. 470. As to whether council might be sued, see *Ib.*

The city and parties responsible for unguarded excavation in street can not be joined as co-defendants. Zeigler v. Ashley, 1 N. P. 62.

In an action jointly against a lot owner for maintaining a dangerous pit encroaching upon the sidewalk, and against a municipality for permitting the sidewalk to be in a dangerous condition without a barrier, and unlighted, there is a misjoinder of parties defendant. Mineral City v. Gilbow, 81 O. S. 263.

As to when it is necessary to allege that the acts, the consequences of which caused injury to plaintiff, were negligently done, see Cincinnati v. McLaughlin, 31 C. C. 503, 12 C. C. (N. S.) 220, (causing increased flow of water on plaintiff's premises); Armstrong v. Cincinnati, 12 C. C. (N. S.) 76; Louden v. Cincinnati, 11 N. P. (N. S.) 533, (injury from explosives).

An action against a city for personal injury caused by the city's leaving the streets in a dangerous condition, obstructed by rubbish, etc., is an action for maintaining a nuisance within § 11397 G. C., and abates at the death of the party injured. Cardington v. Adm'r of Fredericks, 46 O. S. 442; Cincinnati v. Darby, 18 Dec. 253; 5 N. P. (N. S.) 216, (aff'd, 80 O. S. 733).

County commissioners are not proper parties to institute proceedings in mandamus to compel a city to assume care and control over viaduct which commissioners have built within the city limits, under statutory directions. State ex rel. v. Cincinnati, 4 N. P. 313.

Where city fails to take charge

of and keep in repair a viaduct built within its limits, by a county, the county commissioners are not proper parties to compel the city to accept it by proceedings in mandamus. State ex rel. v. Cincinnati, 4 N. P. 313.

As to *quo warranto* proceedings in case where municipality has granted franchise to street railway company to use a bridge within municipal limits, but built by county, see State ex rel. v. Railway Co., 19 C. C. 79.

Measure of damages.—As to measure of damages in action for injury to property, see Cincinnati v. Wright, 2 N. P. (N. S.) 53; 14 Dec. 600 (aff'd 74 O. S. 479); Johnson v. Cincinnati, 30 C. C. 686.

As to measure of damages in personal injury cases, see Ohliger v. Traction Co., 23 C. C. 265; Toledo v. Radbone, 23 C. C. 268; 3 C. C. (N. S.) 382 (aff'd, 68 O. S. 687); Toledo v. Nitz, 23 C. C. 350; Toledo v. Fuller, 27 C. C. 729; 7 C. C. (N. S.) 598.

Measure of damages for causing overflow of plaintiff's premises, see Cincinnati v. McLaughlin, 31 C. C. 503; 12 C. C. (N. S.) 220.

Sec. 3715. [Opening streets; shall be by ordinance.] When it deems it necessary, the council may open, straighten, alter, divert, narrow or widen, any street, alley, or public highway within the limits of the corporation. The council shall provide by ordinance[1] therefor which shall briefly, and in general terms, describe the part, if any, of the street, alley, or public highway to be abandoned by reason of such change thereof, and the property, if any, to be appropriated for such purposes. The proceeding for such appropriation shall be as provided for the appropriation of property for other municipal purposes in this title.[2] [R. S. Sec. 2642; 98 v. 143; 70 v. 126.]

(1) **Necessity for ordinance.**—See note 2 "Appropriations for Street Improvement" under § 3679.

The declaration, in an ordinance authorizing an extension of a street railroad over a certain street, that a portion of the street in question is to be "relocated" between certain points, and that the street railroad extension is to be constructed over said street so to be relocated, is not a substitute for, or the equivalent of, an ordinance to "open, straighten, alter, or divert" such street as required by Section 3715, General Code, for the relocation thereof. Carpenter v. Traction Co., 18 N. P. (N. S.) 1.

(2) Appropriation proceedings are provided for in § 3677 *et seq. ante.*

Sec. 3716. [When turnpike or plank-road becomes street.] When a turnpike or plank-road terminates within the corporate limits, any portion of it so included therein shall become a

public street of the corporation, and shall be maintained and kept in repair as other streets, and the council may cause it to be condemned and appropriated for use as such,[1] as provided in this title for the appropriation of property for other municipal purposes.[2] [R. S. Sec. 2643; 66 v. 236, § 510.]

(1) **Amount condemned.**—A city can not condemn a portion of that part of a turnpike brought within its limits, but must condemn all within the corporation. Turnpike Co. v. Cincinnati, 2 B. 126.

Rights of turnpike company.—As to whether part of turnpike coming within municipal limits becomes a public street and turnpike company is divested of all control over it, notwithstanding compensation has not first been made to the company, see C. C. & W Tp. Co. v. Traction Co., 15 Dec. 118, (reversed, without report, 71 O. S. 530); see also Turnpike Co. v. Cincinnati, 5 Dec. (Re) 299.

Evidence of value.—Evidence of the net revenue derived from tolls taken on that portion of a turnpike lying within a municipality, is admissible. Cincinnati v. Scarborough, 5 B. 77.

A person familiar with the road, its income and probable future, and an expert in stocks, bonds and investments, may give his opinion as to the rate at which the income of such road should be capitalized. *Ib.*

Conversations of president of turnpike company in negotiating for sale of road to a street railway company to be dedicated to city, are not admissible, as evidence of value on behalf of city seeking to condemn a part of the road within its limits, although city officers were present at the time of the conversation. Cincinnati & Wooster Turnpike Co. v. Cincinnati, 19 C. C. 607.

The jury may ascertain the probable future income of the whole road by considering the past income, probable future travel, the chances of evading toll because of future cross streets, contracts with a street railroad for use of the road, contracts for repair and other expenses, and the proportion of the income that may be lost by the appropriation. Avondale v. Tp. Co., 18 B. 308.

In capitalizing the income lost by the appropriation the jury may consider the legislative right to reduce tolls, and the chances of forfeiture for non repair, etc. The capitalization must be such as would reasonably be earned by a safe investment. *Ib.*

There are two methods of fixing compensation for part of turnpike appropriation by a municpality which may be resorted to: First,—the direct method of determining in detail the present cash value tangible and intangible, of the property according to its best use and adaptability; second—the capitalization method, of determining the rate of per ctn. at which the probable future net annual income of the strip appropriated should be capitalized, and then ascertaining therefrom the capital as the basis of value of all the property taken. C. C. & W. Tp. Co. v. Cincinnati, 6 N. P. 233.

See Cincinnati v. Delhi, etc. Tp. Co., 33 B. 250.

(2) See §§ 3677 *et seq. ante.*

Sec. 3717. [Cost of improving turnpikes or plank-roads.] When a portion of a turnpike or plank-road, or the control thereof, is required by a municipal corporation, or when an arrangement is made with the company owning it for the improvement or repair thereof, provision for the cost, and for improving and keeping such turnpike or road in repair, shall be made, as is provided with respect to the streets and other highways of the corporation.[1] [R. S. Sec. 2644; 66 v. 250, § 597.]

(1) **Assessment of cost of condemnation** of toll road was held to be properly levied on abutting property in Winslow v. Cincinnati, 10 C. C. 191, 53 O. S. 665; but see Ry. Co. v. Cincinnati, 62 O. S. 465, and Dayton v. Bauman, 66 O. S. 379.

Contract exempting from toll the residents of a village in consideration of annual payment by village to turnpike company, held to amount to a method of collecting toll. State v. Lower River Road, 21 C. C. 662. As to the validity of such a contract see Extension of Lower River Road Co. v. Cincinnati, 13 Dec. 214. (See 2 O. L. R. 281.)

Sec. 3718. [Remedy for neglect of corporation to keep turnpike or plank-road in repair.] If a municipal corporation condemns a portion of a turnpike or plank-road, and fails to keep the portion so condemned in as good condition and repair as is required by the charter of the company, the directors of the company may, by writ of mandamus, compel the corporation to perform that duty. [R. S. Sec. 2645; 72 v. 164, § 598.]

Sec. 3719. [How turnpike or plank-road condemned for street purposes.] If a municipal corporation extends its limits so as to include therein a portion of a turnpike or plank-road, without purchasing or condemning it, within six months after the mayor is notified in writing that such company demands compensation therefor, the council shall proceed, in the manner prescribed in this title for appropriation of property for other municipal purposes, to cause such portion of such turnpike or plank-road to be condemned for street purposes.[1] On failure of the council so to proceed, the president of the turnpike or plank-road company, if authorized by the directors thereof, may file an application in the court of common pleas of the proper county, setting forth such facts, and asking that

the value of such portion of the turnpike or plank-road be assessed by a jury. [R. S. Sec. 2646; 72 v. 164, § 598.]

(1) **Condemnation.**—See as to condemnation of turnpike in municipal limits, § 9255, under title "Streets", in Part II.

A corporation organized to provide for the keeping in repair of gravel, macadamized roads, etc., although the road of such corporation be a plankroad, was held to be a turnpike company within the meaning of this section and its remedy for compensation of part of its road taken by a city to be as provided here, and such company was held not entitled to a civil action as a plankroad company under act of March 23rd, 1869, 66 O. L. 36. Tremainsville Pl. & Tp. Co. v. Toledo, 31 O. S. 588.

Venue of action.—Action by turnpike company for compensation for portion of road within municipal limits is transitory and must be brought in county in which defendant municipality is situated. Cincinnati, etc., Tp. Co. v. Milford, 13 C. C. (N. S.) 170.

Sec. 3720. [How proceeding conducted.] The cause shall be conducted to final judgment in the manner so prescribed, so far as applicable, and the corporation shall pay the compensation awarded by the jury, with interest, and costs, in such proceeding, within one year after date of the rendition of the verdict. When the compensation awarded has been paid, the title to such portion of such turnpike or plank-road shall vest in the corporation. For the purpose of providing means to pay therefor, the council may levy a tax in addition to the amount limited by law. [R. S. Sec. 2646; 72 v. 164, § 598.]

Sec. 3721. [Adaptation of turnpike or plank-road.] When the road of a turnpike or plank-road company passes through or terminates in a municipal corporation, the council shall have power, with the consent of the company, to make any improvement or repair of such road, additional to the improvement or repair required by law of the company, that, in the opinion of the council, will better adapt such road to use as a street of the corporation. [R. S. Sec. 2647; 66 v. 251, § 599.]

Sec. 3722. [Right of toll not to be impaired.] The right of any company to take toll at any toll-gate established in the corporation, shall not be impaired by anything in this title contained, except where the road of the company has been duly appropriated, and compensation made therefor, or the rights

of the company in the road have been surrendered by agreement.[1] [R. S. Sec. 2648; 66 v. 251, § 600; 66 v. 36.]

(1) **Toll gate in municipal limits.**—A contract between municipality and turnpike company, by which the company is allowed to maintain part of its road in the municipal limits and collect toll for such part, must be construed with reference to the laws providing for location of tollgates, and the company may collect toll for the part of the road in city limits if its tollgate is properly located. Springfield Tp. Co. v. Springfield, 27 O. S. 584.

This section was held not to repeal or modify § 3491 R. S. (now §§ 9254, 9255 G. C.), making it unlawful to keep up a tollgate or collect tolls within municipal limits. Tp. Co. v. Kelley, 41 O. S. 144. But under provisions of § 3491 R. S. (now §§ 9254, 9255 G. C.), it was held a company can not collect tolls for the part of its road included in a municipality. Madisonville v. Tp. Co., 17 B. 30. See further, Bader v. Lower River Road, 21 C. C. 662.

As to condemnation of turnpike and removal of toll gate in municipal limits, see §§ 9254, 9255 under title "Streets" in Part II.

Sec. 3723. [Dedication of streets; acceptance by council necessary.] No street or alley dedicated to public use by the proprietor of ground in any corporation, shall be deemed a public street or alley, or under the care or control of the council, unless the dedication is accepted and confirmed by an ordinance specially passed for such purpose.[1] [R. S. Sec. 2650; 66 v. 222, § 440.]

(1) **Character of provision.**—This section is not intended as a limitation upon the general powers of a municipality for opening and improving streets, but as a restriction to prevent the municipality from being vested with the title to and charged with the care of streets and alleys without its consent. Wisby v. Bonte, 19 O. S., 238.

Failure of council to accept dedication of streets in platted territory does not relieve a municipality of its obligation to furnish reasonable police and fire protection, or to supply water. See Op. Atty. Gen. (1920), p. 782.

The question whether streets and alleys dedicated to public use and accepted by the public have been improved or opened up to public travel is one for the jury. Dayton v. Rhotehamel, 90 O. S. 175.

Public highways already established, coming into a municipal corporation by annexation, do not have to be accepted and confirmed by ordinance before they come under the control of council. This section was not intended to withdraw from control of council such streets as are already established by public use and by the acts of the city authorities improving them. Steubenville v.

King, 23 O. S. 610; R. R. v. Defiance, 10 C. C. 27, 32 (affirmed, 52 O. S. 262).

Does not abolish common-law dedication.—Nothwithstanding the provisions of § 3723, there may be an offer of dedication and an acceptance under the principles of common law; although, under § 3723 no liability attaches to the municipality to keep such highway in repair until after ordinance passed. Winslow v. Cincinnati, 6 N. P. 47, 53, (aff'd, 53 O. S. 665).

Title by prescription.—Streets may be established by prescription, where there is neither an intention to dedicate nor an acceptance; but such title can be acquired only by adverse user by the public, under a claim of right, and uninterrupted for twenty-one years. Railroad Co. v. Roseville, 76 O. S. 108. As to what will constitute such adverse use, see Toledo v. Converse, 21 C. C. 239; Milliken v. Bowling Green, 9 C. C. 493; Railroad Co. v. Roseville, 76 O. S. 108.

Applies only to streets or alleys.—This section does not apply to a dedication of a park to a municipality. Abraham v. Cincinnati, 13 Dec. 619.

Kinds of dedication.—Valid dedication of property for street purposes may be made either (*a*) according to the rules of common law, or (*b*) under the statute. See Fulton v. Mehrenfeld, 8 O. S. 440; Sullivan v. Columbus, 12 Dec. 650.

Common-law dedication.—In case of a *common-law dedication*, there must be not only a dedication to public uses by the owner, but also an acceptance by the public. Such a dedication operates by way of estoppel and not as a grant or transfer of interest. Fulton v. Mehrenfeld, 8 O. S. 440; Sullivan v. Columbus, 12 Dec. 650; Abraham v. Cincinnati, 13 Dec. 619.

The dedication and acceptance may be shown by acts and declarations of the parties and surrounding circumstances. *Ib.*

But the intention to make a dedication must be shown by acts clearly evincing such intent. Webber v. Toledo, 3 C. C. (N. S.) 319; 23 C. C. 237; Railroad Co. v. Roseville, 76 O. S. 108.

A defective statutory dedication is evidence, as an act *in pais*, of a dedication at common law by the owner. Daiber v. Scott, 3 C. C. 313; Doren v. Horten, 1 Disney, 401.

Intention to dedicate.—As to what will constitute an intention to dedicate sufficient to show a common-law dedication, see Penquite v. Lawrence, 11 O. S. 274 (acquiescence in public use); Wisby v. Bonte, 19 O. S. 238; Daiber v. Scott, 3 C. C. 313 (accepting lots of subdivision platted with streets); Lockland v. Smiley, 26 O. S. 94, 100, (description in a deed of property as bounding on a street), Schlemmer v. Furniture Co., 7 C. C. (N. S.) 468; 15 Dec. 92; 2 N. P. (N. S.) 293 (describing property as an "alley" and its use by public as such); Ry. Co. v. Cleveland, 1 N. P. 1; (allotment in partition reserving rights of way not a dedication, though rights of way are open to public use); Boeres v. Strader, 1 C. S. C. R. 57, (merely having property open to public as a wharf, not a dedication); Macneale v. Cincinnati, 8 B. 324, (purchase of lot described as abutting on street and strip called street used by public for

long period); Duffy v. Norwood, 3 N. P. 325, (call for a street in deed, and public use of the street); Cherry v. Howe, 17 C. C. 246, (leaving strip off end of lot to afford access to owners' tenants, not a dedication); Millikin v. Bowling Green, 9 C. C. 493, (owner putting down board walk on his own property, but bordering a street whose lines are unmarked not a dedication); Winslow v. Cincinnati, 6 N. P. 47, (attaching to donor's will a plat with street marked on it); Toledo v. Ry. Co., 17 C. C. 265, 279; Myers v. Toledo, 18 C. C. 817, (co-owners partitioning by making a plat showing streets); Toledo v. Converse, 21 C. C. 239, (making a plat showing a triangular piece of ground colored as streets are colored on the map, and having no lot number, but not within dimensions of streets mapped and no taxes being paid on the strip, do not show intention to dedicate); Deutsch v. Chemical Co., 8 N. P. 428, (having a private right of way open to the public for several years, but having a sign "Private Property," etc., not a dedication); Eagle, etc., Co. v. Cincinnati, 1 C. S. C. R. 154, (reserving, in a lease, part of property abutting on alley "for private street," but the strip being used by the public for thirty years); Cincinnati v. McMakin, 38 B. 261 (a covenant in a deed to dedicate a certain strip on demand not enforceable by the city); Webber v. Toledo, 23 C. C. 237 (fact that owner of property, a part of which is appropriated to widen a street, puts down sidewalks, either voluntarily or by order of city, not to be construed as intention to dedicate); Wright v. Oberlin, 23 C. C. 509 (a map, though not acknowledged or recorded, may bind parties to a dedication, and a dedication may be made by allowing public to use the property); Railroad Co. v. Roseville, 76 O. S. 108 (intention to dedicate not shown by proof of permissive use for forty years by public of way over railroad track and unenclosed land, when such way was maintained by railroad company and used by its patrons); Bonebrake v. Columbus, 6 N. P. (N. S.) 41; 18 Dec. 367 (recorded plat showing way "for common use of all persons now or hereafter interested in said divisions" does not show intention to dedicate to public use).

Where boundary line of street dedicated is in dispute, what evidence will establish true line, see Mooren v. Cleveland, 15 Dec. 456.

Acceptance.—Acceptance by the municipality can not be shown by proof of user by the public, but it is essential that acts of acceptance by its proper officials be shown. Railroad Co. v. Roseville, 76 O. S. 108; see also Bonebrake v. Columbus, 18 Dec. 367; 6 N. P. (N. S.) 41; Lunkenheimer v. Cincinnati, 23 C. C. 617; Milliken v. Bowling Green, 9 C. C. 493. But see Winslow v. Cincinnati, 6 N. P. 47; Toledo v. Converse, 21 C. C. 239; where acceptance by public user is recognized.

A common law dedication of a street is not proved by evidence that the original owner of the premises improved the street and sold lots with reference to it, referring to an unrecorded plat, and the city renamed the street, placed a sign with the new name at a corner of the street, and gas lamps on it, renumbering and cleaning the street. Hillman *et*

al. v. Realty Co., 19 C. C. (N. S.) 330.

Dedication by plat in 1837 required no acceptance. Morison v. Cleveland, 17 C. C. (N. S.) 427.

An unsigned and unacknowledged plat placed on record in the county recorder's office in 1856, together with deeds of the same period, referring to a roadway thereon indicated, and followed by its use thereafter by the public, held sufficient to constitute dedication. Cincinnati v. Leeds, 20 C. C. (N. S.) 212; 3 Oh. App. 123. Motion to dismiss petition in error sustained by Sup. Ct. Dec. 1, 1914.

As to what acts of officials will constitute such acceptance, see Ry. Co. v. Carthage, 36 O. S. 631 (ordinance granting street railway company right to use street); Dick v. Toledo, 11 C. C. 349, 350; Cleveland v. C. C. C. & St. L. Ry. Co., 19 Dec. 372; Bonebrake v. Columbus, 18 Dec. 367; 6 N. P. (N. S.) 41.

Estoppel.—No estoppel on municipality to claim dedication because of assessment and taxation of land claimed. Reynolds v. Newton, 14 C. C. 433; but, see *contra,* Toledo v. Converse, 21 C. C. 239, and Lunkenheimer v. Cincinnati, 3 C. C. (N. S.) 143; 23 C. C. 617. Deed of dedication estops persons under it from denying existence of highway, although highway is not such in sense that public must repair. Hayes v. Park Co., 13 Dec. 67. See further Abraham v. Cincinnati, 13 Dec. 619.

Right to keep open undedicated street.—Abutters upon an undedicated street have a right to have it kept open sufficiently for ingress and egress to and from their lots. Hillman *et al.* v. Realty Co., 19 C. C. (N. S.) 330.

Statutory dedication.—In the case of a *statutory dedication,* there must be some form of grant or transfer to the municipality, and all the statutory requirements must have been complied with. Sullivan v. Columbus, 12 Dec. 650; Abraham v. Cincinnati, 13 Dec. 619.

A statutory dedication may be made either:

(*a*) By the platting commission making a plat (see § 4348), and the owner accepting the plat, as provided in § 4353, or

(*b*) By the owner making a plat as provided in § 3584.

As to what is necessary to constitute a statutory dedication, see Stephenson v. Leesburg, 33 O. S. 475, (imperfect plat); Satchell v. Doram, 4 O. S. 542, (plat not duly executed not *per se* evidence of alley); Lockland v. Smiley, 26 O. S. 94, (imperfect plat not duly acknowledged not a statutory dedication); Doren v. Horton, 1 Disney 401, (recorded plat without acknowledgment does not dedicate); Ashley v. Toledo, 13 C. C. 1, (subdivision acknowledged only by owners of one-sixteenth of tract); Reynolds v. Newton, 14 C. C. 433 (plat not signed by all owners, but all parties to a subsequent partition); Sullivan v. Columbus, 12 Dec. 650, (immediate improvement not necessary); (agreement to receive damages awarded by viewers, but no evidence that money was ever paid, does not constitute dedication.) Oberhelman v. Allen, 26 C. C. (N. S.) 305; 7 Oh. App. 251.

Grantee in esse not necessary to a dedication. William v. Socie-

ty, 1 O. S. 478; Brown v. Manning, 6 O. 298.

Dedication to a village before its incorporation is not complete and valid, and a conveyance of the property before creation of the village operates as a valid revocation of the dedication. Drucker v. Home City, 31 C. C. 466; 12 C. C. (N. S.) 309 (aff'd 81 O. S. 507).

Condition in a dedication does not invalidate it, but the condition becomes inoperative. Richards v. Cincinnati, 31 O. S. 506. And see Lloyd v. Hulbert, 1 C. S. C. R. 228.

Dower can not be claimed in lands dedicated to public use. Gwynne v. Cincinnati, 3 O. 24.

What dedication includes.—Dedication of land for street purposes carries with it the right to remove lateral support of the residue in the improvement of the street. Ross v. Cincinnati, 24 C. C. 43 (aff'd, 67 O. S. 521); but see Cincinnati v. Skinner *et al.*, 12 Dec. 735; and see also Grant v. Hyde Park, 47 B. 831, and Tenney v. Cincinnati, 24 C. C. 237 (aff'd 67 O. S. 518), holding that where property is condemned for street purposes the inquiry embraces not only an ascertainment of compensation to the landowner for the land taken, but damages to the residue of his abutting land which may result from the grading of the street.

Where land is dedicated for a street, the dedication carries with it the right to improve to a reasonable grade. Ely Realty Co. v. Elyria, 18 C. C. (N. S.) 288; aff'd without opinion, 86 O. S. 328.

As to rights of municipality to use of private sewer in street dedicated, see Kinney v. Cincinnati, 18 Dec. 257; 6 N. P. (N. S.) 137.

Agreement to dedicate, made with grantees of lots in neighborhood, whether municipality can take advantage of, see Abraham v. Cincinnati, 13 Dec. 619.

FORM OF ORDINANCE ACCEPTING DEDICATION.

Ordinance No.....

Accepting the plat of ..... of ..... addition and confirming the dedication of the streets and alleys thereon shown.

Be it ordained by the council of the City [*or* Village] of ....., State of Ohio,

Sec. I. That the plat of ..... and ..... of ..... addition to said city [*or* village] be, and the same is approved and accepted, and that the dedication to public use of the streets and alleys thereon shown, be, and the same is hereby accepted and confirmed.

Sec. II. That this ordinance shall take effect and be in force from and after the earliest period allowed by law.

.....
President of Council.

Passed ....., 19....
Attest.....
Clerk.

Sec. 3724. [Power to procure material to improve streets.] The council of municipalities, where material for graveling and macadamizing the streets must be transported by rail, shall have like power with county commissioners in case of turnpike roads.[1] [R. S. Sec. 2651; 67 v. 52, § 2.]

(1) Power of county commissioners, see § 7479 G. C.

VACATION.

Sec. 3725. [Vacation of streets; change of name.][1] On petition by a person owning a lot in the corporation praying that a street or alley in the immediate vicinity of such lot may be vacated or narrowed,[2] or the name thereof changed,[3] the council of such municipality, upon hearing, and upon being satisfied that there is good cause for such change of name, vacation or narrowing, that it will not be detrimental to the general interest, and that it should be made, may declare by ordinance such street or alley vacated, narrowed, or the name thereof changed. And council may include in one ordinance the change of name, or the vacation or narrowing, of more than one street, avenue or alley. [R. S. Sec. 2652; 98 v. 202; 90 v. 350; 67 v. 78.]

(1) For vacation of streets by court, see § 3730.

(2) **Statutory method exclusive.**—Streets and highways can be abandoned by municipalities only in the manner provided by statute, and their use can not be destroyed except for a purpose beneficial to the public. Ry. Co. v. Elyria, 14 C. C. 48, 52.

Streets do not become abandoned and revert to the original proprietors by nonuser or misuser by the municipality. Williams v. Presbyterian Society, 1 O. S. 478.

Abandonment of part of a street by vacation, would not work an abandonment of the rest of the street. State v. Railway Co., 53 O. S. 189; Cincinnati v. Kirchner, 13 Dec. 727; 1 N. P. (N. S.) 93; ordinance fixing width of sidewalk can not make an abandonment of part of street. Columbus v. Philbrick, 5 N. P. (N. S.) 449. See also Holmes v. Ry. Co., 15 O. F. D. 906; Cleveland v. Railway Co., 19 Dec. 372 (temporary diversion not an abandonment).

Part of county road brought within limits of a municipality by annexation, can not be vacated by council. Ry. Co. v. Cummins, 34 B. 301 (aff'd 53 O. S. 683); Cleveland T. & V. R. R. Co. v. Akron, 18 Dec. 231; 6 N. P. (N. S.) 81.

Who may claim damages.—Owners in immediate vicinity of, but not abutting on, street sought to be vacated, can not claim damages for vacation, unless specially injured. *In re* Ry. Co., 19 C. C. 308; Doppas v. R. R. Co., 19 C. C. 582, (aff'd, 66 O. S. 648); Kinnear

Mfg. Co. v. Beatty, 65 O. S. 264.

Proof of frequent use of vacated street by such owners, and that they would be greatly inconvenienced does not show such special injury, if other egress is possible. Kinnear Mfg. Co. v. Beatty, 65 O. S. 264.

The intended use of the street by the person to whom it will revert as evidence of lot owner's injury can not be shown in action under this section. *Ib.*

Where municipality, to construct a subway under railroad track, lowered the grade of the east portion of a street on which plaintiff's lot abutted on the west side, and vacated a part of the west side of the street where it crossed the railroad tracks, but north of paintiff's lot, plaintiff was held entitled to damages from the municipality and the railway company, for depreciation of value of plaintiff's property caused by diversion of travel from part of street in front of plaintiff's lot. Schimmelmann v. Ry. Co., 83 O. S. 356. See also Cohen v. Cleveland, 43 O. S. 190.

Injunction.—Non-abutting owner will be enjoined from removing fencing on vacated street. Campbell v. Mitchell, 17 C. C. (N. S.) 483.

To whom vacated street revert.—See notes to § 3729, *post.*

(3) **Change of name.**—Council can not change the name of a street without good cause, except on petition of abutting owners. Miller v. Cincinnati, 21 B. 121 (edit).

Illegal purpose in change of name.—Ordinances passed by council, ostensibly in the exercise of a power to change the names of streets, but really for the purpose of nullifying the law of the state, forbidding the grant of a railway franchise unless certain conditions are complied with, are invalid. Carpenter v. Traction Co., 13 N. P. (N. S.) 81.

FORM OF PETITION TO VACATE STREET.

To the council of the city [*or* village] of.....State of Ohio:

The undersigned, owners of lots in the city [*or* village] of..... in the immediate vicinity of.....street, from.....to .....respectfully petition your honorable body that..... street may be vacated between the points named, for the reason that it is no longer of use to the public and its vacation will not be detrimental to the general interest.

.....Owner of lot No.....
.....Owner of lot No.....
Etc.

(If it is desired to have an alley vacated, or a street or alley widened or the name changed, the above form may be adapted to suit the circumstances.)

Sec. 3726. [Change without petition.] When there are two or more streets, avenues or alleys of the same name, in the municipality, the council, by ordinance and without petition

therefor, may change the name of any such street, avenue or alley, so as to leave only one to be designated by the original name. When in the opinion of the council there is good cause for vacating or narrowing a street or alley, or any part thereof, and that such vacation or narrowing will not be detrimental to the general interest, it may by ordinance and without petition therefor, vacate or narrow such street or alley or any part thereof. [R. S. Sec. 2652; 98 v. 202; 90 v. 350; 67 v. 78.]

Sec. 3727. [When notice not required.] Notice of the intention of council to vacate any street, alley, avenue, or part thereof shall, in all cases, be given as provided in the next section, except when there is filed with council written consent to such vacation by the owners of the property abutting the part of the street or alley proposed to be vacated, in which case such notice shall not be required. [R. S. Sec. 2652; 98 v. 202; 90 v. 350; 67 v. 78.]

Sec. 3728. [Notice of application to be published.] No street or alley shall be so vacated or narrowed, unless notice of the pendency and prayer of the petition be given by publishing in a newspaper published or of general circulation in such municipality, for six consecutive weeks preceding action on such petition, or, where no newspaper is published in the corporation, by posting the notice in three public places therein six weeks preceding such action. Action thereon shall take place within three months after the completion of the notice. [R. S. Sec. 2653; 67 v. 78.]

FORM OF NOTICE.

Notice is hereby given that a petition by owners of lots in the immediate vicinity of.....street has been presented to the council of the city [*or* village] of....., praying for the vacation of said street, from.....to.....; and that said petition is now pending before said council and final action thereon according to law will be taken on and after.....19.... (not less than six weeks after date of first publication nor more than three months after completion of notice.)

.....

.....19....

Clerk of the city [*or* village] of.....

FORM OF ORDINANCE TO VACATE STREET.

Ordinance No.....

To vacate.....street, from.....to.....

Whereas, on the.....day of.....19...., a petition by persons owning lots in the immediate vicinity of.....street from..... to.....was duly presented to council praying that said street, between the points named, be vacated; and notice of the pendency and prayer of said petition has been given as required by law, by publication in....., a newspaper of general circulation in the corporation, for six consecutive weeks ending..... 19....; and,

Whereas, council, upon hearing, is satisfied that there is good cause for such vacation as prayed for, that it will not be detrimental to the general interest, and ought to be made, now therefore,

Be it ordained by the council of the city [*or village*] *of*..... State of Ohio, Sec. 1: That.....street from..... to.....be and the same is hereby vacated.

Sec. 2: That this ordinance be and remain in force from and after the earliest period allowed by law.

Passed.....19....

.....President of Council.

Attest: .....

Clerk.

Sec. 3729. [Effect of order of vacation.] The order of the council vacating or narrowing a street or alley which has been dedicated to public use by the proprietor, shall, to the extent to which it is vacated or narrowed, operate as a revocation of the acceptance thereof by the council, but the right of way and easement therein of any lot owner shall not be impaired thereby.[1] [R. S. Sec. 2654; 66 v. 232.]

(1) **To whom vacated streets revert.**—To the streets of a city, the municipality holds a qualified or determinable fee. The limitation upon the title necessarily implies that there is a substantial interest not conveyed which will revert when the street is vacated. This interest is a private right in the nature of an incorporeal hereditament legally attached to the contiguous grounds and erections on them, (Crawford v. Delaware, 7 O. S. 459, 469; Railway Co. v. Cumminsville, 14 O. S. 523; Ry. Co. v. Lawrence, 38 O. S. 41) and in case of vacation the land will go to the owner of the abutting property, and not to the original owner of the land at the time it was dedicated or taken for street purposes. Callen v. Electric Light Co., 66 O. S. 166, 173; Kinnear Mfg. Co. v. Beatty, 65 O. S. 264; Stevens v. Shannon, 6 C. C. 142; Hamilton G. & C. Traction Co. v. Parish, 67 O. S. 181, 190; McLean v. Cincinnati, 18 Dec. 745; 7 N. P. (N. S.) 205; but see Lough v. Machlin, 40

O. S. 332 (where the street dedicated had never been accepted, and the abutting owner's deed did not give title to the middle of the street).

Upon the vacation of a street the whole of which was dedicated out of the property of the grantors of the abutting property holders on the west side, the abutting property holders on the east side, whose grantors contributed no property to the original dedication, are entitled to an easement only in the vacated street. The fee of such vacated street subject to such easement is in the abutting property holders who are the grantees of the original grantor who dedicated the street. Oberhelman v. Allen, 15 N. P. (N. S.) 75; and see s. c. 26 C. C. (N. S.) 305; 7 Oh. App. 251.

Division of land in vacated street where the contributions of abutting owners were unequal, see Mt. Union v. Misteleski, 22 N. P. (N. S.) 504.

Conveyance of the abutting property, even after vacation, conveys the grantor's interest in the street, if this is not especially reserved in the deed. Kerr v. Commissioners, 42 B. 193.

The reverter is subject to such rights as other property owners have in the property as a necessary means of access to their property. Kinnear Mfg. Co. v. Beatty, 65 O. S. 264; Stevens v. Shannon, 6 C. C. 142. And property owner may enjoin obstruction to his only means of access. *Ib.*

But a property owner whose land abuts on street, a part of which, not in front of his property, is vacated, has no right to enjoin the obstruction of the vacated portion by the owners to whom it reverted, where he has reasonable access to his property. He must suffer a special inconvenience different in kind from that of the general public, before he is entitled to relief. Kinnear Co. v Beatty, 65 O. S. 264.

But an alley vacated by council can not be obstructed by petitioning owner at its only exit, as against a nonpetitioning abutting owner, without furnishing another reasonable means of egress therefrom, notwithstanding nonpetitioning owner has access to a street in front of his lot. Schlemmer v. Furniture Co., 2 N. P. (N. S.) 293; 7 C. C. (N. S.) 468.

Merely failing to appear and protest against vacation does not estop nonpetitioning owner from enjoining obstruction. *Ib.*

Effect of section.—This right which other lot owners have by law is merely preserved by this section, and it does not create any new right. Kinnear Mfg. Co. v. Beatty, 65 O. S. 264. See also Schlemmer v. Furniture Co., 15 Dec. 92; 2 N. P. (N. S.) 293.

When not applicable.—The provisions of this section as to the right of way and easement of a lot owner in a vacated street, do not apply to streets the land for which had been appropriated by the municipality. Bohm v. Kelley, 17 C. C. (N. S.) 265.

Sec. 3730. [Vacation or establishment of street or alley by court.][1] On petition filed in the court of common pleas by any person owning a lot[2] in a municipality, for the establish-

ment or vacation of a street or alley in the immediate vicinity of such lot, the court, upon hearing, and being satisfied that it will conduce to the general interests of such municipality, may declare such street or alley established or vacated, but the remedy shall be in addition to those prescribed in this title. [R. S. Sec. 2655; 37 v. 44; 76 v. 25.]

(1) **Vacation of streets by council,** see § 3725 *et seq. ante.*

When section applies.—The statutory remedy may be resorted to in all cases where there has been a clear nonuser of the street by the public for twenty-one years. Nail & Iron Co. v. Furnace Co., 46 O. S. 544, 549.

But this section does not apply where the city never had title to the parcels sought to be vacated or had forfeited title. Miller v. Cincinnati, 5 C. C. 583.

See Ry. Co. v. Elyria, 14 C. C. 48, 52.

Not erroneous to refuse vacation where it is merely shown that street is not demanded by present needs of the city. To vacate street, court must be satisfied that vacation will conduce to general interests of city. *In re* Vacation Michigan Street, 31 C. C. 426; 12 C. C. (N. S.) 414.

No authority to *narrow* a street or alley, under this section. Dorsch v. Glass Co., 74 O. S. 208.

(2) **Municipality is not a lot owner** within the procedure here provided for. *In re* vacation Hotel Alley, 25 B. 89.

FORM OF PETITION FOR VACATION OF STREET.

Court of Common Pleas, ...County, Ohio,

In re vacation of .....street. } Petition.

Petitioner represents that he is the owner of lot No.....on..... street in the city [*or* village] of....., State of Ohio, in the immediate vicinity of.....street from..... to ..... in said city [*or* village].

Petitioner further represents that it will conduce to the general interest of said city [*or* village] to have said.....street from .....to .....vacated.

Wherefore, petitioner prays that the court may declare said..... street from.....to.....vacated.

.....

By.....

(*Verification.*) His attorney.

Sec. 3731. [Notice of such petition.] Notice of the pendency, object and prayer of a petition for such vacation or establishment of a street or alley shall be served upon such

municipality in the manner provided by law for the service of summons and shall be given by publication in a newspaper of general circulation in the county in which such street or alley is located, for four consecutive weeks on the same day of the week,[1] and the cause may be heard and determined at any time after the expiration of ten days from the date of last publication. [R. S. Sec. 2656; 99 v. 93; 95 v. 449; 37 v. 44.]

(1) **Notice.**—Sufficiency of notice by publication, under former statute, see vacation of Sherman avenue, 19 Dec. 683; 6 O. L. R. 558.

FORM OF NOTICE OF PETITION.

Notice is hereby given that.....the owner of a lot in the immediate vicinity of.....street from.....to ..... in the city [*or* village] of ....., County of ....., Ohio, has filed a petition in the Court of Common Pleas of said county, alleging that it will be conducive to the general interest of said city [*or* village] to have said.....street from.....to .....vacated, and praying the court to declare said street between said points vacated.

Said petition will be for hearing on and after.....19...., the first day of the next term of said court.

.....19....

....
Attorney for petitioner.

Sec. 3732. [Hearing of adverse claims.] If a person, other than the petitioner, owning a lot in the immediate vicinity of such street or alley prayed to be vacated or established, claims that he will sustain damage thereby, the court may proceed to hear proof in reference thereto and may render judgment against the petitioners for such damages as it may think just,[1] and they shall be assessed by the court against the petitioners ratably according to the value of the property owned by them as it stands taxed on the tax list of the county, and a jury may be demanded as in other cases. When necessary the court shall appoint a guardian ad litem for all minors or persons of unsound mind who may be interested in the premises. [R. S. Sec. 2656; 99 v. 93; 95 v. 449; 37 v. 44.]

(1) **Validity** of former section which omitted provision as to jury trial, see Cincinnati v. Hamilton Co., 1 Disney, 4.

Character of proceeding.—Proceeding to vacate a street under sections 3730 to 3732 is a special proceeding and not a civil action, and is not appealable to Circuit Court. *In re* Hartford Street, 31 C. C. 123.

Who may recover damages.—Owners of lots in the immediate vicinity of, but not abutting on the street vacated, cannot recover damages for such vacation, unless they have suffered some special damage different from that of the general public. *In re* C., N. O. & T. P. Ry., 19 C. C. 308; Doppas v. R. R. Co., 19 C. C. 582 (aff'd, 66 O. S. 648); Kinnear Mfg. Co. v. Beatty, 65 O. S. 264.

Where municipality damaged.—A municipality has such a proprietary interest in its streets, as to be entitled to compensation under this section if it suffers special damage by reason of change of drainage, etc. Cincinnati v. Hamilton, 1 Disney, 4.

But a municipality is not a "lot owner" within the procedure provided in this section, and can not be heard on question of its general damages, such as an ordinary lot owner would suffer; but it is entitled to be compensated for special damage, such as that caused by change of drainage. *In re* vacation of Hotel Alley, 25 B. 89.

FORM OF ENTRY VACATING STREET.

Court of Common Pleas, ... County, Ohio.

In re Vacation of .....street in the City [*or* Village] of ....., Ohio. } Entry.

This day this cause came on to be heard on the petition of ..... heretofore filed herein for the vacation of [*or* a portion of] ..... street, in the City [*or* Village] of ....., Ohio, and upon the evidence; and it appearing to the court that notice of the pendency, object and prayer of said petition has been given as required by law and that the vacation prayed for will conduce to the public interest, it is ordered and adjudged that ..... street from ..... to ..... in the City [*or* Village] of ....., Ohio, be, and the same is hereby vacated.

And the court coming now to consider the claim of ..... for damages sustained by his property in the vicinity of such vacation, assesses his damage at the sum of $..... to be paid by the petitioner [*or* by the petitioners in proportion to the value of the property owned by them as it stands on the tax list of said county]; and it is further ordered that the said petitioner pay the costs of this proceeding.

Sec. 3733. [Street not to be closed until damages paid.] No street or alley so declared vacated, shall be closed or obstructed until the damages so assessed shall have been fully paid to the persons entitled to them.[1] [R. S. Sec. 2657; 37 v. 44.]

(1) **Injunction.**—Property owner has a right to an injunction to prevent the closing of a street on which his property abuts, by vacation or obstruction, if the street is cut off near enough to his property to materially affect its value, unless he is first compensated for his injury. Madden v. Ry., 21 C. C. 73 (aff'd, 66 O. S. 649); but where his property does not abut on the street vacated and he has other reasonable means of access, he is not entitled to injunction. Kinnear Mfg. Co. v. Beatty, 65 O. S. 264.

Sec. 3734. [Road districts.] Repealed, 106 v. 574.

Sec. 3735. [Road taxes, how collected and applied.][1] Repealed, 106 v. 574.

(1) See Lima v. McBride, 34 O. S. 338.

Sec. 3736. [Attachment of contiguous territory for road purposes.] Repealed, 106 v. 574.

Sec. 3737. [Exemption from provisions of this subdivision.] Repealed, 106 v. 574.

Sec. 3738. [Labor upon streets of municipality.] Repealed, 103 v. 759.

Sec. 3739. [Fines to which delinquent liable.] Repealed, 103 v. 759.

Sec. 3740. [Collection of fines, etc.] Repealed, 103 v. 759.

Sec. 3741. [What provisions shall govern.] Repealed, 106 v. 574.

VIADUCTS.[1]

Sec. 3742. [Municipalities authorized to construct or repair viaduct; bonds therefor.] When the council of a municipal corporation has determined to issue bonds for the purpose of constructing or repairing any viaduct over any street, stream, railway tracks or other place where an overhead roadway or footway is deemed necessary as provided by law, or when such council has so determined to purchase or condemn, or when a municipal corporation has purchased or condemned land for the purpose of constructing or repairing a viaduct,

the municipal corporation may construct or repair such viaduct and purchase or condemn the necessary land therefor, and the money arising from the sale of any of the bonds so issued shall be expended as provided in the next section. [95 v. 567, § 1.]

(1) **Other provisions.**—General power to construct and keep in repair viaducts, is given in § 3629, *ante.*

Bonds for construction and repair of viaducts are provided in § 3939, *post.*

Supervision of improvement and repair, see §§ 4325 and 4364, *post.*

Sec. 3743. [How money raised for such purpose to be expended.] All funds arising from the sale of bonds for the construction or repair of viaducts or for the purchase or condemnation of land for such purpose, shall be paid into the treasury of the corporation and paid out and expended upon the vouchers of the board, officer or officers thereof having charge of the repair of public roads or streets. Contracts for such improvements shall be made in the same manner as other contracts are required by law to be made. Vouchers to pay such contracts or for any portion of the cost of such improvements shall be drawn by such board, officer or officers upon the auditor or clerk of the municipal corporation, who shall keep an accurate account of moneys so expended, and the funds created by the sale of bonds for viaduct purposes shall be known as the "Viaduct fund." [95 v. 568, § 2.]

Sec. 3744. [When bond issue is authorized by election.] When the voters of a municipal corporation determine to issue bonds for the construction or repair of viaducts, or for the purchase or condemnation of the land, necessary therefor, as authorized by law, the authority to make the improvement is hereby conferred and the money arising from the sale of the bonds shall be expended in the same manner as provided in the preceding section. [95 v. 568, § 3.]

SPRINKLING.[1]

Sec. 3745. [Petition for sprinkling streets.] Upon the petition of thirty-five per cent of the electors in a municipal corporation, certified by the mayor thereof to the council, such council may by ordinance provide for sprinkling with water

any and all or any part of the streets, avenues, squares and public places within the corporation in the manner hereinafter provided. [95 v. 447, § 1.]

(1) **Other provisions** for sprinkling streets, see §§ 3839 *et seq.*, *post.*

Supervision of, see §§ 4325 and 4364, *post.*

Sec. 3746. [Ordinance; two-thirds vote required.] The ordinance to provide for such sprinkling shall not become operative unless it has received the affirmative votes of two-thirds of the members elected to council. [95 v. 448, § 2.]

Sec. 3747. [How and by whom to be done.] Upon the certification of such petition, and the passage of such ordinance, the board or officer having charge of the repair of streets in the municipal corporation may purchase the appliances and materials and employ the labor necessary to provide for sprinkling, or make contracts for all or any part thereof for periods not exceeding five years. [95 v. 448, § 3.]

Sec. 3748. [Tax levy therefor; railway companies to pay portion of cost.] To provide a fund to pay all or part of the cost of such sprinkling, the board or officer having charge of the repair of streets in the corporation, each year may estimate the cost thereof, and cause to be levied a tax therefor upon the general tax duplicate of the corporation, in the same manner and subject to the same conditions as other levies for municipal purposes, except that the levy may be in addition to the amount authorized for municipal purposes. Upon such estimate, the levy shall be made by the council in the corporation. Street railroad companies operating within such corporation shall annually pay into the treasury of the municipal corporation one cent per lineal foot of track upon sprinkled streets as their part of the cost of such sprinkling. [95 v. 448, § 4.]

Sec. 3749. [Council may require street railway company to sprinkle its right of way.] The council of a municipality by resolution may require any interurban or street railway company to sprinkle with water its right of way on any street, alley or public highway, or any portion thereof lying within the limits of the municipality. [98 v. 5, § 1.]

Sec. 3750. [Municipality may contract; when; cost and penalty; a lien.] Upon failure of any interurban or street railway company after sixty days' notice to the person having charge of management of such interurban or street railway company in such municipality, to comply with the provisions of such resolution, the municipality may do such sprinkling or contract therefor, through its proper officials in accordance with the laws relating to contracts, and the cost thereof shall be charged against such interurban or street railway company so directed to sprinkle, and shall be a lien upon all the real estate and leasehold interest of such interurban or street railway company within the county wherein such municipality is situate, and such charge and cost together with a penalty of twenty-five dollars for each and every day of failure on the part of such interurban or street railway company to sprinkle as required, may be collected in any court of competent jurisdiction or the lien enforced in the manner provided by law. All charges, costs and penalties collected under the provisions of this section shall be paid into the general fund of the municipality to be disposed of as the council thereof may direct. [102 v. 48; 98 v. 5, § 2.]

Sec. 3751. [Contracts to treat streets with oil.][1] Municipal corporations may treat with oil, for the purpose of laying the dust on, and preserving the surface of streets, alleys, squares and public roadways. When the council desires to have such work performed by contract, it shall pass an ordinance declaring its intent so to do. In villages the council shall contract and in cities the council shall direct the director of public service to contract, for a period named, not exceeding five years, with any person or corporation for treating with oil the streets, alleys, lanes, squares and public roadways and places, such contract to include all the districts established as hereinafter provided, during the entire term of such contract. [99 v. 588; § 1; 98 v. 50.]

(1) **Validity** of act sustained. Eyre v. Norwood, 75 O. S. 608, (no report).

Sec. 3752. [How such contracts made.] The contract shall be made in accordance with the general laws governing mu-

nicipal contracts, except that the requirement of a certificate that the necessary money is in the treasury, and the provision of law that council shall not enter into a contract not to go into full operation during the term for which all the members thereof are elected, shall not apply to such contract. [99 v. 588, § 1; 98 v. 50.]

Sec. 3753. [Districts created on petition of property owners.] When a written petition signed by the owners of a majority of the abutting feet of property on a street or alley, or part thereof, or of connecting or intersecting streets or alleys, or parts thereof, is presented to the director of public service in a city, or to the council in a village, praying that the roadways within the territory described be treated with oil, and for the assessment of the whole cost thereof on the property abutting such streets or alleys, the director or council shall forthwith declare, by resolution, such territory to be, and thereafter it shall be, a district within which the roadways will be treated with oil, for a period named in the petition, not to exceed the life of the contract, and the cost thereof assessed upon the property abutting the streets or alleys therein, by the abutting foot. [106 v. 450; 99 v. 588, § 2; 98 v. 50.]

Sec. 3754. [Districts created by official action.] When, in the opinion of the director of public service in a city, or of council in a village, the treatment with oil, for the purpose of laying the dust on and preserving the surface of the roadways of any public park or parks, or of any street or alley, or part thereof, or of connecting or intersecting streets or alleys, or parts thereof, having a roadway area of not less than five thousand square yards, will be of general benefit within the corporation, such director or council may declare by resolution such park or parks, or the territory including such street or alley, or part thereof, or intersecting or connecting streets or alleys, or parts thereof, to be, it thereupon shall be a district, within which the roadways shall be treated with oil, for a period named in the resolution, not to exceed the life of the contract. The whole cost, or such portion thereof as may by him or the council be deemed just, shall be paid by the cor-

poration, and the remainder of the cost to be assessed by the abutting foot on the property abutting the streets or alleys in such district. There shall be no assessment levied on any property in excess of fifty per cent of the whole cost, except where petitioned for, as hereinbefore provided. [99 v. 588, § 2; 98 v. 50.]

Sec. 3755. [Assessment of property.] When a portion of the cost is to be assessed against private property, notice to the owners thereof shall be given by publishing the resolution establishing the district and setting forth the portion of the cost to be assessed, once each week, for two weeks in a newspaper published and of general circulation in the corporation, and if there is no newspaper published therein, copies of the resolution shall be posted in twelve public places in the corporation. [98 v. 51, § 3.]

Sec. 3756. [Objections to assessment.] If an owner objects to the assessment, he shall file his objections in writing with the director of public service in cities, and the council in villages, within ten days after such publication or posting, and thereupon such director or council shall consider such objections, and, if they are found to be well taken, may remit the whole, or such portion of the assessment against the property of the objecting owner as is deemed just, and any deficiency arising from such remitter may be made up from any fund of the corporation available for cleaning and repairing of streets, or by contributions from the owners desiring that the work be done. [98 v. 51, § 4.]

Sec. 3757. [Notification of contractor to proceed with work.] After the expiration of the time within which objections may be filed, and the disposition of objections, such director or council shall notify the contractor of the passage of the resolution creating such district, and direct him to proceed with the work, fixing in the notice to the contractor some reasonable period of time within which such work shall be begun. [98 v. 51, § 5.]

Sec. 3758. [Assessments and the collection thereof.] Where the whole or a portion of the cost is to be assessed, such director or council shall, within thirty days after the first treatment with oil has been accomplished, and at his or its option may, at any time previous thereto, levy an assessment by the abutting foot on the property abutting the streets and alleys in the district, to pay the whole or such portion of the cost as was in the resolution determined. The assessment may be collected in one or more installments in the manner provided for assessments for street improvements, with a penalty of five per cent and interest for failure to pay at the time fixed in the assessing ordinance. No assessment shall be collected in more than one installment, unless the work petitioned for covers a period of time greater than one year, when the installments may equal in number the years for which the district was created. [98 v. 52, § 6.]

Sec. 3759. [Bonds may be issued.] Bonds or certificates of indebtedness may be issued and sold in anticipation of the collection of such assessments, or installments of assessments, and there may be included in one bond issue or one certificate of indebtedness the amount of uncollected assessments, or installments of assessments, levied on the property, in any number of districts and payable within any one calendar year. In the cost shall be included the cost of work done on intersections and roadways within the district, advertising, inspection and superintendence. The right of the municipality to levy such assessments shall not be affected by the amount of assessments theretofore levied upon such property. [98 v. 52, § 6.]

Sec. 3760. [Treatment with oil regarded as a cleaning and repairing of streets.] Such treatment with oil shall be regarded as a cleaning and repairing of streets and alleys, and the corporation's portion of the cost thereof may be paid from any fund available for the cleaning or repairing of streets or alleys. When the roadways of a public park or parks are ordered to be so treated, the cost thereof may be paid from any fund available for the care or maintenance of such parks. [98 v. 52, § 7.]

Sec. 3761. ["Owner" defined.] The term "owner", within the meaning of these provisions for such treatment with oil, or sprinkling with water, shall be held to include the legal or equitable owner, the person in whose name the property may be assessed for taxation on the tax duplicate, or a tenant giving satisfactory guaranty that the assessment against the property signed for will be paid, or the board of education having the control of any school property, and any such board of education is authorized to provide for sprinkling with water or treatment with oil any street abutting on such property by private contract, and pay for the same as other contingent expenses. [102 v. 304; 98 v. 52, § 8.]

LIGHTING BRIDGES AND RAILROADS.

Sec. 3762. [Council may require bridge or railway to be lighted.] When deemed necessary by the council of a municipality to have a bridge or railway, located in whole or in part in such corporation, owned, possessed, or operated by an individual, company, association, or corporation, or any portion thereof, lighted, the council shall pass an ordinance for that purpose, requiring such individual, company, association, or corporation, to light such bridge or railway within a specified time, but it shall not require such railway or portion thereof to be lighted with electric arc lights.[1] [R. S. Sec. 2494; 95 v. 419; 69 v. 47.]

(1) **Validity.**—Law requiring railroad to light its tracks within city or village is constitutional. C. H. & D. R. R. v. Sullivan, 32 O. S. 152; Ravenna v. Pennsylvania Ry. Co., 45 O. S. 118; C. H. & D. R. R. v. Bowling Green, 57 O. S. 336, C. C. C. & St. L. Ry. Co. v. St. Bernard, 15 C. C. 588.

Any railroad.—This includes a company operating the road, though neither the owner nor the lessee. C. H. and D. R. R. v. Bowling Green, 57 O. S. 336.

Interurban railways are to be deemed railroads within the meaning of this section and as such may be required to light street crossing. Ottawa v. Ohio Elec. Ry., 32 C. C. 197; 13 C. C. (N. S.) 561.

Requirements must be reasonable.—Municipality may specify the kind of light, and where lights must be placed, but it must not act unreasonably or arbitrarily. C. C. C. & St. L. Ry. Co. v. Village of St. Bernard, 15 C. C. 588; C. H. and D. R. R. v. Bowling Green, 57 O. S. 336.

A requirement that company proceed within twenty days from receipt of notice is not unreasonable. St. Mary's v. Railroad, 60 O. S. 136.

FORM OF ORDINANCE REQUIRING RAILWAY TO BE LIGHTED.

Ordinance No.....

Requiring the.....Railroad Company to light its railway within the city [*or* village] of.....

Be it ordained by the council of the city [*or* village] of....., State of Ohio:

Sec. 1. That it is deemed necessary by the council of the city [*or* village] of....., to have the railway (or a certain portion defined) within the limits of said city [*or* village] lighted, and that The.....Railroad Company be, and it is hereby required to light its railway within the limits of said city [*or* village] with..... and erect.....[lamp posts, poles, *etc., as required*] located as follows: (Give place where posts are to be placed); said..... [lamp-posts, etc.] shall be of ..... (describe style of lamp-posts, etc.); and such lights shall be kept burning from.....to..... in each twenty-four hours.

Sec. 2. That the clerk be and he is hereby directed to give notice to the.....Railroad Company of the passage of this ordinance, by delivering a copy thereof to said company or the person or corporation having possession, charge or management of said railway, [or in the manner provided in § 3764 of the General Code of Ohio] and if said railway is not lighted as herein required within twenty days from the receipt of this notice, said lighting will be done by said city [*or* village] and the expense thereof assessed against said company in the manner provided by law.

Sec. 3. This ordinance shall take effect and be in force from and after the earliest period allowed by law.

Passed.....19....

.....
President of Council.

Attest:

.....,
Clerk.

Sec. 3763. [Character of the ordinance.][1] The ordinance shall specify the manner in which such bridge or railway shall be lighted, the number and style of lamp posts, gas posts, electric lights or other lights and fixtures, and the time such lights shall be kept burning in each twenty-four hours; but no such lights, poles or fixtures, nor any lights, poles or fixtures, located by any municipal corporation on its streets, alleys or public grounds shall be required to be so placed as to interfere with a clear view of any fixed signal used in the operation of such railroad from such points thereon as

such view is required for safe operation. And all lights, poles or fixtures heretofore placed so as to interfere with such clear view shall, within a reasonable time, be re-located to conform to this act. Provided, however, that nothing herein contained shall be construed as excusing any railway company from lighting its bridges and tracks, when required so to do or from paying any reasonable assessment or charge therefor. [103 v. 470; R. S. Sec. 2495; 91 v. 147; 66 v. 220, § 430.]

(1) **Character of regulations.**— A city or village has authority to prescribe the kind of light to be used. C. H. and D. R. R. v. Bowling Green, 57 O. S. 336.

But an ordinance providing for electric lighting when municipality contains no electric plant would be an unreasonable burden and void. *Ib.*, 344.

City or village may require railroad compay to use same kind of lamp and illuminating material as used in city or village. *Ib.*

And it may require a light unknown at the time of the enactment of the statute. C. H. & D. R. R. v. Bowling Green, 9 C. C. 524, 531.

An ordinance requiring a company to light its tracks and specifying that the lamps shall be lighted the same hours as the lamps of the village, is sufficiently definite. C. H. and D. R. R. Co. v. Bowling Green, 57 O. S. 336.

Sec. 3764. [Notice of requirement shall be given; time and manner.] Notice of such requirement shall be given at least twenty days before penalty or charge shall be imposed for default, and such notice may be given by delivering a written or printed copy of the ordinance to an owner or part owner, or any person having possession, charge or management of such bridge or railway.[1] When such ordinance requires the lighting of a railway, service of such written or printed copy of the ordinance upon a ticket or freight agent of such railway company in such municipality, and if there is no such ticket or freight agent therein, upon any ticket or freight agent of such railway company in the county wherein such municipality is located, shall be sufficient, and shall charge the person, company, corporation, or partnership, owning or operating such railway with notice of the passage of the ordinance and the requirements thereof.[2] [R. S. Sec. 2496; 95 v. 369; 66 v. 221, § 431.

(1) **What notice required.**—An ordinance requiring the lighting of a railway is not rendered void by failure of village to notify company of its intentions. C. C. C. and St. L. Ry. v. St. Bernard, 19 C. C. 299.

The notice required must be made only when a penalty or charge is to be imposed for default. *Ib.* See also C. C. C. & St. L. Ry. v. Village of De Graff, 20 C. C. 710.

No fixed time for performance necessary.—§§ 3762 to 3767 should receive a reasonable construction, and an ordinance will not be held to be defective as failing to fix a specified time for the performance of such requirement by the company, if its language, taking the ordinance altogether, is sufficiently definite to inform the company that such lighting is required to be done, how it is to be done, and when it is to be done. St. Mary's v. Railroad, 60 O. S. 136.

(2) **Service of notice.**—Notice served by sending registered letter with receipt of the addressee, is sufficient. Bowling Green v. C. H. & D. R. R., 10 C. C. 63, 68.

And notice to an officer of the "C. H. & D. Railway Co.," instead of Railroad Co. was held sufficient. *Ib.*, 69. See also C. H. & D. R. R. v. Bowling Green, 9 C. C. 524, 526.

Sec. 3765. [Procedure on failure to light bridge or railway.] If the person, company, or corporation, owning, possessing or operating such railway or bridge, neglects or fails to do such lighting in conformity with the provisions of the ordinance, for twenty days after such notice, the council may immediately cause the lighting to be done at the expense of such person, company, or corporations.[1] [R. S. Sec. 2497; 69 v. 47.]

(1) **Recovery.**—On failure of company to obey ordinance to light, the village may light the track and recover in an action against the company. C. H. & D. R. R. v. Bowling Green, 57 O. S. 336.

A village may recover even though a lamp was not placed on the track, if the track was lighted and although the lamp also lighted a street. The particular location of the lamp is not material if it effect its purpose. C. C. C. and St. L. Ry. v. St. Bernard, 19 C. C. 299. See also C. H. and D. R. R. v. Bowling Green, 9. C. C., 524, 531.

Municipality may employ private company.—On failure of railroad company to perform, municipality may employ a private company, pay the bill and collect from the company in an action. C. H. and D R. R. v. Bowling Green, 9 C. C. 524, 530, aff'd, 57 O. S. 336.

Amount assessed presumed right.—Presumption attaches that the action of council was regular and the amount assessed proper. Village of St. Mary's v. Railroad, 60 O. S. 136, 148.

Sec. 3766. [Assessment for expense of such lighting.] The council may direct the manner in which the expense of lighting such bridge or railway shall be assessed and collected. When

so assessed, the amount shall be a debt due against and payable by such person, company, or corporation, and shall be a lien[1] to be enforced as any other lien on such bridge and the land on which it is built, or upon the real estate of the railway company or leasehold interest within the county wherein such municipality is located. [R. S. Sec. 2498; 69 v. 47, § 433.]

(1) **Expense of lien.**—When, on default of the railway company, the lighting is procured to be done by the council, the expense of such lighting may, by the council, be assessed or declared a lien upon any of the real estate of the railway company within the municipality. Railroad Co. v. Sullivan, 32 O. S. 152.

FORM OF ORDINANCE TO ASSESS EXPENSE OF LIGHTING RAILWAY.

Ordinance No.....

To assess the cost and expense of lighting.....railway within the limits of the city [*or* village] of.....

Be it ordained by the council of the city [*or* village] of....., State of Ohio:

Sec. 1. That to pay the cost and expense incurred by the city [*or* village] of.....in lighting the .....railway (or portion thereof, as the case may be) within the limits of said city [*or* village] in the manner provided in an ordinance No..... passed....., 19...., requiring the.....railroad company to do said lighting, and after the passage of said ordinance, and the failure of said railroad company to comply with its requirements after due notice as required by law, there be assessed on all the real property or leasehold interest of The.....Railroad Company within the county of....., the sum of..... dollars.

Sec. 2. That the amount herein assessed upon the property of said railroad company shall be payable to the treasurer of the said city [*or* village] within.....days from the passage of this ordinance, and if not paid as herein required, the solicitor is hereby directed to proceed against said company for the sum so due, in the manner provided by law.

Sec. 3. This ordinance shall take effect and be in force from and after the earliest period allowed by law.

Passed....., 19....

.....
President of Council.

Attest:

.....,
Clerk.

Sec. 3767. [How lien may be enforced.] The charge may be collected or the lien enforced in the manner provided for the assessment of damages and expenses for making public improvements.[1] [R. S. Sec. 2499; 66 v. 221.]

(1) **Lien, how enforced.**—See C. H. and D. R. R. Co. v. Sullivan, 32 O. S. 152; Bowling Green v. C. H. & D. R. R., 10 C. C. 63. See § 3898, *post.*

STREET RAILROADS.[1]

Sec. 3768. [Terms and conditions of construction and operation to be fixed by council; renewal of grant.] No corporation, individual or individuals shall perform any work in the construction of a street railroad,[2] until application for leave[3] is made to the council in writing, and the council by ordinance has granted permission, prescribed the terms and conditions upon, and the manner in which, the road shall be constructed and operated, and the streets and alleys to be used and occupied therefor,[4] but the council may renew any such grant at its expiration upon such conditions as may be considered conducive to the public interest.[5] [R. S. Sec. 2501; 92 v. 206; 84 v. 40; 66 v. 217; 76 v. 156.]

(1) **Other street railway laws.**—For other laws relating to street railways in municipal limits not contained in Title XII, see title "*Street Railroads in Municipal Limits*" in Part II. See also §§ 3632, 3643, 3749, *ante.*

For provisions, applicable to Cincinnati, relative to lines operated under the "Rogers Law", see Secs. 4000-1 to 4000-15, *post.*

For provisions relative to appointment and powers of rapid transit commission, and operation of municipally owned lines, see Secs. 4000-16 to 4000-28, *post.*

Public utility owned by municipality; grant of right to operate.—See State *ex rel.* v. Cincinnati St. Ry. Co., 97 O. S. 283.

Construed with other laws.—These provisions to be construed with other laws on the same subject, see R. R. Co. v. Commissioners, 56 O. S. 1, 7; Hattersly v. Waterville, 26 C. C. 226, 229; 4 C. C. (N. S.) 242 (aff'd, 74 O. S. 466); C. C. C. & St. L. Ry. Co. v. U. B. & N. Ry. Co., 26 C. C. 180; 5 C. C. (N. S.) 583 (aff'd, 73 O. S. 364).

(2) **Definition.**—A street railway is a railway constructed upon streets or highways and for the purpose of facilitating the use thereof by the public in the transportation of persons and property. State v. Dayton Traction Co., 18 C. C. 490.

Steam railroads and electric railways are classified and recognized as separate and distinct from each other

by the statutes of Ohio, and statutes relating to and regulating the former are inapplicable to the latter unless an intention to the contrary clearly appears. Dayton & U. Ry. Co. v. Traction Co., 26 C. C. 1. Thus a municipal corporation has no authority to compel an interurban or street railroad company to light its bridge or railroad within the limits of such corporation. Railway Co. v. The Village of Ottawa, 85 O. S. 229.

But while a railroad and a street railway are distinct and different things, the distinction is not that one is for the transportation of both persons and freight and the other for the carrying of passengers only. State v. Dayton Traction Co., 18 C. C. 490; 64 O. S. 272. See also, as to distinction, Cleveland & Cincinnati, R. R. Co. v. Cincinnati, Cin. Court Index, Vol. 10, No. 32 (aff'd, 66 O. S. 639); Traction Co. v. Traction Co., 47 B. 854; Commissioners v. Traction Co., 75 O. S. 548.

It is immaterial what the motive power is where it is not steam, and that the cars carry freight and mail, if they stop at any point for passengers and the rails conform substantially to the grade of the highway. Dietz v. Traction Company, 4 N. P. 399.

Suburban and interurban railroads are street railways within the meaning of laws on street railways. C. & H. E. S. R. Co. v. C. H. & I. R. Co., 21 C. C. 391; C. L. & A. St. Ry. v. Lohe, 68 O. S. 101; C. C. C. & St. L. Ry. Co. v. U. B. & N. Ry. Co., 26 C. C. 180. See also State v. Cleveland, 83 O. S. 61, (construing § 12497 G. C. before amendment), and see § 5488 G. C. But see Webber v. Elec. Ry. Co., 13 Dec. 194; Matthews v. Traction Co., 13 Dec. 311 (25 C. C. 652). The rules of negligence, however, which apply to ordinary street railways are applicable to interurban railroads only when running within municipality; when running in open country on track like steam railroad track and at high rate of speed the rules of negligence applicable to steam railroads should apply. C. L. & A. St. Ry. v. Lohe, 68 O. S. 101, 110.

A traction company is a street railway company if organized for purpose of operating interurban electric road. H. G. & C. Traction Co. v. Traction Co., 47 B. 854. So a grip cable road was held to be a street railroad. Clement v. Cincinnati, 16 B. 355.

Street railways may carry freight. —State v. Dayton Traction Co., 64 O. S. 272.

Not an additional burden.—A street railroad is not an additional burden upon the streets of a municipality requiring compensation to abutting property owners. St. Ry. v. Cumminsville, 14 O. S. 523; Oviatt v. Akron St. R. R. Co., 2 N. P. 84; Glidden v. Cincinnati, 30 B. 213; H. G. & C. Traction Co. v. Parish, 67 O. S. 181; State ex rel. v. Columbus Ry. Co., 24 C. C. 609; Detroit v. Railway Co., 56 Fed. 867; Detroit Railway Co. v. Detroit, 64 Fed. 628; Akron, etc., Co. v. Erie Ry., 28 C. C. 36; 7 C. C. (N. S.) 199; C. C. C. & St. L. Ry. Co. v. Railway Co., 26 C. C. 180 (aff'd, 73 O. S. 364); but see Weber v. Electric Railway Co., 13 Dec. 194; Anderson v. Columbus, 14 Dec. 180; 1 N. P. (N. S.) 541. It is not an additional servitude though allowed any motive power other than animal and permitted to

carry freight. Dietz v. Traction Co., 4 N. P. 399; and changing of motive power to electricity does not make a railway an additional servitude. Pelton v. East Cleveland Railroad, 22 B. 67. The poles and wires used in putting electric railway on street do not necessarily constitute a new servitude. Simmons v. Toledo, 8 C. C. 535, 558 (aff'd, 31 B. 367); and where railway is properly located the company is not liable for injury to trees made necessary by construction of road. Keefe v. Ry. Co., 8 N. P. 466.

Except for statutory requirements of consent municipal authorities can grant the right to use the streets without such consent. Transit Co. v. Traction Co., 12 Dec. 1; H. G. C. Traction Co. v. Parish, 67 O. S. 181.

But while a street railway is not an additional servitude on a street entitled the abutting owner to compensation, under ordinary circumstances, yet where the owner is deprived of the means of ingress and egress to his property and the same is made inconvenient and burdensome in a special way by the construction of railway, his property rights are invaded and he is entitled to compensation. Akron, etc., Ry. Co. v. Keck, 23 C. C. 57; Street Railway v. Cumminsville, 14 O. S. 523; Bellaire, etc., Street Railway Co. v. Smith, 41 B. 212. But such rights of abutting owners are not invaded by changing street railway from single to double track even though this prevents wagons from standing at right angles to curb while cars are passing. Miller v. Railway Co., 13 Dec. 418.

And if from the peculiar nature of the abutting owner's business, his trade is impaired or his property rendered less desirable by the construction of the street railway, there being no change of grade or unnecessary interference with the abutter's easement, this is *damnum obseque injuria.* Ireton Bros. v. Traction Co., 2 N. P. (N. S.) 317.

Encroachment on sidewalk by street railway track in such way that car in turning extends slightly over sidewalk, is not such material interference with ingress and egress as to entitle abutting owner to injunction. Powell v. Electric Ry. Co., 10 N. P. (N. S.) 266; 20 Dec. 313.

Character of occupation of streets.—As to correlative rights of vehicles and street railways in streets, see Lake Shore Railway Co. v. Majewski, 25 C. C. 55; Toledo Electric St. Ry. Co. v. Westenhuber, 22 C. C. 67. As to rights of pedestrians and vehicles in streets where such are used by street railways in reference to questions of negligence, see Toledo, etc., Railway Co. v. Gilbert, 24 C. C. 181; Cincinnati Street Ry. Co. v. Snell, 54 O. S. 197; Cain v. Traction Co., 13 Dec. 591. As to rights of street railway company and abutting owners to occupy street exclusively for temporary purposes, see Miller v. Railway Co., 13 Dec. 418.

Municipality can not construct.—It was held that a municipality has no authority to construct or operate a street railway. Cleveland v. Railway Co., 3 C. C. (N. S.) 563; 23 C. C. 373.

But see Art. XVIII, Sec. 4, Ohio Constitution, as adopted Sept. 3, 1912. For provisions relative to appointment of rapid transit commission, see §§ 4000-16 *et seq., post.*

Municipal power to grant right, to construct street railway, independent of statute, considered, see Hattersly v. Waterville, 4 C. C. (N. S.) 242; 26 C. C. 226. But where there are statutory requirements, grant must be made in accordance with them and they are mandatory. Horstman v. Street Railway Co., 14 Dec. 545, 551; Louisville Trust Co. v. Cincinnati, 11 O. F. D. 112; Raynolds v. Cleveland, 2 C. C. (N. S.) 139; 24 C. C. 215.

Character of grant.—The right to construct a railway in the street is a privilege or franchise granted by the state, and the fact that the privilege is not to be exercised until municipal authorities consent does not change the source of power, but is merely a condition to the exercise of the privilege. State ex rel. v. Columbus Railway Co., 24 C. C. 609, 627; 1 C. C. (N. S.) 145. The grant does not exclude another grant for use of unoccupied portion of street. H. G. & C. Traction Co. v. Transit Co., 69 O. S. 402.

The street railway company, granted the right to use a particular portion of a street, does not acquire the fee to the soil of that portion, but it does acquire a franchise, and easement, which is its private property; it is more than a license, it is a vested property right, carrying with it the right to exclusive user, so far as consistent with the welfare and convenience of the general public. *Ib.*

Power of eminent domain, is not impliedly given by this section to street railway companies, nor do such companies have this power under general steam railroad laws. Columbus, etc., Traction Co. v. Marriott, 47 B. 357. Interurban railway seeking to appropriate property in municipality, is subject to laws applicable to street railways and not those applicable to steam railroads. Southeastern, etc., Co. v. Stoneware Co., 51 B. 421.

For laws giving power of eminent domain to street railway companies, see §§ 9108 and 9115, under "Street Railways", in Part II.

Railway through park.—As to the right of a municipality to grant a railway route through a park, see Mathers v. Cincinnati, 3 B. 551; Cleveland, etc., Ry. v. Barriss, 33 B. 314.

Power to regulate.—As to speed, see § 3632, *ante.* As to watchmen at crossings, see § 9123, under "Street Railways", in Part II.

Municipality has no power to prescribe by ordinance the qualifications of motormen and conductors and make violation of such ordinance an offense punishable by fine. Columbus Ry. & L. Co. v. Columbus, 10 N. P. (N. S.) 161; 20 Dec. 555.

Ordinance forbidding employment of motormen and conductors, until they have had ten days' instruction, is void. *Ib.*

So, this section gives no power to pass an ordinance forbidding cars without conductors. Thornhill v. Cincinnati, 4 C. C. 354.

An ordinance providing that motormen should exercise "all possible care and vigilance" or should operate "with the greatest care" or "under complete control" on approaching another car that has stopped to receive or let off passengers is valid. Leis v. Ry. Co., 101 O. S. 162; reversing

Ry. Co. v. Leis, 11 Oh. App. 254; 30 O. C. A. 369.

(3) **Application for leave.**—That the application for grant is filed before the company is fully incorporated, does not make it invalid or give ground for enjoining grant. Sloan v. People's Elec. Ry., 7 C. C. 84.

The application may be in the alternative, leaving the city to choose between two routes. Simmons v. Toledo, 5 C. C. 124.

Presentation of ordinance to council by company was held to be a sufficient application. Sanfleet v. Toledo, 10 C. C. 460, (affirmed, 54 O. S. 620).

(4) **Ordinance to construct.**—*Preliminary ordinance* designating the route and directing advertisement for bids is not an ordinance creating a right or granting a franchise or involving an expenditure of money. State ex rel. v. Henderson, 38 O. S. 644.

An ordinance establishing the route was held not to be necessary, in Sloane v. People's Electric Ry., 7 C. C. 84.

Construction of doubtful terms.—The Constitution of Ohio provides that all private property shall be "subservient to the public welfare." By virtue thereof, where a private person or corporation enters into a contract with the public and such contract is of doubtful or uncertain meaning as to any of its provisions, that construction should be adopted that is most favorable and advantageous to the public interest and general welfare. Ry. Co. v. Cleveland, 97 O. S. 122; words "repair" and "repave", as used in street railway franchise, construed. *Ib.*

Construction of ordinance.—The grant by a city to a street railway company to lay its tracks in the street is to be strictly construed and a doubt is fatal. Hamilton, etc., Electric Transit Co. v. Hamilton, 1 N. P. 366; Cleveland Elec. Ry. Co. v. Cleveland, 15 O. F. D. 433.

The right to have necessary sidetracks, etc., and other appliances was held not to include the right to have a transfer house in the middle of the street. *Ib.*

Permission to build a temporary transfer house will not confer the right to build a permanent structure. *Ib.*

A franchise granting to an interurban railway company the right to run upon tracks laid in certain streets and to "transport passengers, baggage, mail, express, freight and other articles pertaining to the business of said railway company," does not give the company the right to use a portion of one of the streets so designated as a station for loading and unloading freight. Newark v. Railway, 13 N. P. (N. S.) 487.

Legislative or municipal grants of property, franchises, or privileges in which the government or public has an interest are to be construed strictly in favor of the public, and nothing passes by implication which is not granted in clear and explicit terms. Central Trust Co. v. Municipal Traction Co., 16 O. F. D. 311.

The grant by a city council to a consolidated street railway company operating a number of lines of road, which were built under separate

franchises expiring at different times, of the right to build extensions and connecting lines and to operate the same in connection with its other lines until a given date, does not operate to extend the franchises of such other lines or any of them until such date, where some of them by their terms expired earlier, and where no such intention was expressed. Central Trust Co. v. Municipal Traction Co., 16 O. F. D. 311.

Construction of ordinance requiring railway company to pay for pavement already laid on street, such proportion of cost as the width occupied by track and one foot on each side, bears to entire width of roadway. U. M. & C. Ry. Co. v. Columbus, 16 Dec. 102; 3 N. P. (N. S.) 438.

Construction of ordinance renewing previous grant, see Akron v. Traction & Light Co., 27 C. C. 536; 6 C. C. (N. S.) 445 (aff'd, 75 O. S. 565); Cleveland Elec. Ry. Co. v. Cleveland, 15 O. F. D. 433.

When the provisions of the ordinance are plain and unambiguous, there is no room for a practical construction by conduct of the parties. Cincinnati v. Street Railway Co., 6 N. P. 140.

An ordinance providing that a street railway shall pay annually $4 per lineal foot on each car run does not mean on the average numbers of cars run, but is to be strictly construed. *Ib.*

Statement rendered by the company as to cars run and payment pursuant thereto, does not constitute account stated or settled or accord and satisfaction, but only a payment on account. *Ib.*

An ordinance requiring a percentage of all earnings to be paid to the city and fixing a sum per lineal feet on each car, construed. Cincinnati v. Mt. Auburn Cable Railway, 28 B. 276. See also Cincinnati v. Cincinnati Incline Plane Railway Co., 30 B. 321.

A provision in a franchise for the payment to the city of a percentage on all "gross earnings" includes earnings from interurban lines operating under traffic arrangements with grantee company. Cincinnati v. Street Ry. Co., 12 N. P. (N. S.) 305.

The fact that a railway route branches into two directions does not make it two routes. Aydelott v. Cincinnati, 11 C. C. 11.

A street railway grant providing that the railway should be built within six months from the time the city had completed certain grading, interpreted. Toledo v. Toledo Ry. & Light Co., 2 C. C. (N. S.) 97.

Ordinance providing that only one set of wires and poles should be erected upon any street construed and held not to give the company first stringing its wires an exclusive use to operate on the streets. Mulhenney v. Toledo Central St. Ry. Co., 30 C. C. 686.

Character of ordinance.—An ordinance duly accepted by the company constitutes a contract between the railway and the city. Cincinnati v. Street Railway Co., 6 N. P. 140; State v. Ry., 15 C. C. 200; Cleveland Electric Ry. Co. v. Cleveland, 14 O. F. D. 746; Cleveland City Ry. v. Cleveland, 12 O. F. D. 635; and grant to another company inconsistent with first grant is void. *Ib.*

As to franchise ordinance considered as contract, see also dis-

cussion in the opinion in Wyoming v. Traction Co., 104 O. S. 325.

A proviso in an ordinance prescribing a certain fare for carriage from the village to an adjacent city in the event of the annexation of the village to the city, held to constitute a valid contract and binding so long as the company retains the franchise and operates thereunder. Interurban Co. v. Cincinnati, 93 O. S. 108; affirming 15 N. P. (N. S.) 40. To same effect, Interurban, etc., Co. v. Util. Com., 98 O. S. 287.

Company not relieved by extraordinary conditions growing out of war.—New and unforeseen conditions due to the war resulting in increased cost of operation and deficiency in revenues will not give company the right to terminate its contract or escape its obligations thereunder. Railway Co. v. Columbus (U. S. Dist. Ct.), 16 O. L. R. 377.

The grant can not be exclusive to one company. Toledo, etc., Railway Co. v. Toledo Electric Street Railway Co., 6 C. C. 362, (affirmed, 50 O. S. 603).

It can not be upon the streets to be thereafter designated. Cincinnati Street Railway Co. v. Smith, 29 O. S. 291.

It can not grant a route in the alternative, leaving the company to choose. Sommers v. Cincinnati. 8 Rec. 612.

It is not void because the person to whom it is granted is designated as trustee. Simmons v. Toledo, 5 C. C. 124.

Error in name of company not fatal to grant, see State ex rel. v. Oakwood St. Ry. Co., 30 C. C. 632.

Grant is not invalid because it covers only part of the route described in the application. Simmons v. Toledo, 5 C. C. 124.

Grant is inoperative so far as it requires company to increase fares to points as to which company has existing contracts. Humphrey Co. v. Railway Co., 9 N. P. (N. S.) 609; 20 Dec. 510.

If grant to street railway fixes the fare and provides that it shall be the rate during the existence of the ordinance, unless the express power to change the fare is reserved it can not be changed by the municipal authorities. Cleveland City Ry. v. Cleveland, 12 O. F. D. 635.

Where a street railway company has a franchise in which no provision is made for either single or double trolley system and the company adopts single trolleys, it can not subsequently be required to change to a double trolley system to avoid injury to public or private property by electrolysis. Dayton v. City Ry. Co., 12 Dec. 258.

Effect of changing the proposed route after advertisement for bids. Raynolds v. Cleveland, 24 C. C. 215; 2 C. C. (N. S.) 139 (aff'd, 76 O. S. 619).

Public utilities commission without power to change agreed rates.—The statutes of Ohio which create the public utilities commission and define its powers do not confer authority on the commission to change rates fixed by the terms of valid contracts made by a public utility with a municipality in the exercise of powers clearly conferred upon it. Interurban Ry. & Term. Co. v. Public Utilities Commission, 98 O. S. 287.

To same effect, see Ry. Lt. Co. v. Pub. Util. Com., 98 O. S. 303.

Conditions.—Municipality may prescribe such terms and conditions as are in furtherance of the municipality's duty to the public and essential to the preservation of the streets for public use, and not inconsistent with the rights granted to, or restrictions imposed upon, the street railway company by the legislature. Elyria v. Cleveland, etc., Ry. Co., 19 Dec. 294; 8 N. P. (N. S.) 85.

In granting an extension of street railway franchise, municipality may require the company to widen a bridge occupied by it, or, in lieu thereof, pay a stipulated sum, at option of the municipality. *Ib.*

As to liability of street railway under its franchise for expense on viaduct though not used by it, see Ry. Co. v. Cincinnati, 24 C. C. (N. S.) 241; (aff'd Ry. Co. v. Cincinnati, 96 O. S. 297).

Illegal condition, not separable, renders the whole grant invalid. Cincinnati Street Railway v. Smith, 29 O. S. 291.

Construction of a grant containing the condition that the company should keep the streets between its tracks in repair. See Columbus v. St. Railroad, 45 O. S. 98.

Ordinance can not impose conditions that the company shall not exercise one of its corporate powers. Thus a regulation that it shall not carry freight is void. State v. Dayton Traction Co., 18 C. C. 490.

A provision requiring arbitration between railway company and its employees held invalid. Raynolds v. Cleveland, 13 Dec. 125; 24 C. C. 215; 2 C. C. (N. S.) 139 (aff'd, 76 O. S. 619).

Requirement that railway company should pave between rails does not make the company liable to the city for any part of damages awarded to property holders for a paving improvement. Street Railway v. Dayton, 1 Dayton, 165.

A street railroad company operating a single track on a street of a city, when said street was paved, paid for seven feet of the pavement as required by its franchises. Nine years later the company laid another track in the street, replacing the pavement in good order; thereupon the city brought an action to recover from the street railroad company the cost of paving an additional seven feet, which the company would have been required to pay for if it had been operating two tracks at the time the pavement was first laid. Held: There could be no recovery for or on behalf of the city or of abutting property owners. Traction Co. v. Stewart, 19 C. C. (N. S.) 27.

Upon failure to comply with the conditions in a grant council may order tracks to be torn up without legal proceedings where an ordinance contained the words "or if in their opinion expedient to have the tracks removed from the street." Stewart v. Ashtabula, 36 B. 46.

Where ordinance provides for notice before forfeiture, notice must be given before council can declare rights forfeited. Akron v. Traction & Light Co., 27 C. C. 536; 6 C. C. (N. S.) 445 (aff'd 75 O. S. 565).

Ordinance may provide for transfers. Raynolds v. Cleveland, 8 C. C. (N. S.) 278; 28 C. C. 463 (aff'd on ground of laches, 77 O. S. 631).

Interurban cars operated by city company.—When the cars of an interurban electric railroad

company at the terminus of a street railroad company operating under a municipal franchise, are turned over to the latter company and are operated by it on its own tracks, the interurban company retaining no control over said cars when so operated by the other company and having no contract with it as provided in Sections 9130 to 9133, inclusive, General Code, the cars become the cars of the city company, and, as such, subject to regulation by the city council, under the terms of the franchise to the city company. Stafford v. Railway, 20 C. C. (N. S.) 129.

Effect of annexation.—Stipulation in a franchise granted by a village to an interurban company that in case of annexation to the City of Cincinnati the rate of fare between any point in said village and the Cincinnati terminus should not exceed 5c is binding. Cincinnati v. Interurban Ry., 15 N. P. (N. S.) 40.

Rights of grantee.—Where a city council has, by ordinance, legally granted to one street railroad the right to construct its railway over a particular part of a designated street, and such company has accepted the grant and taken possession of the right of way, such company acquires a vested property right in the nature of a franchise or easement to the particular portion of the street designated in the grant, and such grant carries with it all right of acquisition, occupancy and use of that portion of the street for the purposes for which it was granted so far as consistent with the welfare and convenience of the general public. H. G. & C. Traction Co. v. Transit Co., 69 O. S. 402.

Another company claiming under a subsequent grant of the council to use the same right of way by straddling the tracts of the former company, can not enter and take possession of the right of way granted to the first company without appropriating the right so to do, and paying compensation therefor. *Ib.*

A company having grants of several routes can not combine any of the streets in such routes into a new route, without a new grant complying with statutes. Horstman v. St. Ry. Co., 14 Dec. 545. Where one company has been granted the right to put down a double track and another the right to put down a single track on same street, a court can not compel them to combine so as to have two instead of three tracks. Hamilton St. Ry., etc., Co. v. Transit Co., 5 C. C. 319.

Remedies in case of illegal grants or violation of ordinance.—Injunction *pendente lite* will not be allowed to prevent railway company from acting under an ordinance claimed to be illegal because an abuse of corporate power of the city, where it appears that the ordinance is beneficial to the city. Ross v. Columbus, 8 N. P. 420.

An abutting owner suing in his right as such and not as a taxpayer, can not attack the grant except for want of consents. Glidden v. Cincinnati, 30 B. 213; Barney v. Railway Co., 30 B. 286.

Abutting owner can not enjoin on ground that street railway is a nuisance. Dietz v. Traction Co., 4 N. P. 399; Sanfleet v. Toledo, 10 C. C. 460.

Courts will not interfere with

the discretionary power of council to grant the use of streets to any street railway company, if beneficial to the public, in the absence of fraud. Sims v. Street R. R. Co., 37 O. S. 556.

It was held a competing railway can not object to noncompliance with the provisions of old §§ 2501, 2502 R. S. (now §§ 3768, 3769 G. C.), Toledo, etc., Ry. v. Toledo Elec. St. Ry., 6 C. C. 362.

As to injunction against grant, see further, Buning v. Cincinnati Street Railway, 1 C. C. 323; Cincinnati St. Ry. v. Smith, 29 O. S. 291; Gallagher v. Johnston, 31 B. 24.

As to enjoining contract between two companies for carrying cars over tracks, see Rogers v. Railway Co., 12 Dec. 136.

Injunction will lie at suit of a taxpayer to prevent a railway corporation from using for purposes not authorized by its grant, rights and privileges in the streets. Rogers v. Ry., 12 Dec. 136.

So, operation of street railway without authority of law, or under unconstitutional law, may be so enjoined. Horstman v. Street Ry. Co., 13 Dec. 670; 1 N. P. (N. S.) 25; 14 Dec. 545; and such operation is a continuing nuisance, and the statute of limitations does not apply. *Ib.*

A railway company using a single trolley system under municipal grant not specifying the system, will not be compelled by a court of equity to change to a double trolley system, because of damage to water pipes, where there is a conflict in the testimony as to whether or not a single trolley system is a proper one for street railways. Dayton v. Railway Co., 26 C. C. 736; 6 C. C. (N. S.) 41.

Liability of railway company for injury to water pipes from single trolley system, see *Ib.*

Street railway grant can not be enjoined unless defects and irregularities in proceedings are plainly jurisdictional, or of such a nature that the equity and justice of the case demand the interference of the court. Sloane v. Ry. Co., 7 C. C. 84.

Specific performance is not the proper remedy to compel the company to carry out the terms of its franchise. Matthews v. Traction Company, 25 C. C. 652; 5. C. C. (N. S.) 179 (aff'd, 70 O. S. 436).

As to whether *quo warranto* will lie for violation of franchise from municipality, see State ex rel. v. Toledo Ry. & Light Co., 23 C. C. 603; 3 C. C. (N. S.) 285; reversed, 73 O. S. 356; State ex rel. v. Oakwood St. Ry. Co., 30 C. C. 632; 11 C. C. (N. S.) 263.

Quo warranto may be resorted to, although another remedy may be provided for in the franchise where an electric railway company refuses to remove its tracks to the center of the highway when the same is improved by paving. State ex rel. v. C. D. & M. Co. 104 O. S. 120.

As to when forfeiture of franchise will be granted, see Toledo v. Toledo Ry. & Light Co., 2 C. C. (N. S.) 97; 25 C. C. 441; State ex rel. v. C. M. & L. Traction Co., 5 C. C. (N. S.) 167.

As to damages in case of failure of company to build tracks as agreed, see Elyria v. Railway Co., 23 C. C. (N. S.) 578.

As to when court will grant mandatory injunction to compel specific performance of provision for repair

in franchises, see Milford v. Traction Company, 26 C. C. 271; 4 C. C. (N. S.) 191 (aff'd 71 O. S. 529).

The obligation of the original grantee of a franchise to operate a street railroad is assumed by the purchaser of the road when sold "as a going concern" at judicial sale. Gress v. Ft. Loramie, 100 O. S. 35.

But where such road is purchased by a national bank to protect itself as a creditor and the road has no prospect of earning a fair return, the court will authorize the purchaser to discontinue its operation. *Ib.*

The grantee of a franchise from a municipality to construct and operate a street railway in its streets, accepts the grant with knowledge of dominant rights of the public, and that the municipality has not the full power of an individual in making the contract; and in the absence of valid provisions in the contract, there is no implication that on the expiration of the franchise or its forfeiture for non-compliance with its terms, the grantee may tear up the streets in order to remove its tracks without restoring them to the condition in which it found them. Mt. Vernon v. Berman, 100 O. S. 1. Reversing Mt. Vernon v. Berman, 11 Oh. App. 472.

(5) **Renewal of grant.**—*What is.* Leave to change the motive power to electricity is not an implied renewal. Cincinnati v. Street Ry. Co., 30 B. 321 (affirmed, 52 O. S. 609).

Consolidation into one system and ordinance imposing transfer obligation do not operate to prolong life of any prior grant. Cleveland Elec. Ry. Co. v. Cleveland, 14 O. F. D. 513; 3 O. L. R. 75. See also Central Trust Co. v. Municipal Traction Co., 16 O. F. D. 311.

Extension of time of grant by implication is not favored. *Ib.*

Before expiration of grant.—Renewal may be made before the original grant has expired. State ex rel. v. East Cleveland Ry., 6 C. C. 318; Cincinnati v. St. Ry., 31 B. 308; Belle v. Glenville, 27 C. C. 181; 5 C. C. (N. S.) 461 (aff'd 73 O. S. 392); Lima v. Cramer, 17 Dec. 245; 5 N. P. (N. S.) 113. But in such renewal, prior to expiration of previous grant, company may not be released from obligations of old franchise. Lima v. Cramer, 17 Dec. 245; 5 N. P. (N. S.) 113.

Renewal before expiration of previous grant may be as to all or part of previous grant. *Ib.*

Renewal after expiration of original grant, where delay by mutual agreement, see State ex rel. v. Oakwood St. Ry. Co., 30 C. C., 632; 11 C. C. (N. S.) 263.

Longer than legal.—Renewal for longer period than allowed by law will be valid for the period allowable. Sommers v. Cincinnati, 6 Dec. Re. 887.

To original grantee only.—Renewal must be to original grantee and may not be made to a stranger to the contract. Raynolds v. Cleveland, 21 C. C. (N. S.), 228.

Renewal of grant is a waiver of rights of municipality because of failure of company to lay tracks as provided in orignal grant. Akron v. Traction & Light Co., 27 C. C. 566; 6 C. C. (N. S.) 445 (aff'd, 75 O. S. 565).

Renewal grant constitutes con-

tract, and where it requires paving between rails, municipality cannot by ordinance afterwards require paving of "devil strip." Woodland, etc., Co. v. Cleveland, 17 Dec. 763; 7 N. P. (N. S.) 161.

Ordinance renewing grant is not of general or permanent nature, and does not have to be read on three different days. State ex rel. v. Oakwood St. Ry. Co., 30 C. C. 632; 11 C. C. (N. S.) 263.

Consents and competitive bidding.—Neither consents of abutting owners, nor competitive bidding, nor publication of the notice are necessary in case of renewal of grant. State v. East Cleveland Ry., 6 C. C. 318 (aff'd 27 B. 64); Pelton v. East Cleveland Ry., 22 B. 67; Haskins v. Cincinnati Consol'd Ry. 4 B. 1126; Lima v. Cramer, 17 Dec. 245; 5 N. P. (N. S.) 113.

It was not the intention of the legislature to apply the provisions of former section 2502 R. S. (now § 3769), in respect to publication of notice and competition in rates, to a renewal of the grant of a franchise to a street railway company to occupy the streets; nor is the consent of the property owners a condition precedent to the validity of such grant. State v. East Cleveland Ry., 6 C. C. 318.

Conditions.—Renewal may be made on condition that city might allow another company to use the tracks on terms satisfactory to city. In such case court will not interfere, even though part of first company's business would be taken away. Broadway, etc., Ry. v. Brooklyn, etc., Ry., 10 B. 72.

Under a renewal grant of a street railway franchise a municipal corporation has the right to provide that the street railway company may operate "express passenger service and other special cars", and in the regulation thereof the municipality may authorize a special rate of fare upon such cars and that they stop at certain designated places only for the purpose of taking on and letting off passengers. Stafford v. Railway, 20 C. C. (N. S.) 129.

FORM OF APPLICATION FOR LEAVE TO CONSTRUCT A STREET RAILWAY.

APPLICATION.

.....19....

To the Honorable the Council of the city [*or* village] of ....., State of Ohio:

The undersigned hereby request permission to construct, maintain and operate a street railroad in the city [or village] of....., State of Ohio, over, along and upon the following streets: (Here describe the route) said railroad to consist of a single [*or* double] track with the necessary switches, turnouts, curves, loops, Y's, poles, wires and all other necessary fixtures and apparatus and to be operated by electricity or other motive power except steam.

And the undersigned respectfully request your honorable board to take

the necessary steps required by law to establish said route and grant said permission.

Respectfully,

.....

Sec. 3769. [Proceedings to establish a street railway route.][1] Nothing mentioned in the preceding section shall be done, no ordinance or resolution to establish or define a street railroad route shall be passed, no action inviting proposals to construct and operate such railroad shall be taken by the council, and no ordinance for the purpose specified in such section shall be passed, until public notice of the application therefor has been given by the clerk of the council once a week, for the period of at least three consecutive weeks in one or more of the daily papers, if there be such, and if not, then in one or more weekly papers published in the corporation.[2] [99 v. 103, § 30; 96 v. 32, § 30.]

(1) **Old section.**—2502 R. S.

(2) **When publication necessary.**—The wording of old § 2502 R. S. was somewhat different from Municipal Code § 30 (codified in the above section 3769). Section 2502 R. S. read: "Nothing mentioned in the next preceding section (2501) shall be done; no ordinance or resolution to establish or define a street railroad route shall be passed and no action inviting proposals to construct and operate such railroad shall be taken by the council, except upon recommendation of the board of improvements, etc., . . . and no ordinance for the purpose specified in said preceding section shall be passed until public notice of the application therefor has been given, etc." . . .

In M. C. § 30 (and the above §3769) by the omission of the reference to the board of improvements, all of the clauses of the section up to the words "until public notice, etc." are made to apply to the provision relating to the notice.

Under old § 2502 it was held that the operation of the provisions of § 2502 R. S. was restricted to the ordinance for the original construction of a street railway, and a publication of notice was therefore not necessary, in the case of a renewal of a grant. State v. East Cleveland R. R. Co., 6 C. C. 318, 322. In Lima v. Cramer, 17 Dec. 245; 5 N. P. (N. S.) 113, it was held the same interpretation should be given Code § 30, as to the requirement of notice.

Under old § 2502 it was held that no notice was necessary before the terms and conditions of a grant were made, only the final grant requiring the notice. Aydelott v. Cincinnati, 11 C. C. 11.

Sufficiency of publication.—One insertion each week on same day of week for three weeks is sufficient. Smith v. Columbus, etc., Ry., 8 N. P. 1; Simmons v. Toledo, 5 C. C. 124

(aff'd, 30 B. 392, no report.) See also Early v. Doe, 16 How. (U. S.) 610, and cases cited.

Under former laws, publication for required time, in one newspaper was sufficient, even though a general city ordinance required such ordinance to be published in two newspapers. Simmons v. Toledo, *supra.*

But, as to present requirement, see § 4228, *post.*

Estoppel of municipality to deny publication, see Raynolds v. Cleveland, 8 C. C. (N. S.) 278.

Where franchise was granted after publication of notice legally insufficient, council can not legalize the grant by a curative ordinance declaring the publication sufficient. Raynolds v. Cleveland, 8 C. C. (N. S.) 278.

Sec. 3770. [When consent of property owners necessary.][1] No such grant[2] shall be made, except to the corporation, individual or individuals, that agree to carry passengers upon such proposed railroad at the lowest rates of fare,[3] and shall have previously obtained the written consent of a majority of the property holders upon each street or part thereof, on the line of the proposed street railroad, represented by the feet front of the property abutting on the several streets along which such road is proposed to be constructed.[4] When within the year preceding, a street railway has been operated upon such street or part thereof, under a grant or renewal of a grant which has expired or will expire within two years, it shall not be necessary to obtain the consent of the property holders abutting thereon, if the number of tracks on the street, public way or part thereof is not increased beyond the number for which consents were originally obtained. [99 v. 103, § 30; 96 v. 32, § 30.]

(1) **Old section.**—See old section 2502 R. S. repealed.

(2) **Renewal.**—In case of grant in renewal of a previous grant, consents and competitive bidding are not necessary; see note (3) under section 3768.

Extensions.—As to consents and competitive bidding in case of extension of route, see notes under Sec. 3777.

Validating grants.—See, as to curative acts validating *ultra vires* grants of a municipality, Millcreek Valley St. Ry. v. Carthage, 18 C. C. 216; see, also, Hume v. Traction Co., Cincinnati Ct. Index, Aug. 1, 1902; Kumler v. Silsbee, 38 O. S. 445; State v. Hoffman, 35 O. S. 435; Knorr v. Miller, 5 C. C. 609 (aff'd, 27 B. 64, 187); State ex rel. v. Oakwood St. Ry. Co., 30 C. C. 632; 11 C. C. (N. S.) 263. See also, Horstman v. St. Ry. Co., 1 N. P. (N. S.) 25; 13 Dec. 670.

(3) **Must be to lowest bidder.**—The franchise must be given to one who bids the lowest fares and

the grant to one who is not such is void. Knorr v. Miller, 5 C. C. 609 (affirmed, 27 B. 64); Compton v. Johnson, 9 C. C. 532.

Who is lowest bidder.—A bidder who agreed to charge "the lowest price of commutation tickets in packages" is not the lowest bidder. Cincinnati St. Ry. v. Smith, 29 O. S. 291.

Council can not disregard the lowest bid on the ground that the motive of the bidder was obstructive and not *bona fide*. Knorr v. Miller, 25 B. 128; 5 C. C. 609 (affirmed, 27 B. 64); every bid is presumed to be in good faith, and the burden is on those who contest it to show the contrary. Gallagher v. Johnson, 31 B. 24; the lowest bid can not be rejected as not in good faith if the bidder intends to comply with it and council may investigate the matter to determine whether the bidder does so intend. *Ib.*

Council should disregard informalities not going to the substance of the bid. Compton v. Johnson, 9 C. C. 532.

Council can not consider that the bid is so low as to be a losing one. Gallagher v. Johnson, 30 B. 139.

Irregularities in opening and considering a bid when no time was fixed for the opening and the form of bid was not regulated, are not ground for injunction. Sloan v. People's Electric Railway, 7 C. C. 84.

Bond.—Council may waive bond required by notice inviting bids if no favoritism is intended thereby. Sloan v. People's Electric Railway, 7 C. C. 84.

Informality in the bond is no ground for injunction. Simmons v. Toledo, 5 C. C. 124.

A bond by one person not mentioning associates is sufficient, though the bid mentions that person and his "associates." Compton v. Johnson, 9 C. C. 532; Gallagher v. Johnson, 30 B. 139.

Check deposited by bidder will be held liquidated damages and not a penalty, if franchise is not complied with, and will be forfeited to municipality, as provided in resolution. Hattersly v. Waterville, 26 C. C. 226; 4 C. C. (N. S.) 242 (aff'd, 74 O. S. 466).

When bidding not necessary.—Where the grant for part of a street railway route fails because the necessary consents were not obtained, the new grant for that portion may be made when the consents are obtained, without further bidding. Sanfleet v. Toledo, 10 C. C. 460 (affirmed, 54 O. S. 620).

Bidding is not necessary in the case of a renewal of a grant. State ex rel. v. E. Cleveland Railroad, 6 C. C. 318; see also Clement v. City, 16 B. 355 (aff'd, 19 B. 74); Lima v. Cramer, 17 Dec. 245; 5 N. P. (N. S.) 113.

Rights of lowest bidder for a street railway are not enforceable until the franchise ordinance has been passed and its terms and conditions accepted. Raynolds v. Cleveland, 13 Dec. 125; 24 C. C. 215; 2 C. C. (N. S.) 139 (aff'd 76 O. S. 619).

Injunction against contract, see Tucker v. Newark, 19 C. C. 1, 3; Knorr v. Miller, 25 B. 128; Johnson v. West Side St. Ry., 10 B. 345; Mathers v. Cincinnati, 3 B. 709; Johnston v. Cincinnati, 26 B. 223.

(4) **Consents — Character.**—Consents inure to the lowest bidder, no matter for whom obtained.

State v. Bell, 34 O. S. 194; Knorr v. Miller, 5 C. C. 609 (affirmed, 27 B. 64); Mathers v. Cincinnati, 3 B. 551.

Property owner giving consent can not limit it to any one corporation, and if he does so, the limitation is void and the consent inures to the lowest bidder. Railway Co. v. Day, 73 O. S. 83; State ex rel. v. Bell, 34 O. S. 194.

Consents do not have to be entered on the records of council or be made a part of the ordinance. Sanfleet v. Toledo, 10 C. C. 460. They need not be obtained before the calls for bids and need not be for the particular manner of construction. Sloane v. People's Electric Railway, 7 C. C. 84.

Consents of abutting lot owners to the construction of a street railroad are not property rights and can not be appropriated. Hamilton G. & C. Traction Co. v. Parish, 67 O. S. 181.

How determine majority.—The majority required is the majority of abutting owners on each separate street. Cable Ry. v. Neare, 54 O. S. 153; but see, also, Rapp v. Cincinnati, 12 B. 119.

What consents counted, see Simmons v. Toledo, 8 C. C. 535, affirmed, 31 B. 367 (agent authorized to use his judgment in signing consent; agent's signature of married woman's name in her maiden name; agent signing on oral authority, but see Rapp. v. Cincinnati, 12 B. 119; signature of son, having charge of property and owning remainder subject to life estate; trustee having control over property with full powers); Rapp v. Cincinnati, 12 B. 119; Ireton Bros. v. Traction Co., 15 Dec. 129; (person holding life estate under a will; tenant by curtesy or dower); Day v. Railway Co., 27 C. C. 60; 5 C. C. (N. S.) 393 (consent of wife signed by husband with authority; consent signed by agent authorized; consent signed a year before passage of ordinance, but while a similar ordinance pending; consent signed by vendee under contract to convey; consent signed by agent without authority, but subsequently ratified).

Consents not counted, see Simmons v. Toledo, *supra;* Day v. Railway, *supra* (signature of husband for himself and wife when wife is owner); Rapp v. Cincinnati, *supra;* Day v. Railway, *supra* (husband signing for wife; father signing for daughter; president of corporation signing without authority from board of directors; guardian signing for minors; executors with power to sell signing); Schwab v. Traction Co., 13 Dec. 116 (consent of a minor); Sommers v. Cincinnati, 8 Rec. 612 (consent by one not owning the property, though afterward ratified by owner).

As to when consent by widow holding dower will be counted, see Schwab v. Traction Co., 13 Dec. 116.

Consent by firm may be counted, though property is not used for firm purposes. *Ib.*

Consent by telegram was held valid. *Ib.*

A tenant in common can be counted for his proportion. Simmons v. Toledo, 8 C. C. 535; Ronnebaum v. Railway, 29 B. 338; Day v. Railway, 27 C. C. 60.

Where owner has consented and afterward sold the property and the buyer does not withdraw signature, it will be counted. Simmons v. Toledo, 8 C. C. 535. But where purchaser has no knowledge of previous

consent, it is not counted. Day v. Railway, 27 C. C. 60; 5. C. C. (N. S.) 393.

Council may consent as to municipal property, see Rapp v. Cincinnati, 12 B. 119; Emerson v. Forest City Ry., 28 C. C. 683; 8 C. C. (N. S.) 560.

A municipality may consent as owner of abutting property. Emerson v. Forest City Ry., 14 C. C. (N. S.) 478; 77 O. S. 596.

The statute is not satisfied by the promised consent of owners of property which will abut upon a proposed street, which has never been established by ordinance and the right-of-way for which has never been acquired by the municipality. Carpenter v. Traction Co., 18 N. P. (N. S.) 1.

Conditional consent.—Power of council to act on the consent is not limited by the condition of the consent as to the time of the completion of the road. Simmons v. Toledo, 8 C. C. 535.

A condition in a consent, that it shall be used only for a specified railway company is void, and the consent may nevertheless be counted as a consent to construction of the road by the lowest bidder. Railway Co. v. Day, 73 O. S. 83.

Consent for a horse railway is not a consent for an electric railway. Sanfleet v. Toledo, 10 C. C. 460, (aff'd, 54 O. S. 620.)

Consent for one track can not be used where a double track is proposed. Roberts v. Easton, 19 O. S. 78.

Consents for extension of a specified railway not good for original construction of another railway. Day v. Railway Co., 27 C. C. 60; 5 C. C. (N. S.) 393.

Consent for construction or extension along a certain route is not consent for another and different route, though passing by same property. Near v. Mt. Auburn Cable Ry., 29 B. 171; Ireton Bros. v. Traction Co., 15 Dec. 129. But slight departure from route to avoid difficult curves would not invalidate consent. Ireton Bros. v. Traction Co., 15 Dec. 129; 2 N. P. (N. S.) 317.

Conclusiveness of council's finding.—Obtaining the proper number of consents is a condition precedent to the power of council to authorize the railway. And council's finding that the requisite consents have been given is not conclusive. Roberts v. Easton, 19 O. S. 78; Sommers v. Cincinnati, 8 Rec. 612; Day v. Railway, 27 C. C. 69; 5 C. C. (N. S.) 393.

But where council has determined that the proper consents were given, the burden is on one denying this. Simmons v. Toledo, 8 C. C. 535. See, also, Cincinnati College v. Nesmith, 2 C. S. C. R. 24; Ireton Bros. v. Traction Co., 15 Dec. 129; 2 N. P. (N. S.) 317.

The rule that the presumption is that council acted with sufficient consents before it, does not extend to the validity of any single consent, where the validity of such consent is attacked; in such case the validity of the consent is to be determined as a fact under the ordinary rules of evidence; and if the consent is by an agent, authority must be shown. Day v. Railway, 27 C. C. 60; 5 C. C. (N. S.) 393.

When necessary.—Extensions or additional switches of existing railway require consents. Harner v. Columbus, etc., Railway, 29 B. 387;

Chambers v. Traction Co., 27 C. C. 193; 5 C. C. (N. S.) 298 (aff'd, 73 O. S. 348).

Consents are necessary for a new track, although there is a double track of another company already on the street. Sanfleet v. Toledo, 10 C. C. 460. So, also, where there is a single track already down and it is desired to lay another track on the same street. Roberts v. Easton, 19 O. S. 78.

Before amendment of 1908, consents were held necessary to a grant to a new company to occupy a street theretofore occupied by a company whose franchise had expired. Isom v. Low Fare Ry., 29 C. C. 593; 10 C. C. (N. S.) 89, (aff'd 77 O. S. 638); and consents were held necessary in case of a grant to a new company, though a grant on the same street had been given to another company that held the requisite consents, and such latter company had assigned its consents to the new company. *Ib.* But when consents have been given, and council is enjoined from making the grant and thereafter a new application is made and ordinance passed, no new consents are necessary. Day v. Railway, 27 C. C. 60; 5. C. C. (N. S.) 393.

When not necessary.— Consents held not necessary for a mere temporary track, the right to lay such track being a revocable license and not a grant. Mathers v. Cincinnati, 3 B. 709.

Consents are not necessary in the case of a renewal of the grant. State v. East Cleveland R. R. C., 6 C. C. 318; Pelton v. East Cleveland Ry., 22 B. 67; Haskins v. Cincinnati Consolidated Ry., 4 B. 1126; Lima v. Cramer, 17 Dec. 245; 5 N. P. (N. S.) 113. Consents are not necessary where one company is appropriating the use of parts of the tracks of another company. Consolidated Street Railway v. Toledo Street Railway, 6 N. P. 537; State v. Electric Street Railway, 19 C. C. 79.

May be dispensed with by charter.—Sec. 187 of the Charter of Cleveland, providing that consents not necessary, held to be valid and constitutional and to supersede the provision of general laws requiring consent of the property owners. Billings v. Railway Co., 92 O. S. 478.

Purchased consents.—Consents of the property owners or withdrawal of such consents may be properly induced by the payment of consideration. Cleveland v. Railway Co., 3 C. C. (N. S.) 563; 23 C. C. 373.

"The owners of abutting lots are free to give or withhold such consent, upon such terms as to them severally may seem proper and there is no public policy in this state against giving such consent for a valuable consideration moving from the street railroad company to such lot owner." H. G. & C. Traction Co. v. Parish, 67 O. S. 181; see, also, Makemson v. Kauffman, 35 O. S. 444.

Withdrawal of consents.—See § 9107 in Part II, relating to withdrawal of consents. And see Hamilton G. & C. Traction Co. v. Parish, 67 O. S. 181.

Right of action for want of consents.—Where council grants the right to construct a railroad without the consent of abutting owners as required by statute, such owners may enjoin the construction of the road. Roberts v. Easton, 19 O. S. 78. Whether *quo warranto*

would lie because of failure to secure consents, see State v. Railway Co., 19 C. C. 79. State ex rel. v. Oakwood St. Ry. Co., 30 C. C. 632; 11 C. C. (N. S.) 263. Injunction for want of consents can be brought only by abutting property owner. Action will not lie by taxpayer as such. Simmons v. Toledo, 5 C. C. 124; Sommers v. Cincinnati, 8 Rec. 612; Harrison v. Mt. Auburn Cable Railway, 17 B. 265; Glidden v. Cincinnati, 30 B. 213; Hamilton v. C. & H. Street Railroad, 5 N. P. 457. Nor has the solicitor on behalf of the municipality, the right to bring injunction for want of consents. Lima v. Cramer, 17 Dec. 245; 5 N. P. (N. S.) 113. Abutting owner can complain only for the want of consents on his own street. Glidden v. Cincinnati, 30 B. 213; Mathers v. Cincinnati, 3 B. 709; Barney v. Railway, 30 B. 286.

Motive of plaintiff in bringing action is not material. Hamilton G. & C. Traction Co. v. Parish, 67 O. S. 181. Isom v. Low Fare Ry., 29 C. C. 583; 10 C. C. (N. S.) 89, (aff'd, 77 O. S. 638). And it can make no difference whether his right is clear or not, only so that it exists. *Ib.*

Validity.—The statutes requiring the written consents of the owners of more than one-half of the frontage of lots and lands abutting on a street along which it is proposed to construct a street railway, do not create a favored class upon whom a privilege is bestowed to the exclusion of others having equal rights, and is not an arbitrary classification of individuals, but is a valid and constitutional exercise of legislative power. Isom v. Low Fare Ry., 29 C. C. 583; 10 C. C. (N. S.) 89, (aff'd, 77 O. S. 638).

FORM OF RESOLUTION ESTABLISHING ROUTE AND AUTHORIZING ADVERTISEMENT FOR BIDS.

RESOLUTION.

Be it resolved by the council of the city [*or* village] of..... State of Ohio, that the application of....., (here insert name of company or individual) for a grant and permission to construct, maintain and operate a street railroad in the city [*or* village] of..... State of Ohio, on the route hereinafter described, be received and placed on file and,

Be it resolved, that there is hereby established a street railroad route in the city [*or* village] of.....over, along and upon the following streets (here define the route) upon which route there may be maintained and operated a single [*or* double] track street railway with the necessary switches, turnouts, curves, loops, Y's, poles, wires and all other necessary fixtures and apparatus, and to be operated by electricity or other motive power except steam, and to be furnished and equipped as a first-class street railroad, as may be more particularly provided for in the ordinance making the grant to the successful bidder therefor; and,

Be it resolved, that the grant for the operation of such street railroad over the route herein established shall be for a period of.....years (not more than 25 years) and,

Be it resolved, that a grant for the above period over said route shall be made to the individual, individuals or company which shall agree to carry passengers over said route and from and to all points thereon for the lowest rates of fare and,

Be it resolved, that the clerk [*or* clerk of the village] be and he is hereby instructed and directed to give notice by publication of the said application of.....(here insert name of applicant) as required by law, and in said notice to invite bids for the construction, maintenance and operation of a street railroad over said route in accordance with the terms and conditions of this resolution.

Passed....., 19....

Attest:

.....

Clerk.

.....

President of Council.

FORM OF ADVERTISEMENT INVITING BIDS FOR STREET RAILROAD GRANT.

LEGAL NOTICE.

City [*or* village] of....., Ohio.

Notice is hereby given that on the .....day of....., 19.... application was made to the council of....., by....., for permission to construct, maintain and operate a street railroad within said city [*or* village] over, along and upon the following streets, to-wit: (Here describe route) and,

That a street railroad route over, along and upon the above named streets has been established in the manner provided by law, upon which route there may be constructed, maintained and operated for a period of .....years a single [*or* double] track street railroad operated by electricity or other motive power except steam, and subject to the terms and conditions provided in the resolution establishing said route and directing this advertisement, on file in the office of the clerk of council [*or* village clerk] of....., State of Ohio; and

That bids will be received up to 12 o'clock noon, ..., 19.... for the construction, maintenance and operation of a street railroad over said route, subject to the terms and conditions set forth in said resolution and for the lowest rate of fare for transporting passengers along and over said route.

.....

Clerk.

.....

President of Council.

FORM OF STREET RAILROAD GRANT.

Ordinance No.....

Granting leave and permission to.....to construct, maintain and operate a street railroad over, along and upon certain streets in the city [*or* village] of....., State of Ohio.

WHEREAS, on the.....day of....., 19...., ...made application in writing to the council of the city [*or* village] of....., State of Ohio, for the right to construct, maintain and operate a street railroad over, along and upon certain streets in the city [*or* village] of ....., State of Ohio, hereinafter specifically set forth and,

WHEREAS, on the ..... day of ....., 19...., a resolution was duly passed establishing a street railroad route over such streets and notice of the establishment of said route and of said application was duly published according to law, and,

WHEREAS, ... [naming grantee] has made a bid for said route which said bid offers rates of fare which are the lowest rates bid, and has previously obtained the written consent of a majority of the property holders upon each of said streets or parts thereof on the line of the said proposed railroad represented by the feet front of the property abutting thereon;

Now, therefore, be it ordained by the council of the city [*or* village] of ....., State of Ohio.

Sec. 1. That said.....(naming grantee) its successors and assigns be and are hereby granted the right and permission to construct, maintain and operate a single [*or* double] track street railway to be operated by electricity or other motive power except steam, with the necessary switches, turnouts, curves, loops, Y's, poles, wires and all other necessary fixtures and apparatus, over, along and upon the following streets in the city [*or* village] of....., viz: (Here insert description of route).

Sec. 2. (Describe character of construction and equipment, agreements as to repair of streets and other special requirements desired, and include agreement to carry police officers and firemen free.)

Sec. 3. This grant shall remain in force for the period of..... years from and after its acceptance by.....(name of grantee).

Sec. 4. This ordinance shall take effect and be in force from and after the earliest period allowed by law and after the filing with the clerk of council [*or* village clerk], of the written acceptance thereof by..... (name of grantee).

.....
President of Council.

Passed....., 19....

Attest:

.....
Clerk.

Sec. 3771. [Grant not valid for more than twenty-five years.] No grant or renewal of a grant for the construction or operation of a street railroad, shall be valid for a greater period than twenty-five years[1] from the date of such grant or renewal, and after such grant or renewal of a grant is made, whether by special or general ordinance, the municipality shall not, during the term of such grant or renewal, release the grantee from any obligation or liability imposed by the terms of such grant or renewal of a grant.[2] [99 v. 103, § 30; 96 v. 32, § 30.]

(1) **Period of grant.**—Renewal of grant for period longer than that allowed by law held valid for legal period. Sommers v. Cincinnati, 8 Rec. 612.

Unlimited grants made prior to statutory limitation held perpetual. State ex rel. v. Columbus Ry. Co., 1 C. C. (N. S.) 145; 24 C. C. 609; but see 73 O. S. 363. But such grants are subject to revocation by legislature. *Ib.*

See also East Ohio Gas Co. v. Akron, 81 O. S. 33, (where it is held that a municipal franchise granted to a gas company and silent as to duration of grant is not perpetual but exists only so long as both parties consent.)

(2) **Release from obligation.**—Such a section as this forbids any release by municipal authorities of amount due the city under its street railway grant, and neither the principles of account stated nor of accord and satisfaction based upon a less amount than that actually due have any application. Cincinnati St. Railway Co. v. Cincinnati, 8 N. P. 80.

But a provision such as this would not prohibit municipal corporation from changing the rate of fare upon proper consideration. St. Ry. v. Cleveland, 12 O. F. D. 635. Better accommodation would be a consideration for the modification of the terms of a grant. Clement v. City, 16 B. 355, (affirmed in Supreme Court, 19 B. 74.) There is nothing to prevent a city council and a street railway company from terminating a grant by agreement previous to its expiration, for good cause, and renewing the grant, State v. E. Cleveland Railroad Co., 6 C. C. 318.

Sec. 3772. [When franchise shall be submitted to vote.] Repealed, 104 v. 238.

Sec. 3773. [How the election shall be conducted.] Repealed, 104 v. 238.

Sec. 3774. [Notice of the election; form of ballots.] Repealed, 104 v. 238.

Sec. 3775. [Grade of streets when street railroad is constructed.] Before a street railroad shall be constructed on any street less than sixty feet in width, with a roadway of thirty-five feet or under, the council shall provide that the crown of the street shall be made a nearly flat uniform curve from curb to curb, without ditch gutters, and in such manner as to give wheeled vehicles the full use of the roadway up to the face of the curb. When the tracks of two street railroads, or of a street railroad and a steam railroad, cross each other at a convenient grade on a street, the crossings shall be made with crossing-frogs of the most approved pattern and materials, and kept up in repair at the joint expense of the companies owning such tracks.[1] [R. S. Sec. 2503; 78 v. 296; 66 v. 217, § 413.]

(1) **Validity.**—This section is valid and applies whether lines were constructed before or after the passage of the act. Cin. St. Ry. Co. v. C. H. & D. R. R., 32 B. 4.

Frogs at crossings.—One compliance with this section is not enough, if a new frog, found to be better, is required. Cin. St. Ry. Co. v. C. H. & D. R. R., 32 B. 4.

Other requirements. — Street railroads crossing steam railroads need not provide interlocking devices as required by § 598 G. C. The requirements in case of crossing of street railway and steam railroad are only those in § 3775 and §9125. C. & H. St. Ry. v. C. H. & I. R. R. Co., 21 C. C. 391.

See § 9125 in Part II.

Sec. 3776. [Pavement of streets where railroads are constructed.] The council may require any part or all of the track, between the rails of any street railroad constructed within the corporate limits, to be paved with stone, gravel, boulders, or wooden or asphaltic pavement, as may be deemed proper, but without the corporate limits, paving between the rails with stone, boulders, wooden or asphaltic pavement shall not be required.[1] [R. S. Sec. 2504; 87 v. 246; 66 v. 217, § 414.]

(1) **Recovery on default of pavement.**—Where city ordinance requires it, a city may, on default of company, improve the street between tracks and recover the cost in an action against the company. Columbus v. Railroad, 45 O. S. 98.

A city having paved between rails at request of the company, may levy a tax on railroad to collect for its share of the work. Cleveland v. Cleveland & Newburgh R. R., 1 Clev. 304.

Validity of requirement.—See Cleveland v. Cleveland R. R. Co., 1 N. P. 413, reversed; 60 O. S. 586.

Annexation.—As to right of city, after annexation of territory, which includes part of an inter-urban railway, to compel the company to pave between and adjacent to its rails, see Railway v. Springfield, 15 N. P. (N. S.) 241. (Aff'd by Court of Appeals, not reported.)

Sec. 3777. [Council may grant extension of street railroad.] The council of a municipality may grant permission, by ordinance, to any corporation, individual, or company, owning, or having the right to construct, a street railroad, to extend the track, subject to the provisions of law relating to the construction, operation and extension of street railways, within or without, or partly within or without any municipal corporation, on any street or streets where council deems such extension beneficial to the public.[1] When such extension is made, the charge for carrying passengers on a street railroad so extended and its connections made with any other road or roads, by consolidation, shall not be increased by reason of such extension or consolidation. [R. S. Sec. 2505; 77 v. 42; 66 v. 140.]

(1) **Other provisions** relating to extensions will be found in §§ 9101, 9103—9106 under title "*Street Railroads in Municipal Limits*" in Part II.

The above section should be construed with the other laws on the same subject. See R. R. Co. v. Commissioners, 56 O. S. 1, 7; Hattersly v. Waterville, 26 C. C. 226, 229; 4 C. C. (N. S.) 242 (aff'd 74 O. S. 466).

Under former statutes, it was held that § 2505 R. S. (now § 3777 above), related to lines wholly within municipal limits, and the extension of such lines, while §§ 3437, 3438, 3439 *et seq.* R. S. (now §§ 9100-9107 G. C.) related to street railroads and extensions wherever located, and where there was a conflict as to provisions for extension of municipal lines the special provisions of § 2505 should govern. C. C. C. & St. L. Ry. Co. v. U. B. & N. Ry. Co., 26 C. C. 180; 5 C. C. (N. S.) 583 (aff'd 73 O. S. 364).

Extensions.—A marked distinction is drawn between an original grant for construction and a grant for an extension of a street railway. In the case of an original grant for construction, the grant can be made only upon publication of notice of pendency of the application and to the company offering to carry passengers at the lowest rate of fare; the grant of a right to extend tracks can only be granted to a company owning or having the right to construct a railroad, and there is no bidding for the grant or notice of the application. Day v. Railway Company, 27 C. C. 60; 5 C. C. (N. S.) 393; C. C. C. & St. L. Ry. Co. v. U. B. & N. Railway Company, 26

C. C. 180. See also Belle v. Glenville, 27 C. C. 181; 5 C. C. (N. S.) 461 (aff'd 73 O. S. 392).

Extension may be granted beyond the termini named in the articles of incorporation of the company. Sims v. St. Railroad, 37 O. S. 556. Extension need not run in the general direction of the original route or begin at one of the original termini. Cincinnati v. Cincinnati St. Railway, 31 B. 308; Belle v. Glenville, 27 C. C. 181; 5 C. C. (N. S.) 461 (aff'd, 73 O. S. 392).

An extension may be along other streets and not in a straight line. Sommers v. Cincinnati, 8 Rec. 612.

An extension granted for a period extending beyond remaining period of grant of original route does not extend grant of such original route, and the extension is valid only during remaining period of original grant. Cleveland Elec. Ry. Co. v. Cleveland, 14 O. F. D. 513; 3 O. L. R. 75; 15 O. F. D. 433.

An extension for an electric railway is not invalid because the original grant was for a railway using horses as motive power. Belle v. Glenville, 27 C. C. 181; 5 C. C. (N. S.) 461 (aff'd, 73 O. S. 392).

An ordinance granting the extension is not an act conferring corporate power. The corporate power is conferred by the statute under which the company is incorporated and the ordinance is merely a permit. Sims v. St. Railroad Co., 37 O. S. 556.

Consents.—In the case of consents obtained for the original construction of a street railroad, they enure to the benefit of the lowest bidder, no matter from whom obtained; but consents obtained for the extension of street railways enure to the benefit only of the railway specified. Day v. Railway Co., 27 C. C. 60; 5 C. C. (N. S.) 393; Isom v. Low Fare Ry., 29 C. C. 583, 591.

Beyond city limits.—An ordinance granting extension along highways outside the city limits merely confers the power and does not dispense with the necessary agreement with the county commissioners, or condemnation. Railroad Co. v. Commissioners, 56 O. S. 1; Richland Co. v. Citizens' Electric Railway Co., 9 C. C. 183.

INTERURBAN RAILROADS.[1]

Sec. 3778. [Franchises to interurban railroads for the purpose of securing terminals.] The council of any municipality may grant a franchise upon such terms and conditions as it may prescribe for the building of any interurban railroad having, constructing or building, ten miles or more of track outside of such municipality, to any company or companies using electric or other motive power, save steam, for the purpose of securing to such company or companies access to or terminals within such municipality. The council may authorize such company to build and construct tracks and to operate cars

thereon, on any street or streets, or parts of streets, of such municipality, upon which tracks have not already been laid and where the consent of the owners of a majority foot frontage has already been obtained by such company. [98 v. 253, § 1.]

(1) **Other provisions.**—See §§ 9117 *et seq.* under title *"Street Railroads in Municipal Limits,"* in Part II.

Council may stipulate for payment of lump sum into treasury for upkeep of streets. Op. Atty. Gen. (1918), p. 795.

Sec. 3779. [Condemnation proceedings when they can not agree.] The council may permit such interurban railroad to make use of the tracks or such parts of the tracks of any existing street railroad company within the limits of the municipality by agreement with such existing company. If no such agreement can be arrived at, the interurban railroad company may be authorized by council to condemn the right to make use of the tracks of such existing company upon the payment of proper compensation. But the interurban railroad company shall be permitted to condemn and make use of not more than one-eighth of the trackage of such company within the municipality, or so much as may be necessary to give the interurban company access to terminals within the municipality, or to enable such company to secure a right of way over such tracks through such municipality. The interurban railway company seeking permission to enter or pass through a municipality shall not be required to submit to competitive bidding on such routes. [98 v. 253, § 1.]

Sec. 3780. [Competitive bidding shall not be required.] No grant or franchise shall be made to such interurban company for a period longer than twenty years, and no franchise so granted shall be used for the purpose of operating a municipal street car system, it being the only intent hereof to provide a method whereby bona fide interurban railroads may gain access to, and a terminal within, and an exit from, a municipality. [98 v. 253, § 1.]

STEAM RAILROADS.[1]

Sec. 3781. [Regulation of rate of speed.] When a railroad track is laid in a municipal corporation, the council by ordinance may regulate the speed of all locomotives and railroad cars within the corporate limits, but such ordinance shall not require a less rate of speed than four miles an hour, and in villages having a population of two thousand or less, it shall not require a less rate than eight miles an hour. The corporate authorities, by civil action, may recover from an engineer, conductor, or company, violating such ordinance, not less than five dollars nor more than fifty dollars for each offense.[2] [R. S. Sec. 2500; 74 v. 132.]

(1) **Other provisions** relating to steam railroads within municipal limits will be found in Part II under title "Steam Railroads in Municipal Limits."

(2) **Liability of company.—A** traveler crossing a railroad track has a right to presume that the company will conform to a regulation, passed by the municipality, prohibiting the running of trains at a greater rate of speed than that named in the ordinance. Hart v. Devereux, Receiver, 41 O. S. 565.

The fact that the speed allowed by ordinance is exceeded is not proof of negligence, but may be considered by the jury on question of negligence. L. S. & M. S. Ry. Co. v Johnston, 25 C. C. 41; 1 C. C. (N. S.) 357; Meek v. Pennsylvania Co., 38 O. S. 632; Ry. Co. v. Herrick, 49 O. S. 25, 32; Bell v. Pistorius, 18 C. C. 73; L. S. & M. S. Ry. Co. v. Ehlert, 19 C. C. 177; C. H. & D. Ry. Co. v. Murphy, 17 C. C. 223; Watson v. Erie R. R. Co., 8 N. P. 18; Ry. Co. v. Trainer, 18 C. C. 716; Railroad Co. v. McCormick, 24 C. C. 86.

Power not limited to crossings.—This section applies to places within municipal limits other than public crossings. Blancke v. R. R. Co., 103 O. S. 178.

Ordinance regulating speed under authority of this section is invalid if it provides for enforcement by criminal proceedings. Caskey v. Belle Centre, 8 N. P. (N. S.) 153; 19 Dec. 726.

An ordinance regulating speed, adopted pursuant to this section, is a valid exercise of the police power, unless it clearly appears that such ordinance unduly restricts speed. Blancke v. R. R. Co., 103 O. S. 178.

EXCAVATIONS.[1]

Sec. 3782. [Damage from excavation.][2] If the owner[3] or possessor of any lot or land,[4] in any municipality, digs, or causes to be dug, any cellar, pit, vault, or excavation, to a greater depth than nine feet[5] below the curb of the street or

streets on which such lot or land abuts, or, if there be no curb, below the established grade of the street or streets on which such lot or land abuts, or, if there be no curb or established grade below the surface[6] of the adjoining lots, and by such excavation, causes any damage to any wall, house, or other building upon the lots adjoining thereto, such owner or possessor shall be liable, in a civil action, to the party injured, to the full amount of such damage.[7] When there is a curb or established grade, the depth of such excavation, at any point thereof, shall be measured downward from the pitch line projected laterally over the lot or land from and between the corresponding points in the nearest curb or established grade opposite the ends of such pitch line. [R. S. Sec. 2676; 97 v. 323; 66 v. 232.]

(1) **Sidewalk.**—For provision against obstructing or digging up sidewalk, see § 12639 G. C., under title *"Streets and Public Grounds"* in Part II.

(2) **Validity.**—This act is constitutional. Emery v. Coles, 5 N. P. 199.

(3) **Owner** does not include school board holding property for school purposes. Bd. of Ed. v. Volk, 72 O. S. 469.

A municipal corporation does not possess such ownership in the streets as to render it liable, under the provisions of this section, for damage to "any wall, house or other building" from an excavation in a street to a greater depth than nine feet. Brinkmeier v. Cincinnati, 20 N. P. (N. S.) 346.

(4) **Lot or land.**—This section does not apply to improvements in streets and alleys. Allison v. Cincinnati, 2 C. S. C. R. 462.

(5) **No support required when.**—One may dig a cellar nine feet without supporting adjacent walls. The owner of a lot who erects a building that would be injured by the excavation on the adjoining lot to the statutory depth does so at his peril. McMillan v. Watt, 27 O. S. 306.

But the lot owner digging to the statutory depth is not relieved from negligence by this statute. Cincinnati, etc., R. R. v. Pfau, 9 B. 200 (aff'd, 16 B. 7).

How to determine nine foot depth.—Where a lot extends from one street to another of a different grade the nine feet below the curb is a line from nine feet below the upper curb to a point nine feet below lower curb. Elshoff v. Deremo, 3 N. P. 273.

(6) **Surface.**—Surface means the actual surface whether caused by filling in or not, and not the natural surface before any filling. Burkhardt v. Hanley, 23 O. S. 558.

(7) **Construction of section.**—The clear meaning of §§ 3782 and 3783 is to limit their application to a lot abutting on the same street as that upon which abuts the lot in which the excavation is made. Taylor v. Day, 6 N. P. 447.

The effect of this section is to amplify the common-law rule as to lateral support, so as to create a liability for removing the lateral support of buildings where the excavation goes more than nine feet below the street grade, but it does not modify the common-law rule as to the lateral support of the soil itself. Belden v. Franklin, 28 C. C. 373; 8 C. C. (N. S.) 159. But see Hall v. Kleeman, 4 N. P. 201; Volk v. Board of Education, 7 N. P. 164 (reversed 72 O. S. 469).

Sec. 3783. [Depth of excavation allowable.] Such owner or possessor may dig, or cause to be dug, any such cellar, pit or excavation, to the full depth of any foundation wall of any building upon the adjoining lot or lots, or to the full depth of nine feet below the established grade of the street or streets whereon such lot abuts, without reference to the depth of adjoining foundation walls, without incurring the liability prescribed in the preceding section, and may, on thirty days' notice to adjoining owners, grade and improve the surface of any lot to correspond with the established grade of the street, streets or alley, upon which such lot or land abuts, without incurring liability.[1] [R. S. Sec. 2677; 91 v. 211; 66 v. 232; 97 v. 323.]

(1) **Right to grade.**—A lot owner in a city or village may with impunity, in the absence of negligence and upon giving proper notice, grade his lot to conform to the grade of the street. Hall v. Kleeman, 4 N. P. 201, 203.

But where statutory notice is not given the common-law rule would prevail. *Ib.*

Liability of owner when notified.—Where owner has received notice of excavation in adjoining lot and his house is damaged by such excavation he is liable to a tenant injured thereby. Kuhn v. Remmler, 16 B. 366.

Damage caused by flood in cellars.—Where an owner excavates below nine feet and an extraordinary flood fills his cellar and that of his neighbor, he is not liable for damage caused by pumping the water out of his own cellar, thereby causing the pressure in the neighbor's cellar to push out his walls. Brewing Co. v. Ulland, 97 O. S. 210 (reversing Ulland v. Brewing Co., 28 O. C. A. 529).

Where the owner of an adjoining lot excavates upon it without giving notice of his intention so to do as required by statute, he becomes liable under the common law for damages resulting to the land itself. Heimerdinger v. Schneider, 22 C. C. (N. S.) 415.

Measure of damages.—Where an excavation is made to a greater depth than nine feet, liability for resulting damages to adjoining property is limited to that caused by going below nine feet, and not that caused by the whole excavation. Carrel v. Building Co., 21 C. C. (N. S.) 598 (aff'd by Sup. Ct. without opinion).

Sec. 3783-1. [Municipalities empowered to change streams and highways for certain purposes.] When it is necessary in the construction and in the protection thereof by any municipal corporation, of wells, pumps, cisterns, aqueducts, water pipes, dams, reservoirs, reservoir sites, sewers, drains, sewage disposal or water purification plants and waterworks, for supplying water to itself and its inhabitants, or disposing of sewage, to relocate, straighten, change or cross a road or stream of water, such municipal corporation may relocate, straighten, change or cross said road or stream, but without unnecessary delay it shall place such road or stream in such condition as not to impair its usefulness. [103 v. 861.]

CHAPTER 4.

TAXATION.[1]

LEVY AND COLLECTION.

Sec. 3784. [Power of council to levy and collect taxes.][2] Each municipal corporation shall have special powers, to be exercised as provided by law, to levy and collect taxes upon the real and personal property within the corporation for the purposes of paying the expenses of the corporation, constructing improvements authorized, and exercising the general and special powers conferred by law.[3] [96 v. 26, § 9; 96 v. 33, § 32.]

(1) **Smith law.**—The provisions of this chapter relating to the levy of taxes upon property within the municipality, have been considerably modified by the provisions of the Smith law. Sections 5649-1 to 5649-6, inclusive, G. C. These sections will be found under the title "Taxation," in Part II.

(2) **Old sections,** 2262, 2263, 2682, 2683, 2684 R. S., repealed.

(3) **No inherent power to tax.**—A municipal corporation has not the inherent power to tax. It can exercise this power only when clearly delegated to it by statute. Mays v. Cincinnati, 1 O. S. 268; and it is strictly limited to the manner of exercise which the statutes provide. Reed v. Toledo, 18 O. 161, 166.

Public purpose.— *Legislative discretion.*—Taxes should be levied only for those purposes which properly constitute a public burden. But what is for the public good and what are public purposes and what properly constitutes a public burden are questions which the legislature must decide upon its own judgment and in respect to which it is vested with a large discretion which can not be controlled by the courts, except, perhaps, where its exercise is clearly evasive, and where, under pretense of lawful authority, it has assumed to exercise one that is unlawful. Walker v. Cincinnati, 21 O. S. 14, 41; and the power of the legislature to authorize local taxation can not be judicially denied on the ground that the purpose for which it is exercised is not local unless the absence of all local interest is clearly apparent. Walker v. Cincinnati, 21 O. S. 14; State v. Trustees, 20 O. S. 362.

Payment of debts.—It is a general principle of municipal law that where a power is granted to a municipality to incur indebtedness, a commensurate power to levy the necessary tax to discharge the in-

debtedness, is implied. Old sec. 2683 R. S. was held to confer power to levy a tax sufficient to satisfy a valid public debt. United States v. Kent, 12 O. F. D. 422; and it is no defense to an action to compel the municipality to pay the interest on bonds issued by it, that it needs all the money it is allowed to raise by statute, to pay its general current expenses. *Ib.*

For natural gas works.—Supplying the city with natural gas is a public use for which the taxing power may be exercised. State ex rel. v. Toledo, 48 O. S. 112.

Uniformity.—*Annexed territory.*—A tax to pay bonds of a village annexed to a city levied on the annexed territory alone, is not void for want of uniformity. Cleveland v. Heisley, 41 O. S. 670.

An incorporated village is the proper party on whose relation an action for a writ of mandamus may be maintained to compel the county auditor to place the municipal tax upon property newly annexed to the village. State v. Craig, 21 C. C. 13.

General and special statutes.—See Findlay Gas Light Co. v. Findlay, 2 C. C. 237; Dunham v. Opes, 3 C. C. 274, relating to power of council under the former general statutes relating to taxation, where there were special statutes covering the case for which the power to tax was exercised.

Distinction between tax and local assessment.—See Hill v. Higdon, 5 O. S. 243; Reeves v. Treas. Wood Co., 8 O. S. 333; Sessions v. Crunkilton, 20 O. S. 349; Ridenour v. Saffin, 1 H. 464.

Distinction between tax and license fee, see Mays v. Cincinnati, 1 O. S. 268; Baker v. Cincinnati, 11 O. S. 534; Marmet v. State, 45 O. S. 63; Cincinnati v. Bryson, 15 O. 625.

Sec. 3785. [Maximum of municipal taxes allowable.][1] The aggregate of all taxes levied by a municipal corporation, exclusive of the levy for county and state purposes, for schools and schoolhouse purposes, for free public libraries and library buildings, for university and observatory purposes, for hospitals, and for sinking fund and interest, on each dollar of valuation of taxable property in the corporation on the tax list, shall not exceed in any one year ten mills.[2] [96 v. 33, § 33.]

(1) **Old sections.**—See old §§ 2682, 2683, 2689, 2689*a*, 2689*a* (2), 2689*b*, (2689-1) R. S. all repealed.

(2) **Limitations.**—In addition to the limitation in the above section, certain specific limitations upon the amount of taxes that may be levied on the taxable property in any municipality are now made by §§ 5649-1, G. C., et seq. These provisions will be found under the title "Taxation" in Part II.

A statement of these limitations and interpretation of the sections providing for them, are found in the opinion of the Supreme Court in State ex rel. v. Sanzenbacher, 84 O. S. 506. In this case the Court, con-

struing §§ 5649-2, 5649-3 and 5649-3*a*, held as follows:

"1. The taxing authorities of any taxing district may levy taxes not exceeding the aggregate of ten mills on each dollar of the tax valuation of the property of such taxing district for state, county, township, school and municipal purposes, subject to the further limitation of the paragraphs following.

"2. In addition thereto levies may be made for sinking fund and interest purposes necessary to provide for any indebtedness incurred before the passage of said act, and any indebtedness that may be incurred after the passage of said act by a vote of the people.

"3. In case such levy for the year 1911 shall produce an amount greater than the amount of taxes levied in the year 1910, then such levy of ten mills on the dollar must be reduced to such a rate as will produce no more money than the taxes levied for the year 1910.

"4. A municipal corporation may levy for municipal purposes as provided in preceding paragraphs 1, 2 and 3, an aggregate of five mills on the taxable property within such corporation only in the event that such levy of five mills, when added to the levy of state, county, township and school purposes, shall not exceed in the aggregate ten mills on the dollar, of the taxable property within such taxing district exclusive of levies for sinking fund and interest purposes necessary to provide for any indebtedness incurred before the passage of said act and any indebtedness that may be incurred after the passage of said act by a vote of the people, and provided further, that such levy of ten mills on the dollar of taxable property shall not produce for the year 1911 an amount greater than the amount of taxes levied in the year 1910, and whenever such levy exceeds either of said limitations, then it is the duty of the budget commission to revise and reduce said levies in manner and form as directed and authorized by section 5649-3*c*, General Code, as enacted June 2, 1911, having due regard to the proportions of the total amount, that each taxing board or taxing officers are authorized to levy, so that such aggregate of all taxes for all purposes in each taxing district shall not exceed ten mills on the dollar exclusive of sinking fund and interest purposes as aforesaid, and shall not produce for the year 1911 a greater amount of taxes than levied in the year 1910, as provided in paragraph three of this entry. But whenever any levy for township, county, school or municipal purposes exceeds the maximum amount that may be levied for such purpose as provided by section 5649-3*a*, General Code, then such excessive levy must first be reduced by the budget commission to the maximum amount provided in such section before said budget commission proceeds to revise and reduce all the levies certified for such taxing district to bring the aggregate of all within the limitations above referred to, to-wit: ten mills on each dollar of taxable property and to an amount not greater than the taxes levied in the year 1910.

"5. The right to levy five mills on the taxable property within such corporation is further limited by the provision that if said levy of ten mills for the year 1911 will produce

more taxes than were levied in the year 1910, then such levy should again be sealed by the budget commission until the same will produce no larger revenue than the taxes levied in the year 1910.

"6. The five mills, which, subject to the qualifications hereinbefore defined, may be levied by a municipal corporation for corporation purposes, are exclusive of such levies for interest and sinking fund purposes as are or may be necessary to provide for any municipal indebtedness incurred prior to the passage of the act of June 2, 1911, and any indebtedness thereafter incurred by a vote of the people."

See further, notes under § 5649-1 *et seq.*, title "Taxation," Part II.

Taxes included in limitations of § 3785.—By the provisions of former § 2684 R. S. the limitation as to the amount of taxes did not include special assessments. In § 3785 special assessments are not expressly included, though, on general principles, assessments not being strictly taxes would not be included in the amount of taxes allowed. See Hunter v. Austin, 9 C. C. 583. Taxes levied to pay bonds issued for the corporation's part of a street improvement are now specially excepted by § 3821. As to the rule under former statutes, see State ex rel. v. Strader, 25 O. S. 527.

For other cases as to taxes included in former limitations, see State v. Humphrey, 25 O. S. 520. (Taxes levied by the City of Cincinnati to pay interest on Southern Railway bonds); Cleveland v. Heisley, 41 O. S. 670; Toledo v. Toledo, etc., 21 B. 131, (taxes levied for improvements).

Under former provisions it was held that where statutes authorized a tax for a special purpose, this may be in addition to the limit fixed by the general statutes. Hunter v. Austin, 9 C. C. 583; Walsh v. Sisler, 20 C. C. 264.

Effect of levy in excess of limitation.—Under former statutes it was held that an ordinance levying a tax in excess of the statutory limit or after the limit had been exceeded, was wholly void, Cummins v. Fitch, 40 O. S. 56; but an ordinance levying an additional tax after the limit had been reached, though void, did not affect an ordinance for tax before limit reached. *Ib.;* but an ordinance levying an amount in excess of the limit was held not good up to the statutory limit, but void both as to the amount beyond the limit and as to the amount within the limit. Cleveland v. Heisley, 41 O. S. 670.

Sec. 3786. [When greater tax may be levied; submission of question to vote.][1] A greater tax than that authorized herein may be levied by the council of a municipal corporation for any purpose for which such corporation is authorized to levy taxes, if the proposition to make such additional levy is first submitted to a vote of the electors of the corporation, under an ordinance prescribing the time, place and manner of voting thereon, and approved by two-thirds of those voting on the proposition.[2] [96 v. 33, § 34.]

(1) **Old section,** 2687 R. S. repealed.

(2) **Additional levy after vote.**—The provisions of the above section are now modified by the provisions of §§ 5649-5, 5649-5*a*, and 5649-5*b* providing for additional tax after majority vote of the electors, see these sections under title "Taxation," in Part II.

Sec. 3787. [Heads of departments to report estimates.][1] On or before the first Monday in March of each year the several officers, boards and departments in each municipal corporation, shall report an estimate, in itemized form, to the mayor and auditor, or clerk, of the corporation, stating the amount of money needed for their wants for the incoming year and for each month thereof.[2] [96 v. 33, § 35.]

(1) **Old sections.**—See old § 2690*i* R. S., repealed.

(2) **Provision mandatory.**—Provisions such as these requiring estimates by officers and boards before appropriations are made, are mandatory and expenditure of the city funds without such previous estimate may be enjoined. Ampt v. Cincinnati, 5 N. P. 98.

The provisions of old § 2690*a* to 2690*q*, R. S. requiring estimates, were held mandatory, so far as any municipal expenditure is concerned, in Stem v. Cincinnati, 6 N. P. 15. But whether failure to observe them would affect the validity of a tax levy, query in Stem v. Cincinnati, 6 N. P. 15.

ORDER OF PROCEDURE IN MUNICIPAL TAX LEVIES AND APPROPRIATIONS.

The fiscal year in each municipality begins January first and ends December thirty-first. (Sec. 3796). The various steps to be taken by municipal officers can be clearly understood only by bearing this fact in mind. The order of procedure in municipal tax levies and appropriations is as follows:

THE TAX LEVY.

1. *Estimates for succeeding fiscal year*, to be furnished to the mayor and auditor or clerk by the heads of the various departments, on or before the *first Monday in March*, stating the amount of money needed for their respective wants for the next fiscal year, beginning January first, and for each month thereof. (§ 3787).

[NOTE.—The language used in the section is "the incoming year," but since these estimates are the basis for the budget and tax levy designed to furnish money for the next fiscal year, the "incoming year" referred to in the section must be the next fiscal year.

Section 3790 *requiring estimates for the ensuing fiscal year*, to be furnished to the mayor and auditor or clerk by the heads of the various departments on or before the *last Monday in March*, stating the amount of money

needed for their respective wants for each month, was inserted to accomplish the same purpose, apparently as § 3787.]

2. *Auditor's or Clerk's Statement*, furnished the mayor and council and each member thereof, on or before the *first Monday in April*, showing (1) balances at end of last fiscal year, (2) monthly expenditures out of each fund and out of all funds for the preceding fiscal year, (3) annual expenditures from each fund for each of the last five fiscal years, and (4) monthly average of expenditures from each fund for the preceding fiscal year and total monthly average from all funds for the five preceding fiscal years. (§ 3788.)

3. *The Annual Budget*, submitted to council by the mayor on the *first day of April* based upon the annual estimates furnished him by the departments. The items of any of these the mayor may revise and change, but he may not increase the total of any such estimate. The budget should show the needs of the several municipal departments for the succeeding fiscal year, and may conveniently be in the form of a message from the mayor, submitting to council a proposed resolution for the annual budget. (§ 3791.)

4. *Budget resolution* passed by council after examining and revising the budget submitted by the mayor. It should set forth in itemized form an estimate stating the amount of money needed for the wants of the municipality for the ensuing fiscal year and for each month thereof and contain the further information required by § 5649-3a.

[NOTE.—By the provisions of § 3793, which relate to a *tax levy ordinance* to be passed by council, it is required that the levies made by the ordinance shall be submitted to the board of tax commissioners. By the provisions of § 5649-3*a*, council merely submits a budget to the county auditor for consideration and final action by the budget commissioners.]

5. *Submission to mayor* of budget resolution for approval. If the mayor disapproves the resolution it may be passed over his veto by two-thirds vote of council. (§ 4234.)

6. *Publication of resolution* in the manner required by §§ 4228, 4229.

7. *Submission of annual budget to county auditor* by council, on or before the first Monday of June, which annual budget is to be submitted by the county auditor to the budget commissioners. (§ 5649-3*a*.)

THE SEMI-ANNUAL APPROPRIATIONS.

1. *Appropriating Ordinance for first six months* of fiscal year must be passed at the beginning of the year, making detailed appropriations of the moneys in the treasury for each of the several objects for which the municipality has to provide, and dividing the same among all the various funds for said six months. Council may also in this ordinance set apart such sum as it may deem proper as a "contingent fund" to provide for deficiencies in any of the regular funds which may, by any unforeseen emergency, occur during the six months. The ordinance should be published, as one of a general nature. (§§ 3797, 4224, 4227, 4228, 4229, 5649-3*d*.)

2. *Appropriating ordinance for second six months* of fiscal year must be

passed at the beginning of the second half of said year, and the same formalities observed as above.

Sec. 3788. [Statements to be furnished by city auditor and village clerk.][1] On or before the first Monday in April of each year the auditor of such city and clerk of such village shall furnish to the mayor and council and to each member thereof, the following statements, which council may require to be printed:

1. A statement showing the balance standing to the credit or debit of the several funds on the balance sheet of the corporation, at the end of the last fiscal year.

2. A statement showing the monthly expenditures from each fund in the twelve months, and the monthly expenditures from all the funds in the twelve months of the last fiscal year.

3. A statement showing the annual expenditures from each fund for each year of the last five fiscal years.

4. A statement showing the monthly average of such expenditures from each of the several funds for the last fiscal year, and also the total monthly average from all of them for the last five fiscal years.[2] [96 v. 33, § 36.]

(1) **Old section.**—See § 2690*f*, R. S., repealed.

(2) See notes to § 3787 *ante*, see also § 5649-3*a* under title "Taxation," in Part II.

Sec. 3789. [Reports to mayor and council.] The directors and officers provided for in this title, upon request, shall forthwith furnish to the mayor or council any information desired in relation to the affairs of their respective offices. [96 v. 34, § 37.]

Sec. 3790. [Heads of departments to report estimates to mayor and auditor.] To enable the mayor to make up his annual budget, each director or board and each officer, provided for in this title, on or before the last Monday in March of each year, shall make and file with the mayor, and also with the auditor, a carefully prepared and itemized estimate of the amount of money needed in such department or office for all purposes for the ensuing fiscal year, such estimate to be given for each month.[1] [96 v. 34, § 37.]

(1) See notes and order of procedure under § 3787 *ante*.

Sec. 3791. [Annual budget; how made up, etc.][1] On the first day of April of each year the mayor shall submit to council the annual budget[2] of current expenses of the municipality, any item of which may be reduced or omitted by council, but the council shall not increase the total of such budget. In the making of the annual budget, the mayor may revise and change any and all items in the annual estimates furnished to him by the directors and officers as herein prescribed, but he shall not increase the total of any such estimate when including it in his annual budget to council. On such date, and at such other times as he deems expedient, he shall report to council concerning the affairs of the corporation, and make such recommendations to council as he deems proper for the welfare of the municipality. [96 v. 34, § 38.]

(1) **Old sections.**—See old §§ 2690i R. S. repealed.

(2) See notes and order of procedure under § 3787 *ante.*

Sec. 3792. [Board of examiners; appointment, qualifications, duties.] At any time the mayor may appoint competent disinterested persons, not exceeding three in number, not more than two of whom shall be of the same political party, to examine without notice the affairs of any department, director, officer or employe in the city government, for the purpose of ascertaining facts. In connection with such examinations, the mayor or such appointees may compel the attendance and testimony of witnesses, administer oaths and examine such persons as they deem necessary, and compel the production of books and papers. The result of the examination shall be recorded in the office of the mayor and transmitted by him to the council without delay. The council shall provide the examiners reasonable compensation for such services. [96 v. 34, § 38.]

Sec. 3793. [Duty of council and tax commissioners as to examination.][1] The council shall examine and revise each annual budget submitted by the mayor. After it has determined by ordinance the percentage to be levied for the several purposes allowed by law upon the real and personal property in the corporation returned on the grand duplicate the levies shall be submitted by the council to the board of tax commissioners, which board shall examine and return them, as pro-

vided by law, with such suggestions and recommendations as it deems proper.[2] [96 v. 35, § 39.]

(1) **Old section.**—Compare §§2690*g*, 2690*c*, R. S., repealed.

(2) **Provisions of Smith law.**—As to the duties of council under the provisions of the act of June 2, 1911, see § 5649-3*a* under title "Taxation," in Part II.

Sec. 3794. [Percentage of tax to be certified to county auditor; his duty thereupon][1] On or before the first Monday in July, each year, council shall cause to be certified to the auditor of the county, the rate of taxes levied by it on the real and personal property in the corporation returned on the grand duplicate, who shall place it on the tax list of the county in the same manner as township taxes are by law placed thereon. The ordinance prescribing the levy shall specify distinctly each and every purpose for which the levy is made and the per cent thereof, and if he finds that the tax levy so certified to him exceeds the aggregate limit allowed by law, the county auditor shall not place it on the tax list, and the levy for such municipal corporation shall not be valid or collectible against any real or personal property in the corporation. If such levy is in excess of the limit allowed by law, the auditor shall immediately notify the council making it, and within ten days after the receipt of such notification council shall revise its levy so as to bring it within the law.[2] [96 v. 35, § 40.]

(1) **Old section.**—See old section 2691 R. S. repealed.

(2) **Provisions of Smith Law.**—By the above § 3794, council is required to certify to the county auditor the rate of taxes levied by council. By the provisions of the act of June 2nd, 1911, which now govern, council is required to submit an annual budget to the county auditor on or before the first Monday in June and this annual budget is laid before the budget commissioners for examination to determine whether the amount proposed to be raised exceeds the amount authorized by law and if it does exceed such amount, to revise and change it. When the budget commissioners complete their work they certify their action to the county auditor who ascertains the rate of taxes necessary to be levied upon the property in the municipality and places it on the tax list. See §§ 5649-3*a* and 5649-3*c* in Part II, under title "Taxation."

Provision directory.—The provision of former section requiring certification to the county auditor at or before a time fixed in the statute was held to be directory. Gates v. Beckwith, 2 W. B. M. 539.

FORM OF RESOLUTION FOR ANNUAL BUDGET.

RESOLUTION.

To provide for the annual budget for municipal purposes for the year 19....

Be it resolved by the council of the city [*or* village] of ..... State of Ohio:

Sec. 1. That the following is the annual budget of the city [*or* village] of.....setting forth in itemized form the amounts of money needed for the said city [*or* village] for the various municipal purposes for the year 19....

Public health fund.....$.....
Public safety fund.....$.....
Public service fund.....$.....
Hospital fund .....$.....
Library fund .....$.....
Etc.
Also for interest and sinking fund
purposes .....$.....
Etc., Etc.

Sec. 2. That the clerk is hereby directed to certify this annual budget to the auditor of the County of.....

Sec. 3. This resolution shall take effect and be in force from and after the earliest period allowed by law.

Passed....., 19....

.....
President of Council.

Attest:

.....
Clerk.

(§ 5649-3*a* provides the specific information that the budget shall set forth. The county auditor furnishes to the clerk of council the blanks on which the clerk may certify to the county auditor the annual budget of council.)

FORM OF RESOLUTION DECLARING NECESSITY FOR ADDITIONAL TAX LEVY.

(See § 5649-5 under "Taxation", in Part II.)

RESOLUTION.

Declaring the amount of taxes that may be raised by the levy at the maximum rate authorized by law without a vote of the electors to be insufficient and declaring the expediency of a levy in excess of such rate.

Be it resolved by the council of the city [*or* village] of..... State of Ohio, (a majority of all the members elected thereto concurring):

Sec. 1. That the amount of taxes that may be raised by the levy of taxes at the maximum rate authorized by § 5649-2 of the General Code on

the taxable property in said city [or village] will be insufficient for the needs of said city [*or* village] and that it is expedient and necessary that taxes be levied on the taxable property in said city [*or* village] for the period of ..... years, [*not exceeding five*] at a rate in excess of such maximum rate authorized by said § 5649-2 of the General Code.

Sec. 2. That it is expedient and necessary to levy taxes for the years .....[*not exceeding five*] at the rate for each year of..... mills on each dollar of the tax valuation of the taxable property within the city [*or* village] of....., in excess of the rate authorized by the said § 5649-2 of the General Code.

Sec. 3. That the clerk be and he is hereby directed to certify a copy of this resolution to the deputy state supervisors and inspectors of elections of.....county, Ohio, in order that the said supervisors and inspectors of elections may make arrangements for submitting the question of said additional levy to the electors of the city [*or* village] of..... as provided by law.

Passed....., 19....

.....

Attest: President of Council.

.....

Clerk.

Sec. 3795. [Corporation taxes; how collected][1] The taxes of the corporation shall be collected by the county treasurer and paid into the treasury of the corporation in the same manner and under the same laws, rules and regulations as are prescribed for the collection and paying over of state and county taxes. The corporation treasurer shall keep a separate account with each fund for which taxes are assessed, which account shall be at all times open to public inspection. Unless expressly otherwise provided by law, all money collected or received on behalf of the corporation shall be promptly deposited in the corporation treasury in the appropriate fund, and the treasurer shall thereupon give notice of such deposit to the auditor or clerk. Unless otherwise provided by law, no money shall be drawn from the treasury except upon the warrant of the auditor or clerk pursuant to the appropriation by council.[2] [96 v. 35, § 41.]

(1) **Old sections.**—See old §§ 2690, 2692 R. S., repealed.

(2) **In villages** there are no auditors, but the clerk of the village is the proper person upon whose warrant money is to be drawn from the treasury. See §§ 4283, 4285.

Collection where no mode pro-

vided.—If no special mode of collecting a tax is provided, where power is given to collect, council would have authority to prescribe the mode by ordinance. Cincinnati v. Gwynne, 10 O. 192; Cincinnati v. Bank, 14 O. 605.

Payments without appropriation.—In the absence of any allegation of fraud or collusion, a presumption arises that payments made by a municipality for services were regular and duly authorized, and where the payments were such as the city should have made and the persons receiving them were fairly entitled to what they received, an action can not be maintained by the city for recovery back of the amounts so paid, on the bare allegation that no ordinance "appears" to have authorized such payments. Norwalk v. Christian, 25 C. C. (N. S.) 419.

APPROPRIATION AND EXPENDITURE.

Sec. 3796. [Fiscal year.][1] In municipal corporations the fiscal year of each office, board and department shall terminate on the thirty-first day of December, in each year, and all accounts shall be closed on that day, and all annual reports required by law shall be made for the year terminating on that day. [96 v. 36, § 42.]

(1) **Old section.**—Compare old § 1545 R. S., repealed.

Sec. 3797. [Council to make appropriations at beginning of each fiscal half year.][1] At the beginning of each fiscal half year, the council shall make appropriations[2] for each of the several objects for which the corporation has to provide,[3] or from the moneys known to be in the treasury, or estimated to come into it during the six months next ensuing from the collection of taxes and all other sources of revenue.[4] All expenditures within the following six months shall be made from and within such appropriations and balances thereof.[5] [96 v. 36, § 43.]

(1) **Old section.**—Compare old § 2690*h* R. S., repealed.

Other provisions. — See § 5649-3d, in Part II.

(2) **Detailed and specific appropriations.**—*Former statutes* for certain cities required the appropriations to be "detailed and specific." Under such provisions it was held that the expenditures must be classified and appropriation in a lump sum would not be compliance with the statute. Ampt v. Cincinnati, 5 N. P. 98.

Former section 1693 R. S. also required that every ordinance appropriating money should contain an explicit statement of the uses and

purposes for which the appropriation was made. (See Stem v. Cincinnati, 6 N. P. 15, 19; Knauss v. Columbus, 13 Dec. 200).

The present section omits the words "detailed and specific," and section 4224, which supersedes § 1693 R. S., also omits the requirement of an explicit statement in appropriating ordinances, but that such ordinances should specifically state the several purposes for which money is appropriated is shown by the requirement as to contingent fund ordinances in § 3800, that they are to supply deficiencies in any of the "detailed appropriations."

(3) **Purposes of appropriation.**—Entertainment of public guests is not a legal object for the appropriation by a city of its funds raised by taxation. Stem v. Cincinnati, 6 N. P. 15; Moore v. Hoffman, 2 C. S. C. R. 453.

Limitations.—See § 5649-3*d* of the Smith law (under title "Taxation," in Part II), requiring that "no appropriation shall be made for any purpose not set forth in the annual budget nor for a greater amount for such purpose than the total amount fixed by the budget commissioners, exclusive of receipts and balances."

When section 5649-3d G. C., is not applicable to section 3797 G. C. See Op. Atty. Gen., 1919, p. 885.

(4) **Moneys from which appropriations made.**—See § 5649-3*d* of the Smith law (under title "Taxation," in Part II), requiring that such appropriations shall be made "from the moneys known to be in the treasury from the collection of taxes and all other sources of revenue." The section of the Smith law omits the words "or estimated to come into it during the six months next ensuing."

Monies received from automobile license tax must be regularly appropriated before expenditure. Op. Atty. Gen. (1920), p. 1129.

(5) **Similar provision** is found in § 5649-3*d* of the Smith law. See under title "Taxation," in Part II.

Sec. 3798. [Unexpended appropriations or balances shall revert to fund from which taken.] Unexpended appropriations or balances of appropriations remaining over at the end of the year and balances remaining over at any time after a fixed charge shall have been terminated, by reason of the object of the appropriation having been satisfied or abandoned, shall revert to the funds from which they were taken and shall then be subject to such other authorized uses as council determines.[1] [96 v. 36, § 43.]

(1) **Similar provision** is found in § 5649-3*e* of the Smith law. See this section under title "Taxation," in Part II.

Sec. 3799. [Transfer of funds.][1] By the votes of three-fourths of all the members elected thereto, and the approval

of the mayor,[2] the council may at any time transfer all or a portion of one fund or a balance remaining therein, except the proceeds of a special levy, bond issue or loan, to the credit of one or more funds, but there shall be no such transfer except among funds raised by taxation upon all the real and personal property in the corporation, nor until the object of the fund from which the transfer is to be effected has been accomplished or abandoned. [103 v. 522, 96 v. 36, § 43.]

(1) **Validity.**—This section held constitutional. Cincinnati v. Roettinger, 105 O. S. 145.

(2) **Passing over mayor's veto.**—Under former statute 2690*h* R. S. an appropriation from the contingent fund, not approved by the mayor, could be passed over his veto; but under the present section the mayor's approval would be essential, and passing an appropriation over his veto would not be an equivalent. See State v. Brown, 8 C. C. 103.

Transfer of funds.—Transfer from one department to another department of the same fund was held to be forbidden under former statutes. Stem v. Cincinnati, 6 N. P. 15.

Surplus appropriation — how transferred. Op. Atty. Gen. (1912), pp. 1573 and 1626.

Surplus revenues derived from a municipal electric light plant or gas works, should be transferred to the sinking fund of city. Op. Atty. Gen. (1913), p. 352.

Under special charters.—This section applies to cities and villages under special charters and operates to prevent the transfer of revenues from the water works fund to the general fund. Cincinnati v. Roettinger, 105 O. S. 145.

Sec. 3800. [Contingent fund.] In making the semi-annual appropriations and apportionments herein required, council may deduct and set apart from any moneys, not otherwise appropriated, such sum as it deems proper as a contingent fund to provide for any deficiency in any of the detailed appropriations, which may lawfully and by any unforeseen emergency happen.[1] Such contingent fund or any part thereof may be expended for any such emergency only by ordinance passed by two-thirds of all the members elected to council, and approved by the mayor. Any balance remaining in such contingent fund at the end of the fiscal year shall thereupon become a part of the general fund, to be again appropriated as other moneys belonging to the corporation. This section shall not interfere with the provisions of law authorizing the transfer of funds by the court of common pleas.[2] [96 v. 36, § 43.]

(1) **Unforeseen emergency.**—A contemplated improvement deferred for want of funds is not an unforeseen emergency within a provision such as this. Ampt v. Cincinnati, 1 N. P. 379.

To make a case within the meaning of a provision such as this, something unforeseen shall happen affecting the object for which the specific appropriation is made and which, by requiring an unexpected expenditure of money appropriated to that particular object, has caused or will cause a deficiency in the appropriation. Ampt v. Cincinnati, 1 N. P. 379. Whether the determination of council in the ordinance that an emergency did exist is final, see Ampt v. Cincinnati, 1 N. P. 379, 382.

Increase in legitimate municipal expenditures required by reason of a Grand Army encampment, which event was not decided upon until after the estimates for the year were made up, was held to be payable out of the contingent fund. Stem v. Cincinnati, 6 N. P. 15.

(2) See §§ 2296 to 2302 in Part II, under "Taxation," providing for resolution and petition to Common Pleas Court asking for allowance of transfer of funds.

Sec. 3801. [Disposition of cash balances in a fund when purpose for which created is invalid.] Repealed, 103 v. 521.

Sec. 3802. [Disposition of cash balances not legally available.] Repealed, 103 v. 521.

Sec. 3803. [Effect of transfer.] Repealed, 103 v. 521.

Sec. 3804. [Disposition of unexpended balances created by bond issue.] When any unexpended balance remaining in a fund created by an issue of bonds, the whole or part of which bonds are still outstanding, unpaid and unprovided for, is no longer needed for the purpose for which such fund was created, it shall be transferred to the trustees of the sinking fund to be applied in the payment of bonds. [97 v. 520, § 43a.]

Sec. 3805. [Monthly statement of balances.][1] The auditor or clerk, and the treasurer in all municipal corporations shall make up monthly, a statement of the balances in all funds and accounts in their offices, as they exist at the close of business on the last day in the month, and such officers shall forthwith compare such statements, correct any error, and at once forward a copy thereof to the mayor, who shall keep them for public inspection. [96 v. 37, § 44.]

(1) **Old section.**—Compare old § 1765a R. S., repealed.

Sec. 3806. [Certificate of auditor or clerk.][1] No contract, agreement or other obligation involving the expenditure of money shall be entered into, nor shall any ordinance, resolution or order for the expenditure of money, be passed by the council or by any board or officer of a municipal corporation, unless the auditor or clerk thereof, first certifies to council or to the proper board, as the case may be, that the money required for such contract, agreement or other obligation, or to pay such appropriation or expenditure, is in the treasury to the credit of the fund from which it is to be drawn, and not appropriated for any other purpose,[2] which certificate shall be filed and immediately recorded. The sum so certified shall not thereafter be considered unappropriated until the corporation is discharged from the contract, agreement or obligation, or so long as the ordinance, resolution or order is in force. [101 v. 262; 96 v. 37, § 45.]

(1) **Old sections.**—These restrictions substantially incorporate old sections 2699 and 2702 R. S., repealed; the former applying to Cincinnati only, and known as the "Worthington Law," the latter applying, with certain exceptions, to all municipalities and known as the "Burns Law."

General exceptions to the requirement that money for a municipal contract be in the treasury were formerly contained in old §§ 2264 R. S.; 2273 R. S.; 2275 R. S. and 3471-4 and 3471-4*a*, R. S., repealed.

Other restrictions.—Contracts not to be made without previous appropriation of funds, see § 17 and notes in Part II.

(2) **Must be funds at time of ordinance.**—The money must be in the treasury and so certified at the time the ordinance is passed, before the ordinance can take effect. That the money has since come into the treasury and has been set apart is not sufficient. State v. Hoffman, 25 O. S. 328.

The fact that funds are actually in the treasury, does not dispense with certificate. State v. Bair, 50 B. 11; Findlay v. Pendleton, 62 O. S. 80. As to money to be derived from bonds in process of delivery, see § 3810, *post*.

As to the exact time when the certificate is required in case of several steps in a proceeding ending in the expenditure of money, see Braman v. Elyria, 26 C. C. 731; 5 C. C. (N. S.) 387 (aff'd, 73 O. S. 346); Pullen v. Smith, 26 C. C. 549; 5 C. C. (N. S.) 1; Ryan v. Hoffman, 26 O. S. 109; Tyler v. Columbus, 6 C. C. 224.

Certificate need not be executed until just prior to awarding contract. Op. Atty. Gen. (1918), p. 1528.

Object of statute.—The statute embodies "that principle of sound public policy which seeks to enforce

economy in the administration of public affairs. The judicial tribunals of the state should administer these laws so as to advance the purpose thus sought to be accomplished. Contracts made in violation of these statutes should be held to impose no corporate liability. Persons who deal with municipal bodies for their own profit should be required at their peril to take notice of the limitations upon the powers of these bodies which the statutes impose. The corporation should not be estopped by the acts of its officers to set up these statutes in defense to contracts made in disregard of them." Lancaster v. Miller, 58 O. S. 558.

To what expenditures applicable.—*Generally*—These restrictions were held, under former statutes, not to apply to contracts payable out of a fund not raised by taxation. Kerr v. Bellefontaine, 59 O. S. 446, 464; Comstock v. Nelsonville, 61 O. S. 288, 294; State ex rel. v. Gibson, 1 N. P. (N. S.) 565 (aff'd, 49 B. 87).

Thus the former sections were held not to apply to purchases by gas trustees for the erection of gas works, for they were not payable out of a fund raised by taxation. Kerr v. Bellefontaine, 59 O. S. 446, 464.

The power of the various boards of a city to make contracts is limited by such a provision. Newton v. Toledo, 18 C. C. 756. The fact that the certificate is to be filed with council does not imply an intent to limit the requirement to expenses incurred by council. Pittinger v. Wellsville, 75 O. S. 508.

And contract for school building held void for failure to have certificate. McAlexander v. School District, 19 Dec. 89; 7 N. P. (N. S.) 590; 52 B. 211.

Action will not lie for material furnished and used without issuance of certificate. Pleasant Ridge v. Limestone Co., 17 C. C. (N. S.) 498; 1 Ohio App. 245.

Resolution of council accepting a gift of a public library and agreeing to maintain the same at an expense of one thousand dollars per year, is not within the inhibition of this section. Smith v. Evans, 74 O. S. 17. But see Pullen v. Smith, 26 C. C. 549; 5 C. C. (N. S.) 1.

Application of this section to contract for purchase of water mains. See Op. Atty. Gen. (1922) p. 890.

Employment contracts.—Employment of a street superintendent at a weekly salary is not authorized unless at the time of employment money to pay for such employment was in the treasury and so certified. State ex rel. v. Hoffman, 25 O. S. 328.

So, employment of a superintendent over the construction of a town hall. Drott v. Riverside, 4 C. C. 312.

So, employment by board of public service, of janitor for city hall, is unauthorized, without the certificate. Pittinger v. Wellsville, 75 O. S. 508.

Employment of an attorney for Sunday law prosecutions, without certificate of money in treasury, was held void. That the amount of payment in such case could not be ascertained in advance was held to make no exception, for a maximum could have been fixed; nor was it material that the services were to preserve order and enforce an

ordinance. Bond v. Madisonville, 2 C. C. 449.

Employment of attorney by a board, without certificate of auditor that money is in treasury to pay for services, is void, though the board was empowered to sue and be sued. Though the money was in treasury and a financial statement was made to council at each meeting, the certificate could not be dispensed with. Findlay v. Pendleton, 62 O. S. 80. See also Caldwell v. Marvin, 8 N. P. (N. S.) 387.

Expenses incurred in employing a village solicitor were held to be within the restriction of such a provision, where there was no proviso excepting such employment. Easton v. Hyde Park, 6 N. P. 257. Under the present Code, however, the employment of counsel by villages is specially excepted from the restrictions.

Condemnations.—Ordinances to appropriate property for public purposes, as for a public park, are valid without the certificate of money in the treasury to pay for the appropriation. This is put on the ground that the ordinance to appropriate is not one to expend money, the amount is not ascertainable and bonds are issued to pay the award. Put-in-Bay v. Webb, 18 C. C. 780; Pansing v. Miamisburg, 31 C. C. 130; 11 C. C. (N. S.) 511, (aff'd, 79 O. S. 430). But see Ryan v. Hoffman, 26 O. S. 109, 123; Hurst v. Belle Valley, 30 C. C. 563; 11 C. C. (N. S.) 235.

So condemnation of property for opening a street is not within such provisions. Klopfer v. Sunderland, 1 Dayton 143; see also Tyler v. Columbus, 6 C. C. 224; but see Rhoades v. Toledo, 6 C. C. 9, *contra*.

Contracts for street improvements.—The restriction requiring certificate of auditor of money in the treasury does not apply to contracts for street improvements when bonds have been authorized by the municipality to be issued to pay the entire estimated cost and expense of the improvement. Emmert v. Elyria, 74 O. S. 185; Kohler Brick Co. v. Toledo, 29 C. C. 599; 10 C. C. (N. S.) 137; Lloyd v. Toledo, 20 C. C. (N. S.) 47.

Nor is the certificate required for so much of the cost as is to be paid for by assessments on abutting property. Comstock v. Nelsonville, 61 O. S. 288. And this is true even though some of the assessments may prove uncollectible by reason of deficient value of lots or otherwise. *Ib.*

For construction of provisions of former statutes, see Wood v. Pleasant Ridge, 12 C. C. 177, 182; Irwin v. Greenvile, 1 Dayton 140; Chittenden v. Columbus, 14 Dec. 333; 1 N. P. (N. S.) 420; Cincinnati v. McErlane, 3 B. 843; Kirchner v. Cincinnati, 14 B. 48; Ryan v. Cincinnati, 2 B. 251; Mills v. Norwood, 26 B. 348; McGrew v. Elmwood Place, 17 C. C. 676; Comstock v. Nelsonville, 61 O. S. 288. See also Trowbridge v. Hudson, 24 C. C. 76; 3 C. C. (N. S.) 644 (as to contracts relating to sidewalk improvements under former statutes).

Meaning of the provision excepting "street improvement contracts extending for one year or more," in § 3809, see Emmert v. Elyria, 74 O. S. 185, 196.

Running expenses.—*Purpose of statute.*—The policy of such a statute respecting municipalities is that no debt shall be incurred for the

ordinary expenses of the corporation unless an appropriation to meet it has been made by council and the auditor or clerk has certified to council that the money is in the treasury. Pittinger v. Wellsville, 75 O. S. 508. Compare §§ 3787, 3790, 3791, 3793, 3798, and 17.

Under former statutes on same subject, the restrictions were held to apply to all contracts, including the running expenses of the municipality, and were not limited to improvement contracts. Ampt v. Cincinnati, 2 N. P., 332, 339; Cope v. Wellsville, 25 B., 250; Easton v. Hyde Park, 6 N. P., 257; State v. Philbrick, 13 Dec. 158. But see, *contra*, Lima Gas Light Co. v. Lima, 4 C. C. 22, 28.

Appropriation of money raised by bonds.—The restrictions are not applicable to an ordinance appropriating money obtained by council from a sale of bonds made by it to the purpose for which the bonds are sold. Thus the certificate of money in the treasury is not necessary in the case of a contract for hose and chemical wagons and paid for out of the money realized from the bond issue for the purpose of purchasing real estate and equipping a building, etc., for a fire department. Akron v. Dobson, 81 O. S. 66; Cincinnati v. Waite, 12 N. P. (N. S.) 633.

Burns law has no application to a year's rental appropriated out of the proceeds of a lawful issue of bonds, nor can said law be construed as applying to rental for subsequent years under the same lease. Columbus v. Spielman, et al., 19 N. P. (N. S.) 257.

But see Carthage v. Dickmeier, 79 O. S. 323, 342, where such certificate was held necessary where several improvements are to be paid out of a single bond issue. This decision can hardly be reconciled, on principle, with Emmert v. Elyria, 74 O. S. 185, and Akron v. Dobson, 81 O. S. 66, and it would seem safer, in every case, to have the certificate.

See also Knowlton v. Board of Ed., 31 O. C. A., where the above cases are distinguished.

Exceptions implied by other statutes.—Implied exceptions to the restrictions of such a section as this may be caused by the provisions of other statutes. Thus the provision requiring an armory to be furnished by a city (R. S. § 3085) was held to make the city liable for rent, though no certificate of money in the treasury had been made. Wilson v. Cincinnati, 19 B. 10; see also State ex rel. v. Massillon, 24 C. C. 249; 2 C. C. (N. S.) 167.

And the restrictions were held not applicable to a contract for a trunk sewer under a former trunk sewer act (84 O. L. 75), for otherwise the law could not be carried out, since the act required contracting at once and collection of fund by subsequent levy. Cincinnati v. Honnigfort, 32 B. 32. And see Cincinnati v. Holmes, 56 O. S. 104.

They were held not applicable in their entirety to a city's waterworks; for otherwise an accident to the machinery might leave the city helpless for months. Cincinnati ex rel. v. Cincinnati, 11 C. C. 309, 317.

Where gas trustees were given power to construct and control gas plants, things necessary to accom-

plish the purpose of carrying out the power, employing service necessary, preserving the property from destruction and impairment to a degree not amounting to rebuilding or extension, are incidental and go with the power expressly given to construct and control. Current expenses incurred in thus operating and controlling the property do not require certificates that money is in the treasury, for otherwise it would be almost impossible to operate the institution as required by the special statute giving the power. Findlay v. Parker, 17 C. C. 294, 300 (aff'd, 63 O. S. 565); nor where the funds to be used in paying for such services are not to be derived from taxation, but from the revenue arising from water rents. Alcorn v. Price, 13 N. P. (N. S.) 558.

This section does not apply to a contract whereby, in consideration of conveyance of land for park purposes, the municipality agreed to improve same as rapidly as possible. Cleveland v. Herron, 102 O. S. 218.

An ordinance, subsequently passed authorizing payment for such services of the sum required in excess of $500, is a mere granting of authority to pay a valid obligation and is itself valid. *Ib.*

Contract in excess of $500.00 without certificate of auditor, void—money voluntarily paid by city can not be recovered, however, in absence of fraud. Op. Atty. Gen. (1912), p. 1900.

The act (90 O. L. 34) authorizing certain cities to make dredging contracts was held to make an exception to the restrictions of old § 2702 R. S. Sprankle v. Cleveland, 12 C. D. 644.

Express provisions in other statutes, excepting contracts made under them, from the restrictions of a statute such as § 3806, must be read as an exception to this section. Mt. Vernon v. State, 71 O. S. 428.

Exceptions implied from necessity, where public health endangered, see Columbus v. Bohl, 1 N. P. (N. S.) 469; 13 Dec. 569.

Contracts running beyond year.—Street improvement contracts extending for one year or more are made special exceptions by § 3809.

A contract by which a city agrees to pay a water company hydrant rentals for water for fire purposes for thirty years would not be void on the ground that there was not a certificate of money in the treasury sufficient to satisfy the amount falling due for the full period of thirty years. Defiance v. Council, 23 C. C. 96 (reversed on other grounds, 68 O. S. 520). See also Defiance Water Co. v. Defiance, 12 O. F. D. 299 (reversed on other grounds, 14 O. F. D. 127).

As to contracts running over a year, under the former sections on this subject relating to Columbus (§§ 1545-150, 2699-1 R. S. repealed), see Fergus v. Columbus, 6 N. P. 82.

Character of certificate.—Where there are several contracts of the same species entered into at the same time, to be paid from a gross sum theretofore provided, it is not sufficient for the certificate to recite that there is money in the treasury "sufficient" for the particular contract for which the certificate was made, but it should specify the

amount "in the treasury to the credit of the fund from which it is to be drawn, and not appropriated for any other purpose." Carthage v. Diekmeier, 79 O. S. 323.

"Where the certificate is amended by the auditor or clerk with the consent of council, before the contract is executed, by inserting the amount that is in the treasury, the certificate so amended and filed, is a limitation on the amount to be paid on the contract, beyond which the municipality is not liable." *Ib.*

An appropriation for "pay roll of laborers" may not be expended for rental of street roller —duty of auditor. Op. Atty. Gen. (1915), p. 1288.

Mandamus will lie to compel auditor to give certificate of funds on hand, when refusal is without sufficient grounds. State ex rel. v. Noble, 9 N. P. (N. S.) 609; 20 Dec. 308.

Sec. 3807. [Proceedings in violation shall be void.] All contracts, agreements or other obligations, and all ordinances, resolutions and orders entered into or passed, contrary to the provisions of the preceding section shall be void, and no person whatever shall have any claim or demand against the corporation thereunder, nor shall the council, or a board, officer, or commissioner of any municipal corporation, waive or qualify the limits fixed by such ordinance, resolution or order, or fasten upon the corporation any liability whatever for any excess of such limits, or release any party from an exact compliance with his contract under such ordinance, resolution or order.[1] [96 v. 37, § 45.]

(1) **Effect of ordinance or contract made without certificate.**—A contract without the certificate required imposes no liability on the municipality to pay. It is not estopped to set up the defense of the want of a certificate. Lancaster v. Miller, 58 O. S. 588.

The municipality is not liable though the contractor has fully performed his contract. He must ascertain at his peril whether the certificate has been filed and recorded or not. Comstock v. Nelsonville, 61 O. S. 288.

So, municipality is not liable for services of superintendent of city hall, employed without certificate, though services were valuable. Drott v. Riverside, 4 C. C. 312.

Where work already performed and kept and used by the public authorities, held no right to recover back money paid contractor where no certificate of money in treasury before contract made, see State ex rel. v. Fronizer, 77 O. S. 7; State ex rel. v. Bridge Co., 5 N. P. (N. S.) 30.

Right of action in contractor for leave to remove a bridge for which contract had been made, but not according to statute and for which no recovery of contract price or *quantum meruit* would lie. Lee v. Commissioners, 14 O. F. D. 43.

A provision such as contained in this section is designed only to restrain municipal extravagance. It does not make work, done without the preliminaries here required, illegal so as to impose a liability which would not otherwise have been imposed. Elster v. Springfield, 49 O. S. 82.

Thus, where a sewer is constructed by the city without money in the treasury for that purpose and the sewer does injury by carrying off percolating waters, which had fed a spring, the city is not liable. *Ib.*

That a city's partly executed contract is void because there had been no certificate of funds in the treasury, is not necessarily grounds for injunction to restrain further execution of it. Ampt v. Cincinnati, 34 B. 111, 112.

Pleading.—It is not sufficient if the petition avers that the contract was duly made. It is necessary to aver that the certificate of money in the treasury was made. Stone Co. v. Trustees, 18 Dec. 137; 5 N. P. (N. S.) 573, (aff'd, 78 O. S. 444); Soeder v. Cleveland, 16 C. C. (N. S.) 260; *contra*, see Neubauer v. Bd. Education, 6 N. P. 530.

Sec. 3808. [Officer shall have no interest in contracts; penalty.] No member of the council, board, officer or commissioner of the corporation, shall have any interest in the expenditure of money on the part of the corporation other than his fixed compensation.[1] A violation of any provision of this or the preceding two sections shall disqualify the party violating it from holding any office of trust or profit in the corporation, and shall render him liable to the corporation for all sums of money or other thing he may receive contrary to the provisions of such sections, and if in office he shall be dismissed therefrom. [96 v. 37, § 45.]

(1) **Officers interested.**—For examples illustrating the application of this provision, see State ex rel. v. Egry, 79 O. S. 391, 413.

Compare Sections 12910, 12911, and 12912, making it a crime for any person holding any office of trust or profit in this state, or any agent, servant or employee of any officer or of a board of officers to be interested in any contract for the purchase of property or supplies for the use of any county, township, school district, municipal corporation or public institution or any municipal officer to be interested in any contract or work with or for the corporation. (See these sections under title "Officers," in Part II.

Member of Sinking Fund Board is an officer holding an office of profit and trust, when. Op. Atty. Gen. (1914), p. 1250.

Under such sections it is held unnecessary to a conviction that the officer make a profit on the contract, but sufficient if he is personally interested in the proceeds of the sale; nor is it any defense that when said contract was made money therefor was not certified to be in the treas-

ury. Doll v. State, 45 O. S. 445; and the contract so made is void. Dalzell, etc., Co. v. Findlay, 5 C. C. 435, (aff'd, 27 B. 128); Bellaire Co. v. Findlay, *et al.*, 5 C. C. 418; Findlay v. Parker, 17 C. C. 294 (aff'd, 63 O. S. 565); Marsh v. Hartwell, 2 N. P. 389. See also State v. Funk, 16 C. C. 155.

Compare also § 4757 forbidding any member of a school board to be interested in a contract with such board, under which it was held that a contract between the board and a firm in which a member of the board is a partner is void, and any taxpayer may enjoin the same. Grant v. Brouse, 1 N. P. 145.

As to punishment of persons giving bribes to officers or public agents, see § 12823. "Officer" would include an accountant employed by city board of revision; Barker v. State, 69 O. S. 68; and a member of council, Amundsen v. State, 28 C. C. 655; 8 C. C. (N. S.) 518.

A contract of employment between a member of council and a railway company by which the member of council is to devote his time to the general management of the company's business in that city including the procurement of the rights of way over the streets, which are to be granted by the council of which the councilman is a member, was held void. Railroad Company v. Morris, 10 C. C. 502.

In construing § 856 R. S. now sec. 2420 forbidding county commissioners to have an interest in a contract on behalf of the county, it was held that the penalty could not be enforced in a case where the contractor, subsequent to the letting of the contract, entered into an agreement to purchase material therefor from a corporation in which the commissioner was a stockholder, and such subsequent agreement had no influence in procuring the contract. State ex rel. v. Pinney, 47 B. 820.

Member of board of health is an officer of municipality, and ineligible to office of district physician during term or for one year thereafter. State ex rel. v. Wichgar, 27 C. C. 743.

As to validity of contracts made by public officials extending beyond the expiration of their terms, see State ex rel. v. Lewis, 12 Dec. 46.

As to invalidity of franchise where mayor financially interested, see Railway v. Cleveland, 19 N. P. (N. S.) 577.

Canvassing officers have no authority to pass on qualifications of those elected; how a candidate may be disqualified. Op. Atty. Gen. (1915), p. 2342.

Sec. 3808-1. [Additional compensation.] In villages the street commissioner, in addition to his fixed compensation may receive compensation for the use of tools, teams and equipment when such use shall have been first authorized by resolution of council, specifying the amount or rate of compensation therefor. [108 v. 1230.]

Sec. 3809. [Council may provide for light, water and certain public necessaries.] The council of a city may authorize,

and the council of a village may make, a contract with any person, firm or company for lighting the streets, alleys, lands, lanes, squares and public places in the municipal corporation, or for furnishing water to such corporation, or for the collection and disposal of garbage in such corporation, or for the leasing of the electric light plant and equipment, or the waterworks plant, or both, of any person, firm, company or municipality or for the purchase of electric current for furnishing light, heat or power to such municipality or the inhabitants thereof for a period not exceeding ten years, and the requirement of a certificate that the necessary money is in the treasury, shall not apply to such contract, and such requirement shall not apply to street improvement contracts extending for one year or more nor to contracts made by the board of health, nor to contracts made by a village for the employment of legal counsel, nor to contracts by a municipality for the leasing or acquisition of the electric light plant and equipment, or the waterworks plant, or both, of any person, firm or corporation therein situated. [103 v. 526; 96 v. 37, § 45.]

(1) **Meaning** discussed, see Emmert v. Elyria, 74 O. S. 185, 196.

Certificate required.—Under this section a contract with a company for the services of two men at $50.00 per day, in testing the water mains of a municipal water works plant, is not valid without Auditor's certificate as required by section 3906 G. C. Op. Atty. Gen. (1912), p. 412.

Injunction against contractor.—A reduction company which is engaged in collecting and disposing of garbage under a contract entered into with a city under authority of law (General Code, sections 3809, 3649) and which creates a nuisance by the manner in which it operates its plant, can not be enjoined from continuing to carry out the contract, but will be enjoined from continuing the nuisance. Story v. Reduction Co., 19 N. P. (N. S.) 109. Aff'd Reduction Co. v. Story, 25 C. C. (N. S.) 533. See also Reifsnyder v. Fertilizer Co., 28 O. C. A. 577.

Lease of waterworks.—A village prevented by inability so to do, from voting sufficient bonds to construct a water works system may grant a franchise to an individual to construct such a system, and at substantially the same time lease the system for a period of ten years as provided by section 3809. Moore v. Elmore, 13 N. P. (N. S.) 651.

A franchise for the construction, maintenance and operation of a system of water works, and providing that the village may lease the same and also for an option thereon at the expiration

of the period, is not objectionable on the ground of indefiniteness or uncertainty, and as containing more than one subject, the lease and option features being conditions of the franchise and not subjects of limitation. *Ib.*

A contract under this section must conform to the conditions of section 6, Article XVIII of Ohio Constitution. Op. Atty. Gen. (1914), p. 769.

Implied power to issue bonds to pay for construction of pole line. Op. Atty. Gen. (1914), p. 1779.

Contracts under this section not required to be let upon competitive bids after advertisement. Op. Atty. Gen. (1918), p. 152.

Sec. 3810. [When money may be deemed in treasury and in appropriate fund.] Money to be derived from lawfully authorized bonds or notes sold and in process of delivery, shall for the purpose of the certificate that money for the specific purpose is in the treasury, be deemed in the treasury and in the appropriate fund.[1] [97 v. 44, § 45a.]

(1) See Emmert v. Elyria, 74 O. S. 185.

Sec. 3811. [When may not adopt plans or specifications for public improvement.] No municipal corporation shall adopt plans or specifications for a public improvement required by law to be made by contract let after competitive bidding, which requires the exclusive use of a patented article or process, protected by a trade-mark, or an article or process wholly controlled by any person, firm or corporation or combination thereof.[1] [98 v. 204, § 45b.]

(1) **Patented article.**—As to validity of specifications calling for patented article, before enactment of above section, see Hastings v. Columbus, 42 O. S. 585; Holbrook v. Toledo, 28 C. C. 284. See also State ex rel. v. Miller, 30 C. C. 460.

Specifications. — The carrying out of a contract for the purchase of an automobile for municipal use will be enjoined where the specifications are so drawn as to prevent compliance therewith except by one concern, unless compliance is attained by the purchase and assembling of automobile parts from different factories and the production in that manner of an unknown machine at a cost possibly prohibitive. Auto Service Co. v. Cincinnati, 16 N. P. (N. S.) 369. See also Mog v. Cleveland, 18 N. P. (N. S.) 49.

CHAPTER 5.

ASSESSMENTS.

MAKING AND LEVYING.

Sec. 3812. [Special assessments; how made.][1] Each municipal corporation shall have special power to levy and collect special assessments, to be exercised in the manner provided by law.[2] The council of any municipal corporation may assess upon the abutting, adjacent and contiguous or other specially benefited lots or lands in the corporation,[3] any part[4] of the entire cost and expense[5] connected with the improvement of any street, alley, dock, wharf, pier, public road, or place by grading, draining, curbing, paving, repaving, repairing, constructing sidewalks, piers, wharves, docks retaining walls, sewers, drains, water-courses, water mains or laying of water pipe and any part of the cost of lighting, sprinkling, sweeping, cleaning or planting shade trees thereupon, and any part of the cost and expense connected with or made for changing the channel of, or narrowing, widening, dredging, deepening or improving any stream or water-course, and for constructing or improving any levee or levees, or boulevards thereon, or along or about the same, together with any retaining wall, or riprap protection, bulkhead, culverts, approaches, flood gates, or water ways or drains incidental thereto, or making any other improvement of any river front or lake front (whether such river front or lake front be privately or publicly owned), which the council may declare conducive to the public health, convenience or welfare,[6] by any of the following methods:

First: By a percentage of the tax value of the property assessed.[7]

Second: In proportion to the benefits[8] which may result from the improvement, or

Third: By the foot front[9] of the property bounding and

abutting upon the improvement. [107 v. 629; 101 v. 134; 97 v. 98, § 50; 96 v. 39, § 50; 96 v. 26, § 9.]

(1) **Old section** 2264 R. S. repealed and see old sections 2264*a*, 2264*b*, 2266, 2267, and 2269 R. S. repealed.

(2) **Nature of power of assessment.**—Assessments for street purposes are those special and local impositions upon property in the immediate vicinity of an improved street, which are necessary for the improvement and levied with reference to the special benefit which such property derives from the expenditure of the money. Raymond v. Cleveland, 42 O. S. 522.

A re-assessment is a re-apportionment of the cost and expense of such improvement and the imposition may be either upon the same lands or part of the same lands and it may include other lands. *Ib.*

The principle underlying special assessments is that the property upon which they are imposed is peculiarly benefited and therefore the owners do not in fact pay anything in excess of what they receive by reason of the improvement. Walsh v. Barron, 61 O. S. 15; Donohue v. Brotherton, 7 N. P. 367.

From the very nature of assessments, they can not in any case exceed the benefits for otherwise they would be taking of private property for public use without compensation in violation of § 19, Art. 1, of the Constitution of Ohio. Chamberlain v. Cleveland, 34 O. S. 551; Railway Co. v. Cincinnati, 62 O. S. 465; Dayton v. Bauman, 66 O. S. 379, and see notes to § 3819, *post.*

Distinguished from taxation.—The power of assessment is not limited by the constitutional provision requiring taxation by a uniform rule. The power of assessment differs from the power of taxation. Ridenour v. Saffin, 1 H. 464; Hill v. Higdon, 5 O. S. 243; Reeves v. Treas. Wood Co., 8 O. S. 333; Sessions v. Crunkilton, 20 O. S. 349.

Though in a general sense a tax is an assessment, and an assessment is a tax, there is a well recognized distinction between them. Lima v. Cemetery Assn., 42 O. S. 128; and exemption from taxation would not exempt from assessment for local improvement. *Ib.*

Assessments in proportion to benefits are not a taking of private property for public use, but rather a species of taxation. Scovill v. Cleveland, 1 O. S. 126.

The fact that lands not included in a taxing district are more benefited than some lands in the district was held not to render an assessment invalid. Weston v. Commissioners, 6 C. C. 641; see also Raymond v. Cleveland, 42 O. S. 522.

Validity in general.—Legislation authorizing municipalities to levy assessments for street improvements, upon property specially benefited, is constitutional. Hill v. Higdon, 5 O. S. 243; Reeves v. Treas. Wood Co., 8 O. S. 333; Sessions v. Crunkilton, 20 O. S. 349. In Dayton v. Bauman, 66 O. S. 379, where power to assess abutting property to pay costs of condemnation was denied, the power to assess for surface improvements, was reaffirmed.

Such legislation is not unconstitutional, even though it does not

adequately restrict the power of assessment so as to prevent abuse. The duty imposed by § 6, Art. 13 of the Constitution is in this regard directory, and not mandatory. Parsons v. Columbus, 50 O. S. 460. As to what would be sufficient restriction, see Maloy v. Marietta, 11 O. S. 636.

Assessments may be authorized to be made in proportion to the feet front or upon the value of the lands as assessed for taxation, leaving to the municipality the choice of mode. Ernst v. Kunkle, 5 O. S. 520; Hill v. Higdon, 5 O. S. 243; R. R. Co. v. Connelly, 10 O. S. 159, 163.

This section, in providing that municipal corporations may assess upon the abutting lots any part of the entire cost and expense connected with the improvement of any street by constructing water mains or laying water pipe, is constitutional. Stranahan v. Madigan, 18 C. C. (N. S.) 513.

Uniformity.—The rule of apportionment in assessment, whether by the front foot or a percentage of the assessed valuation, must be uniform, affecting all property alike. One rule can not be applied to one owner and a different one to another owner. R. R. Co. v. Connelly, 10 O. S. 159, 165; Jaeger v. Burr, 36 O. S. 164; Upington v. Oviatt, 24 O. S. 232, 246.

An assessment is not uniform which prescribes an equal proportionate charge, but allows a credit to the owners on one side, who had already done most of the work on that side. Jaeger v. Burr, 36 O. S. 164.

But the requirement of uniformity is not violated by dividing a street of varying widths, into as many sections as there are different widths and uniformly assessing the property on each section. Findlay v. Frey, 51 O. S. 390. If a street of varying widths, however, is not divided into sections, the assessment does not have to be graduated according to the width, but may be uniform on all the street. Smith v. Cincinnati, 6 N. P. 175. The same is true of assessment for sidewalks of varying widths. Ulm v. Cincinnati, 7 N. P. 278. And see Op. Atty. Gen. (1912), p. 1626.

Where a street to be improved divides two municipalities, each may assess the abutting property within its limits and a difference in amount between the two assessments will not invalidate them. Scully v. Cincinnati, 1 C. S. C. R. 183.

And assessment may be made on owners on one side of street forming boundary, though made on owners on both sides where same street lies wholly within the municipality. Glasheim v. Cheviot, 53 B. 307.

One seeking to enjoin a street assessment on the ground that lots or lands that should have been assessed have been omitted, must show that the omitted lots or lands derived some benefit from the improvement, and that a proper assessment, including such lots or lands, would probably reduce the assessment on his property. Burr v. Parker, 30 C. C. 297; 10 C. C. (N. S.) 550.

The fact that a parcel of land described in the improvement ordinance is not assessed, does not affect the validity of the assessment, when such parcel is not benefited by the improvement. Ridenour v. Biddle, 30 C. C. 237; 10 C. C. (N. S.) 438.

Properties, in front of which are cement curbs and gutters in good repair and theretofore constructed under the provisions of a city ordinance, can not be assessed for any portion of the cost of constructing similar cement curbs and gutters in front of other properties abutting on the same street, and which were constructed as a part of the general improvement of said street by paving and constructing curbs and gutters. Titlow, et al., v. Springfield, 19 N. P. (N. S.) 65; (aff'd by Court of Appeals without report).

As to uniformity where property not abutting, but near to, the improvement, is included, see Allen v. Cleveland, 1 Clev. 2. Under a statute allowing assessment of property abutting on the street or "near thereto" the assessment need not be made upon the property on the whole street, but only on that part of the street improved. Scovill v. Cleveland, 1 O. S. 126.

As to validity of assessment where property in the assessing district is divided into two classes, viz., abutting property, and contiguous property, and each class assessed by a different rule, see Akron v. Allen, 22 B. 260.

Change of law pending proceedings.—The assessment must be governed by the law as it was at the time of the improvement ordinance, with respect to the manner of assessment and the rights and liabilities of the owners of abutting property. Cincinnati v. Seasongood, 46 O. S. 296; Shehan v. Cincinnati, 25 B. 212 (aff'd, 27 B. 375); Stuart v. Lakewood, 23 C. C. (N. S.) 269.

In Toledo v. Marlow, 28 C. C. 298; 8 C. C. (N. S.) 121, it was held that assessment is a proceeding within the meaning of and protected by § 79 R. S., (now § 26 G. C.) and that the law in force at the commencement of the proceeding must govern, and the limit of assessment provided at that time prevails and that in the absence of a petition for the improvement, the preliminary resolution is the beginning of the proceeding; see also Squier v. Cincinnati, 5 C. C. 400. Harding v. Cincinnati, 13 C. C. (N. S.) 317. But as to this ground see Union Co. v. Greene, 40 O. S. 318, disapproved, however, in 58 O. S. 225. See also Ehni v. Columbus, 3 C. C. 494; and Crossley v. Findlay, 10 C. C. 286; Cincinnati v. Davis, 58 O. S. 225, 226.

And when an improvement is petitioned for, to ascertain the effect of the petition, reference should be had to the law in force at the time the petition was presented. Haynes v. Cincinnati, 62 O. S. 116, 122.

Section 211 of the original code (now omitted) provided that no rights in favor of or against any municipality existing prior to the act, nor any action, or proceeding should be affected by the change in the law. A section similar to this in a former Code (§ 1539 R. S. repealed) was held to apply to assessments and make the rights of parties fixed under the law in force at time of improvement ordinance. Raymond v. Cleveland, 42 O. S. 522, 529; Cincinnati v. Davis, 58 O. S. 225. And the law in force at the time of the assessment would govern a re-assessment, required by the former law to be conducted in the same manner as the original assessment.

though the new law was passed before the re-assessment. *Ib.* After a contract has been made for an improvement and the work commenced, the right to make an assessment to defray the expenses of the improvement, will not be affected by repeal of the act governing such matter where there is a saving clause in the new law. Corry v. Gaynor, 22 O. S. 584; Hubbard v. Norton, 28 O. S. 116.

A tax levy to provide a sinking fund for bonds for improvements, is not a part of the "proceeding" in which assessments for the improvement were levied; and so a city cannot levy taxes by sewer districts to provide a sinking fund for sewer district bonds, issued since the municipal code of 1902 went into effect, for the purpose of paying that portion of the cost of sewers constructed in certain districts and not assessed upon the property specially benefited, notwithstanding proceedings therefor were commenced in council before the present code went into effect and under a statute authorizing such levy. Alexander v. Spencer, 32 C. C. 306; 13 C. C. (N. S.) 475 (aff'd, 83 O. S. 492).

Independently of any saving clause, it was held that a new law, though limiting the amount of assessments, could not effect contracts made by a city with a contractor to deliver to him the assessments made, for such new law would in this regard impair the obligation of contracts. Goodale v. Fennell, 27 O. S. 426.

Existing assessment ordinances remain in force notwithstanding the change of the organization of a municipality, if not inconsistent with the statute. Neff v. Bates, 25 O. S. 169.

Construction of assessment laws.—Strict construction in favor of property owner is required. Cincinnati v. Conner, 55 O. S. 82, 91. See also § 3911, *post.*

The general policy of assessment laws being to limit the amount of assessments, particular statutes will be construed as though intended to adhere to that principle. Birdseye v. Clyde, 61 O. S. 27.

Conditions precedent to assessment.—The determination to make the improvement and to charge lot owners must precede the actual making of the improvement. Donohue v. Brotherton, 7 N. P. 367; Folz v. Cincinnati, 2 Handy, 261. But the assessment may be made before the improvement. Morgan v. Cleveland, 1 Clev. 38.

It is not necessary to determine in the preliminary resolutions and ordinances, the proportion to be assessed, and a different proportion may be fixed in the assessing ordinance, see note "Amount of Assessment," § 3815.

Contesting assessments.—*Injunction.*—An assessment standing on the tax duplicate will be presumed to be valid, and one seeking to enjoin its collection must show its invalidity by proper averment and proof. Bolton v. Cleveland, 35 O. S. 319; Close v. Parker, 30 C. C. 384; 11 C. C. (N. S.) 85 (aff'd, 79 O. S. 444).

Perpetual injunction will be granted only when the plaintiff shows a clear right thereto. Sprangler v. Cleveland, 43 O. S. 526.

Injunction will not lie by abutting owner prior to the making of

the contract because of defects in the improvement. Owner can enjoin assessment when made. Wood v. Pleasant Ridge, 12 C. C. 177.

Where an assessment may be contested on a ground common to all abutting owners, as for defects in the proceedings and also on a ground peculiar to one owner alone, one who resorts to the former ground is barred, in a later suit, from contesting assessment on the latter ground. Cincinnati v. Emerson, 57 O. S. 132.

Petition to enjoin must show that the plaintiff is prejudiced by the irregularities complained of. Slavin v. Greene, 2 N. P. 39. Amendment of petition, see Ulm v. Cincinnati, 7 N. P. 278.

Assessment will not be enjoined for irregularities in proceedings which are curable, where the amount properly chargeable is the same as the assessment. Steese v. Oviatt, 24 O. S. 248.

Where the evidence as to the necessity of a street improvement is conflicting and fails to show an abuse of discretion on the part of council in authorizing the improvement, a court will conclude the improvement was necessary. Cormany v. Cincinnati, 30 O. C. A. 121, 10 Oh. App. 280.

The jurisdiction to restrain the collection of illegally assessed taxes and assessments being an equitable jurisdiction, courts of appeals have appellate jurisdiction in the trial of such cases. Manning v. Lakewood, et al., 94 O. S. 85.

Injunction will lie where the contractor has failed to perform his contract. Stone v. Viele, 38 O. S. 314.

Where sufficient installments have been paid to equal a proper assessment, court may enjoin collection of remaining installments. Cincinnati v. James, 55 O. S. 180.

Two or more persons claiming relief on the same ground may join in an action to enjoin the assessment or one may sue in behalf of others. Upington v. Oviatt, 24 O. S. 232. When cost may be divided, see Reed v. Cincinnati, 8 C. C. 393.

Owners may enjoin without first applying to the city solicitor. They do not sue as taxpayers. Moore v. Cincinnati, 15 B. 196.

As to rights of court to fix amount properly chargeable, when assessment is enjoined because of technical irregularity or defect, see § 3901, *post*.

For matters relating to defenses to suits to collect assessments, see notes under § 3898, *post*.

Limitation of actions.—Action to enjoin collection of assessment on ground that it is in excess of benefits is not barred in four years from the date of the assessment, but the four years' statute begins to run from the dates when the respective installments are due. Gault v. Columbus, 30 C. C. 335; 10 C. C. (N. S.) 263; Dickerson v. Cincinnati, 21 C. C. (N. S.) 81; 3 Oh. App. 68; aff'd 91 O. S. 406.

Estoppel to contest.—*Participation in causing improvement to be made.*—One who participates actively in causing an improvement to be made, by petitioning for the improvements, etc., is thereafter estopped to deny the authority of the municipality to proceed in the way sought and make the assessment. Tone v. Columbus, 39 O. S.

281. But he will not be estopped from objecting that the subsequent proceedings of council were not in conformity to statute. *Ib.*

A petitioning property owner is estopped from objecting that the work was done in an improper and negligent manner where it was done in the way designated in the petition. Breuer v. Gibson, 14 C. C. (N. S.) 48.

The property owner who has induced the contractor to enter into a contract and do the work by assurances that he would be paid, is estopped to contest the validity of assessments on the ground that the contract was void because not founded on petition with the requisite number of signers. Corry v. Gaynor, 22 O. S. 584.

One who participated in the election of commissioners to carry out the improvements was held estopped to the same extent that a petitioner for the improvement would be estopped. Columbus v. Slyh, 44 O. S. 484.

The property owner would not be estopped from contesting the validity of assessments for water works because he had voted for the water works trustees, or had paid taxes, a part of which were for payment of interest on water works bonds. Willard v. Close, 25 B. 391.

Estoppel from executing paper setting forth that improvement was legally made, to enable municipality to issue its bonds, see Shepard v. Barron, 14 O. F. D. 417; 3 O. L. R. 327.

See further, as to estoppel under various former laws, Bloch v. Godfrey, 26 C. C. 781; 5 C. C. (N. S.) 318.

Petitioning for improvement.—For matters relating to estoppel by petitioning for improvement, see notes under §§ 3835 and 3836, *post.*

Permitting improvement without objection.—See, on question whether there can be estoppel from mere silence with knowledge that improvement is being made, Columbus v. Agler, 44 O. S. 485; Wright v. Thomas, 26 O. S. 346; Andrews v. Settles, 16 C. C. 638; but see Tone v. Columbus, 39 O. S. 281; Quinlan v. Myers, 29 O. S. 500; Danks v. Phares, 9 Rec. 554; Birdseye v. Clyde, 61 O. S. 27, 37; Taylor v. Wapakoneta, 26 C. C. 281. See also Gault v. Columbus, 30 C. C. 335; 10 C. C. (N. S.) 263.

The owner of land not having promoted the making of improvement, is not estopped to contest the unconstitutionality of the assessment, though he may have known of the improvement and of the intention to make the assessment. Lewis v. Symmes, 61 O. S. 471.

Where no notice given, knowledge of owner of the proceedings and improvement will not estop him to contest. Rentscheler v. Akron, 18 C. C. (N. S.) 380; (aff'd 86 O. S. 353).

But where the improvement is made on his own land, as where a sewer is run across private property, the owner would be estopped to contest the assessment by permitting improvement without objection. Wilson v. Cincinnati, 5 N. P. 68; see also Milliken v. Fearnside, 30 C. C. 45; 10 C. C. (N. S.) 259; Kellogg v. Ely, 15 O. S. 64.

So, an owner whose land is taken, or encroached upon, in the improvement of a street, but who permits the improvement without objection is estopped to contest the assessment on the ground that the municipality

had not acquired title to the property improved. Neff v. Bates, 25 O. S. 169; Cincinnati v. Longworth, 4 Rec. 528; Cincinnati v. Goodman, 5 Rec. 153.

See also note "Estoppel to deny Title," *post.*

Payment of part of assessment.—Property owner is not estopped to enjoin collection of installments of assessments in excess of amount allowed by law on ground that he has voluntarily paid the first installments. See Monroe v. Cleveland, 29 C. C. 633; 9 C. C. (N. S.) 523, and reversal, 78 O. S. 441.

Payment of part of assessment installments will not estop a property owner who has protested that the work was not properly done according to contract. Hartzell v. Alliance, 39 B. 232. (Supr. Court not reported.) See also Metcalf v. Carter, 19 C. C. 196; Cincinnati v. James, 55 O. S. 180.

Payment of part of assessments in excess of benefits will not estop property owner from setting up defense that benefits are exceeded, where the steps in the improvement had been taken without his knowledge and he did not participate in any way in carrying forward the improvement. Yost v. Ry. Co., 24 C. C. 169; 2 C. C. (N. S.) 519.

Receiving compensation.—The fact that the owner of property received compensation for part of his land taken would not estop him to resist the assessment for the improvement of the road because of its unconstitutionality. Lewis v. Taylor, 18 C. C. 443, 451.

Unconstitutional statutes.—The principles of estoppel apply as well where the proceedings of a corporation are questioned on the ground of unconstitutionality of a statute under which they are had as where they are attacked upon other grounds, unless such proceedings or what is sought to be accomplished by them are *per se* illegal or *malum prohibitum.* Tone v. Columbus, 39 O. S. 281, and see Lewis v. Symmes, 61 O. S. 471, and State v. Mitchell, 31 O. S. 592; Wright v. Thomas, 26 O. S. 346; Murdock v. Cincinnati, 25 B. 26; Mt. Vernon v. State, 71 O. S. 428; Shepard v. Barron, 14 O. F. D. 417.

Extent of estoppel.—A person may estop himself by his acts in promoting an improvement, to deny the legality of the action taken by the authorities with his consent, but he would not ordinarily be estopped to dispute an asessment on his property beyond the limitation fixed by law. Birdseye v. Clyde, 61 O. S. 27.

As to when an owner has estopped himself from disputing an assessment beyond the limitation, by express agreement, in a petition for the improvement, see notes under § 3836, *post.*

What persons estopped.—The acts of owners who procure the improvement and assessment to be made will not operate as an estoppel of their intermediate mortgagees. Donohue v. Brotherton, 7 N. P. 367. But where the grantor is estopped his grantee is equally estopped. Columbus v. Slyh, 44 O. S. 484; and this is so even though the grantee bought without actual notice of the lien of the assessment. Danks v. Phares, 9 Rec. 554.

But the owner will not be estopped by the acts of his agent, signing for the property; though such acts would estop the agent were he

owner. Andrew v. Auditor, 5 N. P. 123.

A purchaser agreeing in a deed to pay specified assessments for street improvements on the property is estopped to contest the validity of assessment which had been levied on the property at the time of the acceptance of deed. Caldwell v. Columbus, 37 B. 270; Herman v. Columbus, 15 Dec. 509; 3 N. P. (N. S.) 216; Waldschmidt v. Bowland, 27 C. C. 782; 6 C. C. (N. S.) 99 (aff'd, 73 O. S. 360). But see Lewis v. Taylor, 18 C. C. 443 (aff'd, on other grounds, 61 O. S. 471). But where it does not appear that the amount of the assessment was taken from the purchase price or could have been known at time deed was made assessment ordinance not yet having been passed, a mere recital that purchaser will pay street assessments, will not estop him from contesting their validity when levied. Walsh v. Sims, 65 O. S. 211; Bell v. Norwood, 28 C. C. 809; 8 C. C. (N. S.) 435.

Change of judicial construction.—Courts will not enjoin an assessment on the ground of the unconstitutionality of the law under which it was levied, if the improvement is made and the assessment levied, and the bonds of the municipality issued, even though similar legislation has been held by the recent decisions of the court to be obnoxious to the constitution, if the law under which the assessment was levied is in all material respects similar to a law which had previously been held constitutional. Shoemaker v. Cincinnati, 68 O. S. 603; Gault v. Columbus, 13 Dec. 575; 1 N. P. (N. S.) 201; Price v. Toledo, 25 C. C. 617; 4 C. C. (N. S.) 57; Cincinnati B. & D. Co. v. Cincinati, 30 C. C. 501; 10 C. C. (N. S.) 31.

As to the case where the steps taken were in compliance with that part of a law which was constitutional, but a requirement of a law which would now be considered unconstitutional, was not complied with, see Adkins v. Toledo, 27 C. C. 417; 6 C. C. (N. S.) 433. Proceedings in such case held valid. *Ib.*

An assessment under this law involves no contractual relation between the municipal corporation and the property owners and the rule that no retroactive operation is to be given to a change in the judicial construction of a statute is restricted to cases involving contractual relations. Sidney v. Cummins, 93 O. S. 328.

Defect in work.—Assessment for street improvement can not be enjoined on ground of defect in the work, unless fraud is shown. McGlynn v. Toledo, 22 C. C. 34 (aff'd, 67 O. S. 498). But see Taylor v. Wapakoneta, 26 C. C. 285. Where injunction is sought against assessment on the ground that the improvement was not made according to specifications, a claim made after the lapse of many years, must be supported by the clearest proof. Gault v. Columbus, 13 Dec. 575; 1 N. P. (N. S.) 201. But burden is on defendant to show that the defects appeared at such a time as would bar plaintiff's action. Coit v. Columbus, 13 Dec. 578; 1 N. P. (N. S.) 600.

As to estoppel to contest assessment on this ground, see Tone v. Columbus, 39 O. S. 281.

(3) **What property may be assessed.**—*Generally.* — Lands ap-

propriated and used by a railroad company for its tracks are subject to the assessment for street improvement. R. R. Co. v. Connelly, 10 O. S. 159; R. R. Co. v. Belmont Co., 19 O. S. 589.

Street railway property may be assessed to pay the company's share of expense of paving between the tracks, as property subject to assessment, though not abutting. Cleveland v. R. R. Co., 1 Clev. 304.

Property used as a wharf, is a lot subject to assessment. Boeres v. Strader, 1 C. S. C. R. 57.

Land cut in two by the street becomes two lots for assessment purposes, and each part must bear its own charge separately. Spangler v. Cleveland, 35 O. S. 469; Younglove v. Hackman, 43 O. S. 69.

Several lots owned by one person and abutting on the improvement, must be separately assessed; one lot can not be liable for the aggregate amount assessed on all. Corry v. Folz, 29 O. S. 320.

Where lands are platted into lots the fact that the lot assessed is shallower than the rest will not be considered. Locke v. Cincinnati, 7 N. P. 318.

The area of a street put through the property to be assessed, since the improvement, is deducted from the property. Coates v. Norwood, 16 C. C. 196.

Abutting property.—*What is.*—Abutting property would seem to include only that abutting the part of a street improved and not all property abutting on the entire street. Creighton v. Scott, 14 O. S. 438; Scovill v. Cleveland, 1 O. S. 126, 133; R. R. Co. v. Connelly, 10 O. S. 159; Smith v. Toledo, 24 O. S. 126, 130.

Where a city improved only ninety feet of a ninety-one foot strip dedicated to it for street purposes, leaving a strip of one foot on one side, the owners of property on that side are nevertheless liable to be assessed as owners of abutting property. Richards v. Cincinnati, 31 O. S. 506. Such an unused narrow intervening strip would exempt owners on that side from assessment, only in case it deprives them of the free and lawful access to their property. *Ib.*

An owner whose lot is separated from the street by a narrow strip, although he is licensed by the owner of the strip to use it for building purposes, such license, however, not having become irrevocable, is not an abutting owner. Buse v. Cincinnati, 28 B. 111.

Where the improvement is confined to one side of a street, the owners of lots abutting the other side would seem to be owners of lots abutting the improvement. See Cincinnati v. Batsche, 52 O. S. 324; Dodsworth v. Cincinnati, 18 C. C. 288.

Property on parts of the street beyond the ends of the improvement, is not property bounding and abutting on the improvement for purposes of front foot assessment. Cincinnati v. Batsche, 52 O. S. 324; Klein v. Cincinnati, 7 C. C. 266 (affirmed without report, 33 B. 83); Frey v. Findlay, 7 C. C. 311, 319.

Approval of subdivision by council under § 3584, after a street assessment has been made, would not relate back so as to make only the abutting lots in the subdivision liable for assessments. Cincinnati v. Corry, 2 B. 337.

Where the front of a lot abutting

on a street is owned by one person and the rear is owned by another, the street assessment by the front foot must embrace the entire lot as numbered and recorded, and the assessment must be apportioned between the owners in accordance with the part owned by each. Frey v. Findlay, 7 C. C. 311, and see Coates v. Norwood, 16 C. C. 196.

What constitutes abutting property subject to assessment is to be determined by the situation of the property at the time of the improvement ordinance and is not affected by the sale of a strip off the front after such ordinance is passed. Douglas v. Cincinnati, 29 O. S. 165. And see Shiner v. Norwood, 17 C. C. 631; Stallo v. Cincinnati, 17 Dec. 714.

Contiguous and adjacent property.—*What is.*—The meaning of the words "adjacent and contiguous" can not be limited by any absolute or fixed measurement but must be determined by the circumstances of each case; yet for all practical purposes they may be said to embrace lots and lands "near to" the improvement, and all such when specially benefited are liable to be charged with the costs and expense, when contiguous and adjacent lands are included in the assessment. Meissner v. Toledo, 31 O. S. 387, 395.

Assessments; how made on strip of land owned by railway company which abuts and runs parallel to street. See Op. Atty. Gen. (1919), p. 501.

Property exempt.—*School lands* are not liable for assessment for street or sidewalk improvements. Toledo v. Board of Education, 48 O. S. 83; Board of Education v. Toledo, 48 O. S. 87. And a statute making school property subject to assessment was held unconstitutional. Board of Education v. Auditor, 35 B. 294. But as to exemption of school property, see Becker v. Columbus, 18 C. C. 888; and see § 3837 and notes. And where the school board held under a lease by which it agreed to pay the lessor's burdens, property was held liable to assessment. Cincinnati v. Board of Education, 2 B. 184.

Municipality cannot assess against the county the cost of paving a county bridge within the corporate limits where the county is not the owner of abutting property. See Op. Atty. Gen. (1920), p. 793.

Liability of township for street assessments on property owned within municipal corporation. See Op. Atty. Gen. (1921), p. 561.

Institutions of public charity are not exempt from assessment for improvement. Gilmour v. Pelton, 2 B. 159.

Property of a cemetery corporation not exempt though exempted by law from taxation. Lima v. Cemetery Association, 42 O. S. 128.

Where property is dedicated to municipality on condition that lots abutting shall be exempt from improvement assessments without the consent of the majority such lots will not be exempt, for the condition is inoperative. Richards v. Cincinnati, 31 O. S. 506.

Where a city purchases land to be used as a boulevard, and as a consideration for such land agrees that no special tax or assessment for the improvement thereof or the maintenance of said boulevard will ever be levied or as-

sessed against the property abutting said boulevard, it will be enjoined from assessing the cost of such improvements against the abutting lands of the grantor; but the condition against assessments for future maintenance are against public policy and void. Vrooman v. Toledo, 26 C. C. (N. S.) 129; 5 Oh. App. 222. See also Vrooman v. Toledo, 26 C. C. (N. S.) 135; 5 Oh. App. 230, where a similar holding was made in case of land dedicated for street purposes.

Property in territory annexed.—Property annexed to a municipality after the improvement was ordered but before it was completed, may be included in the assessment. Upington v. Oviatt, 24 O. S. 232, 246.

As to the effect upon assessment of a condition in an agreement of annexation, see Cincinnati v. Corry, 2 B. 337. As to effect on assessment of previous improvement of property before its annexation to city, see Cincinnati v. Monfort, 3 B. 451.

(4) **Assessment of part.**—Where a market house occupies the middle of a street, extending across an entire square from one intersecting street to another, and the said street is improved with a new pavement on both sides of the market house, an assessment of fifty percent of the cost, exclusive of intersections, against the abutting property is not inequitable but may be legally made and will not be enjoined. Wolf v. Cincinnati, 20 C. C. (N. S.) 566; 1 Oh. App. 439.

Improvements by general taxation.—Council is authorized in § 3812 above, to assess *any part* of the cost of improving streets, etc., upon abutting, adjacent or contiguous property. It has not the power to so assess *all* such cost, for it is restrained by §§ 3819, 3820 and 3896, and by the decisions cited thereunder. But council has power under § 3784 to pay the entire cost of any and all public improvements *by general taxation* upon all the real and personal property in the corporation. Similar authority, though not so broad in scope, was given by old §§ 2262 and 2263 R. S., repealed.

Municipality may use funds arising from automobile license tax to pay its share of cost of improvement. See Op. Atty. Gen. (1922), p. 70.

(5) **What costs and expenses included.**—See notes to § 3896, *post.*

(6) **Conducive to public health, etc.**—The requirement of this section that council shall find and declare that an improvement will conduce to the public health, convenience or welfare, has reference to the improvement of ditches, etc., and not to the numerous street, alley and other improvements provided for in the section as it stood in its original form. McCutcheon v. Franklin, 30 O. C. A. 536.

Where it is proposed to assess the cost of improving water courses, the provision of this section as to declaration that the improvement will be conducive to public health, convenience or welfare, is mandatory. Kasch v. Akron, 100 O. S. 229. But see the curative provisions of § 3911, as amended (108 O. L. 1227), after this decision was rendered.

For what purposes assessments

may be levied.—Assessments may be made for grading and bowldering a street, under the general power to improve and assess. Jessing v. Columbus, 1 C. C. 90, (aff'd, 22 B. 453; 23 B. 3); Kelly v. Cincinnati, 28 O. C. A. 376; 6 Oh. App. 466.

Assessments may be made and enforced though the proceeds go, not to pay for the work or the bonds issued in anticipation, but to reimburse the general fund, where the municipality, on account of delays in collection, had to pay the bonds out of the general fund. Chamberlain v. Cleveland, 34 O. S. 551.

An assessment may be made for the improvement of a public way, the right to which the public has acquired by prescription. Duffy v. Norwood, 3 N. P. 325.

The assessment can be levied only for the costs and expenses connected with the surface improvement of the street or public place. Costs and expenses connected with the appropriation of the property or with the satisfying of claims for damages to abutting property, can not be included in the assessment. See notes to § 3896, *post*, and see Op. Atty. Gen. (1919), p. 1463.

Assessment may be levied on abutting owners for construction of sidewalk and paving of street constituting approach to a bridge constructed by county commissioners within a municipality. Slusser v. Sidney, 11 N. P. (N. S.) 297.

Side walks, curbing, etc.—Sidewalks, curbing, etc., may be constructed as a part of street improvement according to method provided in §§ 3812 *et seq.*, notwithstanding special provisions of §§ 3853 *et seq.* Baldwin v. Springfield, 10 N. P. (N. S.) 65; 20 Dec. 265.

Notice of passage of resolution of necessity of improvement by paving, curbing and guttering, is not defective by failing to give abutting owner opportunity to construct curbing, as would be the case were the curbing constructed under § 3853. *Ib.*

Sanitary sewer.—Assessment for sanitary sewer not authorized by street improvement legislation. See Roebling v. Cincinnati, 102 O. S. 460.

But the municipality is authorized, under this section, to include a sanitary sewer as a part of the street improvement if the legislation providing for such improvement so specifies. Albrecht v. Cincinnati, 104 O. S. 266.

Ornamental lighting. — §§ 3812 and 3842-1 *et seq.*, general code, so far as they relate to the subject of street lighting improvement, are in pari materia and are not irreconcilable; they furnish concurrent methods for initiating such improvement, and, since there was no express repeal of the former statute in that respect, there was no repeal thereof by implication. Leipsic v. Wagner, 105 O. S. 466.

"Repair" Defined.—The word "repair" in reference to a pavement is inherently local and more or less temporary. It is usually made necessary by some local disturbance or defect in the pavement and it is none the less "repair" because new material must be used in order to effect such "repair". Ry. Co. v. Cleveland, 97 O. S. 122.

"Repave" defined.—The word "repave" in reference to a street

improvement has an equally well defined customary usage and meaning and relates generally to a new pavement either of the same or different material for the full width of the street theretofore similarly improved or for some defined section thereof. *Ib.*

Ditch.—Construction of within corporate limits; assessments. See Op. Atty. Gen. (1919), p. 626.

Power of municipality in repair of county ditch within municipal limits. See Op. Atty. Gen. (1922), p. 852.

Water mains and water pipes.—Municipality is without authority to contract with the owners of lands to be assessed for reimbursement when houses are built and connections made. See Op. Atty. Gen. (1920), p. 1159.

Assessment for laying water pipes. See Op. Atty. Gen. (1922), p. 1116.

Improvement without title in municipality.—A municipality has no power to improve private property for street purposes without the consent of the owner or appropriation proceedings, and therefore it can not assess abutting property for such unauthorized improvement, even though the owner of lands assessed has been served with notice and received benefit. Baker v. Norwood, 22 C. C. 173; see Harbeck v. Toledo, 11 O. S. 219.

Where acceptance by ordinance was required before dedication could be deemed complete, a street claimed by the municipality but not so accepted can not be improved, and assessments for its improvement are void. Merchant v. Waterman, 3 W. L. M. 48.

Where the public street has been improved, the property owners can not resist assessment on the ground that the site of the street was changed from a canal to the street without a new condemnation, or that a municipality had granted to a railroad company the right to use the street for its tracks. For any injury which may have been sustained by such changes in the use of the land, the remedy is by action for damages. Richards v. Cincinnati, 31 O. S. 506.

Where a city's right to improve a street depends upon the approval of the plan of improvement by the state board of public works, property owners can not resist assessment by showing that certain details in the plan had not been duly approved. *Ib.*

Title acquired later.—The fact that a municipality has not acquired title to a part of the street on which improvement is made until after the work is contracted for will not make the assessment void. Cincinnati v. Wilder, 9 Rec. 727.

Though the city has not title to the property improved at the time the preliminary steps for the improvement were taken, yet if before the assessing ordinance is passed the property is duly acquired, the assessment will be legal. Cincinnati v. Honnigfort, 32 B. 32; Weston v. Hamilton County, 6 C. C. 641, 643, (affirmed without report, 30 B. 291); Toledo v. Barnes, 1 N. P. 185.

Where the city acquired title to the property improved after the work was begun and even after suit commenced to enjoin the assessment, the assessment was held valid. Wilson v. Cincinnati, 5 N. P. 68.

Condition in city's title.—Where the municipality has acquired by dedication the land to be improved its title will not be defective because of a condition in

the dedication, but such condition will be inoperative. Richards v. Cincinnati, 31 O. S. 506.

Where a city condemned turnpike property in the hands of county commissioners as an abandoned road, the city's title will not be defective because of conditions of the grant to the turnpike company, of its roadway. Cincinnati v. Schoenberger, 2 B. 128.

Estoppel to deny title.—The land owner who permits the street to be improved, knowing that his predecessor in title had undertaken to dedicate it would be estopped to contest the assessment. Neff v. Bates, 25 O. S. 169.

A property owner over whose private property, not yet acquired by a city, a sewer has been put, but who made no objection thereto at the time of the improvement, can not resist the assessment for the improvement. His only remedy is damages for the appropriation. Wilson v. Cincinnati, 5 N. P. 68.

As to estoppel to resist an assessment for improvement including private property not yet properly acquired by the city where the lot owner permitted the improvement to go on without objection, see Cincinnati v. Schoenberger, 2 B. 128; Cincinnati v. Longworth, 4 Rec. 528; Cincinnati v. Goodman, 5 Rec. 153.

Street between two municipalities.—Where the street divides a city from a village each municipality may improve the part within its boundaries and assess abutting owners and the difference in the amount between the assessments will not make them void for want of uniformity. Scully v. Cincinnati, 1 C. S. C. R. 183.

Lighting streets.—No machinery authorized to levy assessment for street lighting. Op. Atty. Gen. (1918), p. 1462. But see later provisions of § 3842-1, *et seq.*, *post.*

(7) **Percentage of tax value.**—Under former laws the statute limiting the amount of assessment to a proportion of the tax value of abutting property was held to mean the value fixed by the appraisement in force when the improvement ordinance was passed and not the one in force at the date of the assessment. Crossley v. Findlay, 10 C. C. 286.

(8) **Proportion to benefits.**—Where an assessment is made in proportion to benefits, the amount of the assessment must be apportioned among the several lots and parcels of land specially benefited, in proportion to the special benefit which each lot or parcel bears to the whole special benefit conferred by the improvement. Chamberlain v. Cleveland, 34 O. S. 551.

Such assessment is of course limited to the benefit and can not be in excess thereof. *Ib.*

An assessment can not be levied part by front foot and part by benefits. Dick v. Toledo, 11 C. C. 349.

An assessment by the front foot can not be made under the guise of the benefit plan. Whichever plan is adopted must be pursued in accordance with the statute, and the two plans can not be commingled. Kelly v. Cincinnati, 28 O. C. A. 376, 6 Oh. App. 466.

As to validity of assessment purporting to be according to benefits, but actually by the front foot, see Nulsen v. Cincinnati, 27 C. C. 383; 5 C. C. (N. S.) 679. See also

Funke v. Cincinnati, 21 N. P. (N. S.) 13.

(9) **By the foot front.**—The mode of assessing the costs and expenses of street improvements in municipalities "by the foot front of the property bounding and abutting on the improvement" requires the municipality to assess upon an entire lengthwise frontage of a lot abutting upon the improvement as well as its breadthwise frontage. Youngstown v. Fishel, 89 O. S. 247.

Constitutionality of assessments by foot frontage, when properly made by a municipal corporation for street improvements, is well settled. Chamberlain v. Cleveland, 34 O. S. 551. See further, Norwood v. Baker, 172 U. S. 269, as interpreted in French v. Barber Asphalt Co., 181 U. S. 324; Crawford v. Cincinnati, 26 B. 215.

Assessment made in terms by the abutting foot is valid, if it does not, in fact, exceed the special benefits. Shoemaker v. Cincinnati, 68 O. S. 603.

Where the assessment is by the foot frontage of abutting property the rate of the assessment must be uniform upon all the property assessed. Jaeger v. Burr, 36 O. S. 164.

The words "front foot" must be interpreted by their popular meaning. Betz v. Canton, 18 C. C. 676.

As to what assessment may be deemed to be a front foot assessment, see Cincinnati v. Batsche, 52 O. S. 324.

It was held that where the assessment was by the front foot the owners were liable according to the feet front assessable when the work was ordered and the assessment made, and not according to the frontage as afterwards reduced by appropriation. Spangler v. Cleveland, 35 O. S. 469.

Lands not subdivided, see § 3813, *post*.

Real front.—Corner lots, etc.—In Haviland v. Columbus, 50 O. S. 471, the court construing the law providing for assessment "by the front foot," held that when the assessment was so made regard must be had to what is the real front of the property; that this is a question of fact to be determined by the manner in which the lot was laid out or in which it had been built upon and used and occupied by the owner and that the lengthwise side of a corner lot abutting on the street improved could not be assessed for the number of feet on that side, but only for the number of feet which the lot had at its real front. This decision was followed in Toledo v. Scheill, 53 O. S. 447.

In section 50 of the Municipal Code, prior to the amendment of 1909, there was slightly different phraseology from that used in the statute construed in Haviland v. Columbus, and provision was made for assessment "by the foot *frontage* of the property bounding and abutting," etc. The supreme court in Oakwood v. Stoecklein, 81 O. S. 332 construing this language held that the rule in Haviland v. Columbus no longer applied and that in the case of a corner lot the entire lengthwise side abutting on the improvement was subject to assessment. In the section above, now providing the method of assessment, as amended in 1910, the phraseology was again changed and the same language used in the statute passed upon in Havi-

land v. Columbus has been adopted and it is provided that the assessment may be levied "by the foot *front* of the property bounding and abutting, etc."

The rule of Haviland v. Columbus has been expressly repudiated, however, by the Supreme Court in Youngstown v. Fishel, 89 O. S. 247, so that the following decisions defining "Real Front" are of historical interest only: Sandrock v. Columbus, 51 O. S. 317; Burggreve v. Cincinnati, 1 N. P. 80; Wehage v. Cincinnati, 1 N. P. 82; Matthews v. Cincinnati, 16 B. 249; Barney v. Dayton, 8 C. C. 480; Schmidt v. Cincinnati, 1 N. P. 48; Betz v. Canton, 32 B. 92; Toledo v. Sheill, 53 O. S. 447; Shattuck v. Cincinnati, 1 N. P. 394; Duffy v. Norwood, 12 C. D. 675; Meyer v. Cincinnati, 1 N. P. 81; Betz v. Canton, 18 C. C. 676; Manns v. Cincinnati, 10 C. C. 549 (54 O. S. 257); Metcalf v. Carter, 19 C. C. 196; Daiber v. Toledo, 7 N. P. 389; Wolfe v. Avondale, 14 C. C. 375; Bentley v. Toledo, 7 N. P. 388; Reed v. Cincinnati, 31 B. 279; Thompkins v. Norwood, 1 N. P. 83; Toledo v. Ainsworth, 7 N. P. 391; Calkins v. Toledo, 12 C. C. 202; Cincinnati v. Manss, 54 O. S. 257, 262; Fridman v. Norwood, 1 C. C. (N. S.) 97; 25 C. C. 258 (aff'd 49 B. 99); Locke v. Cincinnati, 7 N. P. 318; Merkel v. Cincinnati, 52 B. 286; McMaken v. Hayes, 29 C. C. 535; 10 C. C. (N. S.) 38; Cincinnati v. James, 2 N. P. 345; Roegge v. Cincinnati, 52 B. 161.

As to estoppel to deny amount of frontage because of admissions in a petition for the improvement, see note "Estoppel to deny frontage" under § 3836, *post.*

Sec. 3812-1. [Service connections; service of notice; penalty.] The director of public service in cities and council in villages shall have authority to compel the making of sewer and water connections as hereinafter provided. Whenever said director in cities or council in villages deems it necessary in view of contemplated street paving or as a sanitary regulation that sewer or water connections or both be constructed, said director in cities or council in villages shall cause written notice thereof to be given to the owner of each lot or parcel of land to which such connections are to be made, which notice shall state the number and character of connections required. The director of public service in cities and council in villages shall appoint some competent person to serve said notice in the manner provided for the service of summons in civil actions and the report of the person serving said notice or a certified copy thereof shall be prima facie evidence of the service of the notice as therein stated; provided that if any of said owners be non-residents of the corporation or can not be found, such

notice may be given publication twice in one or more newspapers of general circulation in the municipality.[1] If said connections are not constructed within twenty days of such service of notice or day of first publication thereof, as the case may be, the same may be done by the city and the cost thereof, together with a penalty of five per cent. (5%), assessed against the lots and lands for which such connections are made and said assessments shall be certified and collected as other assessments for street improvements. No property owner shall be required to construct such connections further from the street main or sewer than the inner line of the curb. Assessments for such connections, whether levied under authority of this act or section thirty-eight hundred and twelve of the General Code shall not be subject to the limitations prescribed in sections thirty-eight hundred and nineteen, thirty-eight hundred and twenty, thirty-eight hundred and twenty-one and thirty-eight hundred and twenty-two. [101 v. 242.]

(1) Notice to non-residents, how given. Op. Atty. Gen. (1916), 1222.

Sec. 3812-2. [Resolution requiring company to improve at the time municipality authorizes improvement.] At the time of, or subsequent to the adoption by council of a municipality of a resolution declaring it necessary to improve, pave, repave, surface or resurface a street or other public thoroughfare, wherein are located rails, ties, roadbed or tracks owned or operated by a street railway company or companies, which have become worn out or defective, the council of such municipality may by resolution declare the necessity of requiring said street railway company or companies, at the time such street or other public thoroughfare is torn up for said street improvement, paving or repaving, surfacing or resurfacing, to renew, replace, repair or reconstruct the rails, ties, roadbed, and tracks in said street or thoroughfare in accordance with the plans and specifications prepared by the chief engineer of such municipality, which plans and specifications together with the engineer's estimate of the cost of the labor and materials necessary for such renewal, replacement, reconstruction or repair shall be on file and open to public inspection in the office of such chief engineer,

and shall conform to the usual methods of such construction, reconstruction or repair.

[Copy of resolution and notice given company.] A certified copy of such resolution, together with a written notice setting forth the time and place at which a hearing will be given said company or companies and at which it or they may be present to make any objections to said resolution, shall be sent by registered mail to the street railway company or companies owning or operating such rails, ties, roadbed and tracks.

[Ordinance for improvement; notice of modifications.] After holding such hearing council may by ordinance order and require that at the time at which such street, or other public thoroughfare is torn up for such improvement, paving or repaving, surfacing or resurfacing, the street railway company or companies owning or operating such rails, ties, roadbed and tracks shall renew, replace, recontsruct or repair the same in accordance with said plans and specifications, and any modifications or corrections thereof that may be made by council, and a certified copy of such ordinance shall be sent to said street railway company or companies by registered mail.

[Appeal to public utilities commission; notice of hearing to solicitor; when bids for improvement may be authorized.] If the said street railway company or companies are dissatisfied with such ordinance of council, requiring such renewal, replacement, repair or reconstruction, it or they may, within ten days after the passage of said ordinance, file a written complaint or appeal with the public utilities commission of Ohio. Notice of the time fixed by said commission for the hearing of said appeal shall be given to the solicitor of said city or village, and it shall be the duty of said commission, within thirty days after the filing of said appeal to hear and determine the same and approve, revise, modify or reverse the action of council and substitute its finding on such ordinance. Unless within twenty (20) days after the mailing of such certified copy of the ordinance such street railway com-

pany or companies shall notify council in writing that it or they will so renew, replace, repair or reconstruct such rails, ties, roadbed and tracks in accordance with said plans and specifications, and any such modification or corrections thereof or that said company has appealed to the public utilities commission, the council may by ordinance authorize the director of public service in cities, and the council in villages, to receive bids and enter into contracts for the furnishing of the necessary material and labor for such renewal, replacement, repair, or reconstruction of such rails, ties, roadbed and tracks, all of which work shall be done at the time that such street or other public thoroughfare is torn up for the making of such street improvement, paving or repaving, surfacing or resurfacing.

[When municipality may make improvement on the part of company.][1] In the event that such street railway company or companies notify council that it or they will so renew, replace, repair or reconstruct such rails, ties, roadbed or tracks, but fail at the time of making of such street improvement, paving or repaving, surfacing or resurfacing, to renew, replace, repair or reconstruct such rails, ties, roadbed or tracks, the council may by ordinance authorize the director of public service in cities, and the council in villages, to receive bids and enter into contracts for the furnishing of the necessary material and labor for such renewal, replacement, repair or reconstruction, and said work shall be done at the time such street or other public thoroughfare is torn up for the making of such street improvement, paving or repaving, surfacing or resurfacing; and said contract or contracts shall be awarded to the lowest and best bidder. [108 v. 1148; 108 v. 215.]

(1) **Validity.**—This section and 3812-3 in so far as they authorize a municipality to renew, replace, repair and reconstruct rails, ties, road beds or tracks of a street railway company with public money raised by the sale of bonds of a municipality are in violation of sec. 6, Article VIII of the constitution, and invalid. Cincinnati v. Harth, 101 O. S. 344; affirming Harth v. Cinti, 31 O. C. A. 433; 13 Oh. App. 81.

Validity as to paving.—When an electric railway company, exercising an easement in a city street about to be repaved and being liable by law and under the terms of its franchise

for the cost of paving the part occupied by it, proposes that the city pave the railway's part along with the remainder of the street, agreeing to pay its proper proportion thereof, including the preliminary cost of surveys, etc., upon the same terms as special assessments against abutting property are made payable, the city may accept such proposal and proceed accordingly. Such action is not violative of Section 6, Article VIII of the Constitution of Ohio. Newark v. Fromholtz, 102 O. S. 81.

Sec. 3812-3. [Assessment of cost and expense against company.] Council shall by ordinance assess the entire cost and expense of the labor and materials required for such renewal, replacement, repair or reconstruction, against such street railway company or companies, and upon its or their failure to pay such assessment in cash, or by assessment as hereinafter provided, the same shall be a lien upon all of the property of such company or companies, located in said city or village. Said assessing ordinance shall provide for the payment of said assessments in ten (10) equal annual installments with interest thereon until paid at not to exceed six (6) per cent. per annum; provided, however, the company or companies shall not be liable for the installment or installments of said assessments due after the expiration of the company or companies' franchise unless the use of said track or tracks is continued thereafter by said company or companies. Upon the nonpayment of such installments as the same severally become due, the auditor in cities, and the clerk in villages, shall certify the same to the auditor of the county in which the municipality is situated, who shall place the same upon the tax duplicate of said county and add the amount thereof to the tax bills of said street railway company or companies and shall collect such assessments including interest in the same manner provided by law for the collection of taxes levied against real estate. If the entire amount of the cost and expense of such renewal, replacement, repair or reconstruction, be not paid in cash at the time specified in such assessing ordinance, council may by ordinance provide for the payment of the cost and expense of such renewal, replacement, repair or reconstruction, including interest on such installments of assessments, by the issuance of bonds[1] in anticipation of the collection of such assessments, which

bonds shall bear interest at not to exceed six (6) per cent. per annum.

[Not subject to other statutes of limitations.] The assessment herein provided for shall not be subject to any other statute of the state of Ohio limiting or restricting the power of levying and collecting special assessments. [108 v. 1148, 1149; 108 v. 215.]

(1) **Validity.**—This section is unconstitutional. See note to § 3812-2, *ante*.

Sec. 3812-4. [Lighting street, alley, dock, pier, road; special assessment for.] The council of a city upon the recomdation of the director of public service, or the council of a village, may provide for lighting any street, alley, dock, wharf, pier, public road or place, or parts thereof, and levying and collecting special assessments[1] therefor, by any one of the methods mentioned in section 3812, General Code of Ohio. For the purpose of carrying out the provisions of this supplementary section one resolution, ordinance or contract may be made to include one or more streets, alleys, docks, wharves, public roads or places, or parts thereof, and the proceedings by council providing for such lighting and levying and collecting special assessments therefor shall be the same as provided in this chapter for proceedings by council for the improvement of streets, except that notices of the passage of the resolution declaring the necessity for such lighting shall be given to the owners of the lots and lands to be assessed for the payment of the cost and expense of such lighting by publishing such a resolution once a week for two consecutive weeks in two newspapers of opposite politics published and of general circulation within the corporation, and no other or further notice shall be required; provided, however, that in municipal corporations in which no two newspapers of opposite politics are printed, as defined in section 6255 of the General Code, notice of the passage of such resolution shall be given to the owners of the lots and lands to be assessed for the payment of the cost and expense of such lighting by publishing such notice in either of the following manners to be determined by council, viz.: by posting copies

thereof in not less than five (5) of the most public places in the municipality, to be determined by council, for a period of not less than fifteen (15) days prior to the taking effect thereof, or by publication thereof in any newspaper printed in Ohio and of general circulation in such municipality; provided further that in all municipal corporations which have adopted a charter the notice to the property owners may be published in accordance with the provisions of such charter. [109 v. 221.]

(1) Assessment for street lighting. See Op. Atty. Gen. (1923), No. 300.

Sec. 3812-5.[1] **[Boundary street between two municipalities may be improved by agreement; assessment of cost; construction; bonds for payment thereof.]** Whenever the boundary line between two municipalities is located within or along the side lines of a street, avenue or other public highway, such municipalities may enter into an agreement for the improvement of such street, avenue or other highway in such manner as the respective councils of said municipalities may determine. Said agreement may provide for any one or more of the improvements specified in General Code, section 3812, and the cost and expense thereof may be assessed upon the property specially benefited thereby, in the manner provided in said General Code, section 3812, and to the same extent and subject to the same limitations as are provided in this chapter for the levying and collection of special assessments for street improvements. By said agreement, the cost of the entire improvement shall be apportioned between the two municipalities, as their respective councils may agree, and the council of each municipality shall determine whether or not any portion of the cost to be paid by it shall be specially assessed or paid out of the general street improvement funds of the municipality. Said agreement shall also designate one of the municipalities to take exclusive charge of the details of the construction of the improvement, including advertising for bids and awarding the contract, which contract may be entered into by such municipality when the necessary funds have been provided therefor, and the amount to be paid by the other municipality shall have been paid to the treasurer of the munici-

pality authorized to supervise such construction. Bonds may be issued and sold in anticipation of the collection of deferred installments of assessments by the municipality levying the same, and bonds may likewise be issued and sold by either municipality for the purpose of paying its share of such improvement under the terms, conditions, limitations and in the manner provided by law. [110 v. 42.]

(1) Note that the legislature enacted two supplementary sections, each bearing this number.

Sec. 3812-5.[1] **[Establishment of districts; method of assessment.]** Whenever any municipality appropriates or purchases property for a public improvement, the council of the municipality may provide funds in part by assessments upon the lots and lands benefited by such improvement when a district established by ordinance of council, to pay any part of the entire cost and expense connected with such public improvement, and may include as one of the items of such total cost and expense, not more than fifty (50) per centum of the cost of appropriating private property for such public improvement. Such assessments may be levied by any of the following methods:

First. By a percentage of the tax value of the property assessed;

Second. In proportion to the benefits which may result from the improvement; or,

Third. By the foot front of the property bounding and abutting any street, alley, public road or place, or part thereof, within such district. [110 v. 255.]

(1) Note that the legislature enacted two supplementary sections, each bearing this number.

Sec. 3812-6. [Limitation of assessment; May issue bonds.] Such special assessments shall not be in excess of the special benefits conferred upon such lots and lands by such public improvement, and the proceedings of council providing for levying and collecting such special assessments shall be the same as are provided in title 12, division 3, chapter 5, of the General Code of Ohio, and the amendments and supplements thereto, providing for the improvement of streets, except that in setting forth specifically the lots and lands to be assessed it shall be sufficient to describe

them as all the lots and lands bounding and abutting the respective streets, alleys, public roads, or places, or parts thereof, within the district established by council, and in describing those which do not so abut, it shall be sufficient to describe the lots by their appropriate lot numbers, and the lands by metes and bounds.

The council of the municipality may issue and sell bonds as other bonds are issued and sold, to pay the municipality's part of the cost and expense of any such improvement, and may issue and sell bonds in anticipation of the levying or collection of such special assessments, in accordance with the provisions of law pertaining to the issuance and sale of bonds now in force, or as they may be hereafter amended or supplemented. [110 v. 255.]

Sec. 3813. [When council may fix value of lands not assessed for taxation.][1] In making special assessments by percentage of the tax value or by the foot front on lots or lands not sub-divided in lots, when such lots or lands are not assessed for taxation, the council shall fix, for the purpose of such assessment, the value of such lots as they stand and of such lands at what council considers a fair average depth of lots in the neighborhood, so that it will be a fair average of the assessed value of other lots in the neighborhood. In making such assessments in either of such ways on land not subdivided into lots but which are assessed for taxation, council shall fix the value and depth in the same manner,[2] but the above rule shall not apply in making a special assessment according to benefits.[3] [97 v. 296, § 50a.]

(1) **Old sections.**—See old § 2269 R. S. (repealed) and §§ 2264a and 2271 R. S. (repealed).

(2) **Land in bulk, how determined.**—To determine whether land is in bulk or in city lots regard must be had not only to recorded plat, but size of lots generally. Bailey v. Zanesville, 20 C. C. 236; Springer v. Avondale, 35 O. S. 620.

A tract may be a lot and not land in bulk, though not platted, if not larger than fair average of lots. Gibson v. Cincinnati, 27 B. 80.

Situation of property at time of improvement ordinance governs, in determining whether land is in bulk or not. Shiner v. Norwood, 17 C. C. 631.

Purpose of provisions.—A provision such as this is intended to equalize the expense upon all land benefited. Where land is in bulk, council must determine a fair average depth for such land for the purpose of the assessment and fix a value for such part as is assessed,

so that it can be seen whether the limitation on assessments has been exceeded and on what part of the land the lien of assessment attaches. Bailey v. Zanesville, 20 C. C. 236; Parmelee v. Youngstown, 43 O. S. 162; Findlay v. Frey, 51 O. S. 390; Cincinnati v. Oliver, 31 O. S. 371; Griswold v. Pelton, 34 O. S. 482.

Assessment on acreage.—Where an acreage tract has been improved by only one dwelling but is susceptible of subdivision to better advantage with lots fronting in part upon a street in which a sewer has been constructed, which is available for the sewerage of the lots abutting it, but not for the dwelling now on said land, the assessment for such sewer will not be held invalid but the lien for same will be restricted to so much of the land as abuts upon such sewer to the usual depths of lots in the neighborhood. (Section 3813, General Code.) Burckhardt v. Cincinnati, 25 C. C. (N. S.) 542.

Injunction will lie to restrain collection of assessment on land in bulk where council has not fixed fair average depth. But court may fix amount property chargeable. Griswold v. Pelton, 34 O. S. 482.

(3) **Where assessments according to benefits.**—It is within the power of council without any statutory provision on the subject to limit the assessment to the fair average depth of lots, even where the assessment is by benefits. Kohler Brick Co. v. Toledo, 29 C. C. 599; 10 C. C. (N. S.) 137.

Sec. 3814. [Resolution of necessity.][1] When it is deemed necessary by a municipality to make a public improvement to be paid for in whole or in part by special assessments,[2] council shall declare the necessity thereof by resolution, three-fourths of the members elected thereto concurring, except as otherwise herein provided.[3] Such resolution shall be published as other resolutions, but shall take effect upon its first publication.[4] [97 v. 121, § 51; 96 v. 39, § 51.]

(1) **Old sections.**—See old §§ 2304, 2264 and 2264*a* R. S. repealed.

(2) **Procedure limited.**—It seems that the procedure here required is limited to the making of public improvements *for which special assessments are to be levied.* Other improvements are required to be made in the manner provided in the sections of the Code governing the appropriation of private property and the duties with respect to contracts of the council, director of public service, director of public safety and trustees of public affairs.

See, in accord, East End B. & T. Co. v. Cleveland, 1 N. P. (N. S.) 493 (aff'd, Cir. Ct.).

Compare old § 2304 R. S., repealed, which provided that "when it is deemed necessary by a city or village to make a public improvement" council shall declare the necessity, give notice to the owners of abutting property, etc. Ques-

tions as to what public improvements required the procedure provided in § 2304 arose in Krumberg v. Cincinnati, 29 O. S. 60; Caldwell v. Carthage, 49 O. S. 334; Tyler v. Columbus, 6 C. C. 224; Becher v. McCloud, 4 C. C. 305; Nitzel v. St. Bernard, 3 N. P. 317; Fergus v. Columbus, 6 N. P. 82, 91; Garvin v. Columbus, 5 N. P. 236, 239; Rademacher v. Cincinnati, 21 B. 244; Longworth v. Cincinnati, 23 B. 100; Strauss v. Cincinnati, 24 B. 422.

Lighting a street not an "improvement". Op. Atty. Gen. (1918), p. 1462.

(3) **Resolution of necessity.**—*Due passage jurisdictional.*—Resolution declaring necessity and its due publication were held to be conditions precedent, under former statutes, to the power of council to pass the improvement ordinance. Welker v. Potter. 18 O. S. 85; Stephan v. Daniels, 27 O. S. 527; Smith v. Toledo, 24 O. S. 126; Cincinnati v. Corry, 2 B. 337. But see Upington v. Oviatt, 24 O. S. 232.

Object of resolution.—Though the legislature, in providing for the adoption and publication of preliminary resolution, had in view, under former § 2304 R. S. the fixing of time within which those claiming damages must make their claims, yet this was not the only object of the requirements. They were calculated to prevent a hasty and inconsiderate exercise of power. Smith v. Toledo, 24 O. S. 126, 132.

Passage of resolution.—Such a resolution would be a resolution of a general or permanent nature within the meaning of § 4224. Campbell v. Cincinnati, 49 O. S. 463; Thatcher v. Toledo, 19 C. C. 311, 315; but see Upington v. Oviatt, 24 O. S. 232.

Resolution, what to contain.—Resolution sufficiently establishes grade and orders improvement if it refers to plans and specifications on file in office of engineer, though that office is located outside of village. Wood v. Pleasant Ridge, 12 C. C. 177.

Where resolution is broad enough to cover improvement, including retaining wall, it is not necessary that another resolution declaring necessity for retaining wall be passed to authorize separate contract for such wall found necessary after work partly done and paid for by assessment. Cincinnati v. Shaw, 3 B. 556. Separate item not specified in resolution may nevertheless be authorized. Dixon v. Cincinnati, 11 C. C. 629. Resolution may except an intermediate part of the street to be improved. Wilder v. Cincinnati, 26 O. S. 284. It may order improvement of several streets or parts of streets if it is but one improvement. Irwin v. Greenville, 1 Dayton, 140.

Construction.—Resolution to improve a street one side only of which is within city limits will be construed to mean the improvement of that part only which is within the city. Scully v. Cincinnati, 1 C. S. C. R. 183, 187.

As to construction of resolution or ordinance not clearly defining termini of improvement, see Ridenour v. Saffin, 1 Handy, 464.

What defects in resolution cured by curative statute, see notes under § 3901, *post.*

(4) **Publication.**—*How made.*—See note to §§ 4228, 4229.

Effect of omission to publish.—Publication of the preliminary res-

olution as required by former statutes was held to be mandatory as between the municipality and the owners of property assessed. Upington v. Oviatt, 24 O. S. 232.

And omission to publish the preliminary resolution is a fatal defect which is not cured by a curative act relating to technical irregularities. Welker v. Potter, 18 O. S. 85. But see Upington v. Oviatt, 24 O. S. 232, and see Bolton v. Cleveland, 35 O. S. 319.

ORDER OF PROCEDURE IN STREET IMPROVEMENTS FOR WHICH ASSESSMENTS ARE LEVIED.

1. *Resolution directing engineer* to prepare and file plans, specifications and estimates of cost. These must be filed with the director of public service in cities or the clerk in villages. While this resolution is not required by law, it is advisable in view of § 3816 which presupposes that such plans, etc., have been prepared.

2. *Resolution of necessity* (three-fourths of council concurring), and determining grade, approving plans, specifications and estimates, and fixing the method of assessment, the mode of payment, and whether or not bonds shall be issued in anticipation of collection. (§§ 3814, 3815.)

This resolution may be passed at one meeting only by suspension of rule provided in § 4224. It must be published. (§§ 3814, 4227, 4228.)

3. *Notice to the owners of property to be assessed,* served by the clerk of council or an assistant, and on non-residents by publication. (§ 3818.)

4. *Claims for damages,* to be filed by the owners of abutting property. (§ 3823.)

5. *Ordinance to issue bonds for municipality's portion of cost.* Such bonds may be issued, pursuant to § 3939, for one or more contemplated improvements, even before any proceedings for a specific improvement are begun. For form of ordinance, see § 3939. A different order applies in case of sidewalk improvements; bonds for the municipality's portion of sidewalks are not comprehended by § 3939, but should be issued under § 2821. They may not be issued under the latter section until the improvement ordinance has been passed (Heffner v. Toledo, 75 O. S. 413, 5th Syl.).

6. *Ordinance to proceed with the improvement* (three-fourths of council concurring; see § 3835), determining whether claims for damages shall be judicially inquired into before commencing or after the completion of the improvement; directing the solicitor or mayor to institute proceedings to inquire into such claims; determining the mode of payment for the improvement; setting forth specifically the lots and lands to be assessed; describing the general nature of the improvement and the character of materials to be used; giving a reference to the improvement resolution theretofore passed, with the date of its passage and the declaration of intention to proceed with the improvement in accordance with said resolution and plans. If the estimated cost of the improvement is more than five hundred dollars, this ordinance should, in cities, authorize and direct the director of public service to make a contract with the lowest and best bidder, after advertisement according to law; and in villages, the ordinance should direct the clerk to advertise for bids, and the contract should be awarded by council to the lowest and best bidder, and executed by the mayor and clerk. If the estimated cost is less than five hundred dollars, the contract may be made by the director of public

service in cities, and by council in villages, without advertisement. (§§ 3824, 3825, 3827, 3833, 4328, 4221.)

This ordinance may also be passed at one meeting by suspending the rule, and should be published. (See §§ 4224 and 4227.)

7. *Ordinance providing for issue of notes in anticipation of levy of assessments and of issuance of bonds,* (§ 3914). No publication required, (§ 3914). Many municipalities prefer to levy the assessment before making the contract or beginning the improvement. In such case there will be no occaslon to issue notes and the order of proceedure here given should be changed accordingly.

8. *Application for a jury to inquire into claims for damages.* (§ 3827.) (If, in the ordinance to proceed, it has been determined to inquire into the damages after the completion of the improvement, the inquiry should follow such completion.)

9. *Advertisement for bids.* (See §§ 3833, 4328, 4329, 4221, 4222 and 4223.)

10. *Award and execution of contract.* (§§ 3833, 4328, 4330, 4334, 4221, 4222 and 4223.)

11. *Resolution directing clerk or engineer to make and file tentative assessment,* where assessment is by foot front or by percentage of tax value, and publication of notice thereof for three weeks consecutively as required by § 3895. *Or,*

12. *Appointment of three disinterested freeholders,* and equalizing of assessments, where the assessment is in proportion to benefits. See "Order of procedure for assessments by benefits," under § 3847.

13. *Notice of tentative or estimated assessment* to be published three weeks in a newspaper of general circulation in the corporation, (§ 3895).

14. *Assessing Ordinance.* This ordinance requires only a majority vote of council, except where based upon the report of an equalizing board, in which case it requires a two-thirds vote. (§ 3849.) There is no requirement that such ordinance should be published, though its publication would be advisable. An assessing ordinance might, as to method of passage, be regarded as the levying of a tax and should be read on three different days unless three-fourths of council suspend the rule. (§ 4224.)

15. *Certificate of fiscal officer,* (§§ 2295-7, 2295-9, 2295-10). See form of certificate under § 3825.

16. *Ordinance to issue bonds in anticipation of collection of assessments.* (§ 3914.) No publication of this ordinance required. (§ 3914.) For form of ordinance see § 3825. Form of bonds, see § 3939.

Sec. 3815. [Determination of nature of improvement; method of assessment and payment.][1] Such resolution shall determine the general nature of the improvement, what shall be the grade of the street, alley, or other public place to be improved, the grade or elevation of the curbs, and shall approve the plans, specifications, estimates and profiles for the proposed improvement. In such resolution council shall also determine the method of the assessment, the mode of pay-

ment and whether or not bonds shall be issued in anticipation of the collection thereof, and may determine whether or not bonds shall be issued to pay the corporation's part of such improvement, and if such determination be included in the resolution, then the issuance or authorization of issuance of both the assessment bonds and the bonds for the corporation's portion may be included in a single ordinance and such ordinance need not be published. Assessments for any improvement may be payable in one to twenty installments at such time as council prescribes; but nothing herein contained shall be construed to authorize maturities of bonds extending beyond the limitations specified in section 2295-9 of the General Code.[2] [110 v. 456, 459; 107 v. 151; 97 v. 121, § 51; 96 v. 39, § 51.]

(1) **Old sections.**—See old §§ 2304, 2264, and 2264*a* R. S. (repealed).

(2) A contractor is not bound to perform contract at original bid where council changes grade after bid is submitted. Op. Atty. Gen. (1916), p. 514.

(3) **Method of assessment** described in resolution or ordinance to improve can not be departed from and a different method adopted when assessment is made. Dick v. Toledo, 11 C. C. 349. As to method of assessment which might be prescribed under former statutes, see Kelley v. Cleveland, 34 O. S. 468; Irwin v. Greenville, 1 Dayton, 140; Dick v. Toledo, 11 C. C. 349.

Amount of assessment.—It is not necessary that council determine, in advance of the assessing ordinance, the proportion of the cost and expense of the improvement to be assessed upon the property abutting; and the fact that council has done so, in the preliminary resolutions and ordinances, does not bar it from designating a different proportion in the assessing ordinance, provided it is within the limitations fixed by statute. Lippert v. Toledo, 29 C. C. 345; 9 C. C. (N. S.) 455 (aff'd, 76 O. S. 563); Acklin v. Parker, 29 C. C. 625; 10 C. C. (N. S.) 243 (aff'd, 78 O. S. 413).

As to determination under former statutes, see Knorr v. Cincinnati, 21 B. 297.

Right to pay cash.—Where the assessing ordinance fails to provide the right to pay all assessments in cash, the ordinance is not void, but the owner may still exercise the right. Dodsworth v. Cincinnati, 18 C. C. 288.

(2) **Limitation of assessments.**—In determining the number of installments for any assessment, § 2295-9 (found under "Miscellaneous Statutes" in Part II) should be carefully examined with respect to the maximum maturities allowed for bonds for various improvements.

This section is limited by § 2295-12, prescribing a ten-year period of bond issue. See Op. Atty. Gen. (1922), p. 338.

Limitation on number of installments of assessment. See Op. Atty. Gen. (1922), p. 338.

FORM OF RESOLUTION DECLARING NECESSITY FOR IMPROVEMENT.

Resolution No.....

Declaring it necessary to improve.....street from.....to .....by paving (or constructing sewer or making other improvement).

Be it resolved by the council of the city [*or* village] of....., State of Ohio, three-fourths of all members elected thereto concurring:

Sec. 1. That it is necessary to improve.....street, from..... to....., in the following manner (here describe general nature of the improvement, material to be used, etc.);

Sec. 2. That the grade of said street as improved shall be..... ("the existing grade," *or* "the grade established by ordinance passed .....," *or* specifically describe the grade to be established as shown by the engineer's plans); and that the grade of the curbs shall be .....(here insert grade of curbs in relation to that of street).

Sec. 3. That the plans, specifications, estimates and profiles of the proposed improvement heretofore prepared by the engineer [*or* street commissioner] and now on file in the office of the director of public service [*or in villages,* of the clerk], be and the same are hereby approved.

Sec. 4. That the whole cost of said improvement, less one..... thereof (not less than one-fiftieth) and the cost of intersections shall be assessed by a percentage of the tax value thereof [*or,* "in proportion to the benefits which may result from the improvement," *or,* "by the foot front"] upon the following described lots and lands, to-wit: all lots and lands bounding and abutting upon the proposed improvement (or, here describe specifically benefited territory to be assessed) which said lots and lands are hereby determined to be specially benefited by said improvement; and the cost of said improvement shall include the expense of the preliminary and other surveys, and of printing and publishing the notices, resolutions and ordinances required, and the serving of said notices, the cost of construction, together with interest on bonds issued in anticipation of the collection of deferred assessments, and all other necessary expenditures.

Sec. 5. That the assessments so to be levied shall be paid in ..... (not more than ten) annual installments, with interest on deferred payments at the same rate as shall be borne by the bonds to be issued in anticipation of the collection thereof; provided that the owner of any property assessed may, at his option, pay such assessment in cash within thirty days after the passage of the assessing ordinance.

Sec. 6. That bonds of the city [*or* village] of.....shall be issued in anticipation of the collection of assessments by installments and in an amount equal thereto.

Sec. 7. That the remainder of the entire cost of said improvement, not specially assessed, including the cost of intersections, together with the cost of any real estate or interest therein, purchased or appropriated, and the costs and expenses of any appropriation proceeding therefor, and

the damages awarded any owner of adjoining lands and interest thereon, and the costs and expenses of any such award, shall be paid out of..... fund [*or* "by the issuance of bonds in the manner provided by law"].

Sec. 8. This resolution shall take effect and be in force from and after the earliest period allowed by law.

Passed....., 19....

Attest:

.....

Clerk.

.....

President of Council.

NOTE.—§ 2295-9 G. C. limits the maturity of bonds for street improvements to 10 years, accordingly, where bonds are to be issued in anticipation of the collection, the assessments should be limited to 10 annual installments. If the installments are semi-annual, they may be 20 in number.

Sec. 3816. [Plans, specifications, estimates and profiles to be prepared and filed.][1] At the time of the passage of such resolution, council shall have on file in the office of the director of public service in cities, and the clerk in villages, plans, specifications, estimates and profiles of the proposed improvement, showing the proposed grade of the street and improvement after completion, with reference to the property abutting thereon, which plans, specifications, estimates and profiles shall be open to the inspection of all persons interested.[2] [97 v. 121, § 51; 96 v. 39, § 51.]

(1) **Old sections.**—See old §§ 2304, 2264, and 2264*a* R. S. repealed.

(2) **Omission of plans.**—Effect of curative provisions of § 3901, see Becher v. McCloud, 4 C. C. 305.

It is essential to the validity of the proceedings ordering an improvement authorized by § 3812 that plans, specifications, estimates and profiles of the proposed improvement shall be on file in the office of the director of public service in cities, or the clerk in villages, at the time of the passage of resolution declaring such improvement necessary. Kasch v. Akron, 100 O. S. 229.

Estimate; contract in excess of.—A contract made by a municipality with the lowest and best bidder for a street improvement in full compliance with law as to all conditions precedent, with no averment of fraud, bad faith, irregularity, unreasonableness or excessiveness, is valid notwithstanding the amount of said contract exceeds the city engineer's estimate. McDonald v. Hornberger, 21 N. P. (N. S.) 209.

Sec. 3817. [Bonds and interest thereon.][1] When bonds are issued in anticipation of the collection of the assessment, the interest thereon shall be treated as part of the cost of the improvement for which assessment may be made. If such assessment or any installment thereof is not paid when due, it shall bear interest until the payment thereof at the same rate as the bonds issued in anticipation of the collection thereof, and the county auditor shall annually place upon the tax duplicate the penalty and interest as therein provided.[2] [97 v. 121, § 51; 96 v. 39, § 51.]

(1) **Old sections.**—See old §§ 2304, 2264 and 2264*a* R. S. repealed.

(2) **Collection of installments.**—Such installments are to be placed on the tax duplicate and collected as other taxes. Makley v. Whitmore, 61 O. S. 587.

By § 3892 it is made the duty of the clerk of council to certify *all* installments of assessments, whether past due or not, to the county auditor annually (where bonds are issued in anticipation of their collection), and such assessments are then collected as other taxes.

See note 2 under § 3898.

Assessment on tax duplicate prima facie valid and the burden is on the property owner to show invalidity. Murphy v. Sims, 13 Dec. 62.

Interest on Installments.—Where assessment for street improvement is made payable in annual installments, interest runs from the date of passage of ordinance. Leslie v. Norwood, 22 N. P. (N. S.) 63.

Sec. 3818. [Notice, how served.][1] A notice[2] of the passage of such resolution shall be served by the clerk of council, or an assistant, upon the owner[3] of each piece of property to be assessed,[4] in the manner provided by law for the service of summons in civil actions. If any such owners or persons are not residents of the county, or if it appears by the return in any case of the notice, that such owner can not be found, the notice shall be published at least twice in a newspaper of general circulation within the corporation. Whether by service or publication, such notice shall be completed at least twenty days before the improvement is made or the assessment levied, and the return of the officer or person serving the notice, or a certified copy of the return shall be prima facie evidence of the service of the notice as herein required.[5] [97 v. 122, §52; 96 v. 40, § 52.]

(1) **Old section,** 2304 R. S. repealed.

(2) **Strict construction.**—Requirements as to notice must be

strictly pursued. Cincinnati v. Sherike, 47 O. S. 217.

What constitutes such notice. See Op. Atty. Gen. (1918), p. 775.

Must be written.—Notice that is required is a notice in writing. Cincinnati v. Sherike, 47 O. S. 217.

Sufficiency.—Notice that a resolution was adopted declaring it necessary to open and improve a certain street between certain points by grading, etc. (specifying the manner of improvement) according to plans on file stating that the expense was to be charged per front foot upon lands abutting was held to be sufficient under former § 2304 R. S. Canton v. Wagner, 54 O. S. 329.

Notice that resolution declaring it necessary to improve a certain street between certain points and stating the manner of assessing cost was held not sufficient to inform the property owner that the city contemplated appropriating an easement for sloping fill. Fenner v. Cincinnati, 4 N. P. 182.

A resolution to improve by change of grade should set forth specifically extent and character of the grade so that owners may know the effect upon their land. See Cincinnati v. Corry, 23 B. 359.

Notice of an improvement involving a material change of grade, in order to bar an action by a property owner for damages, should definitely state that a change of grade is contemplated as a part of such improvement. Dayton v. Haines, 12 Oh. App. 439.

The twenty days required before levying assessments for improvements by a village council does not prevent the adoption of the preliminary ordinances before the expiration of the twenty-day period, provided no contracts are made or assessments actually levied until after the lapse of the twenty day period. Wagner v. Leipsic, 24 N. P. (N. S.) 177; affirmed Leipsic v. Wagner, 105 O. S. 466.

A village council may pass its preliminary ordinances providing for an improvement, and serve the required notices without waiting thirty days for a referendum petition to be filed, and if such petition be not filed within the thirty days the ordinances are valid. *Ib.*

Service of notice.—Under former § 2304 R. S. it was held that the service of the notice must be personal. McGee v. Avondale, 7 C. C. 246, but if notice was left at the residence or mailed and was duly received it would be sufficient. McGee v. Avondale, 7 C. C. 246; Green v. Cincinnati, 7 C. C. 233; see also, Roberts v. St. Bernard, 29 C. C. 725.

Notice to non-residents, how given. Op. Atty. Gen. (1916), p. 1222.

Compensation of Clerk. See Op. Atty. Gen. (1919), p. 1147.

Effect of want of notice.—The service of notice to resident land owners, required by old § 2304 R. S. was held to be a condition precedent to the exercise of the authority to pass a valid ordinance ordering the improvement so far as such owners are concerned or to make an assessment on their property to pay for the same, and the failure to give notice is not such an irregularity as would be cured by a curative statute. Joyce v. Barron, 67 O. S. 264, 268; but see further, Toledo v. McMahon, 9. C. C. 194; Kirby v. Winton Place,

7. N. P. 169; Schmidt v. Elmwood Place, 15 C. C. 351; Knecht v. Cincinnati, 18 C. C. 875; and as to construction of requirement under various former statutory provisions, see Bolton v. Cleveland, 35 O. S. 319; Scovill v. Cleveland, 1 O. S. 126, Chittenden v. Columbus, 1 N. P. (N. S.) 420; 14 Dec. 333.

An owner who has not received notice will not forfeit his right to recover damages caused by the improvement because of failure to file claim. Fenner v. Cincinnati, 4 N. P. 182.

(3) **Owner** would mean any one having an interest in the real estate, and includes mortgages and owners of minor interests therein. Savings Co. v. Cincinnati, 12 Dec. 218. See also Allison v. McCune, 15 O. 726; Smith v. Altick, 24 O. S. 369, 377; Carpenter v. Canal Co., 35 O. S. 307, 317; Harrison v. Sabina, 1 C. C. 49.

Executor to manage property, pay taxes, etc., and sell at end of fifteen years, is an "owner" on whom notice should be served. Roberts v. St. Bernard, 29 C. C. 725; 8 C. C. (N. S.) 422.

Service upon owner of life estate on day property sold for taxes and before sale confirmed, is upon proper person as required by this section, which should be read in connection with § 3894. Johnson v. Cincinnati, 30 C. C. 644; 11 C. C. (N. S.) 344.

Service on equitable owner not sufficient; must be made on legal owner. Hopple v. Cincinnati, 17 Dec. 193.

Tenant for years is not an "owner" within meaning of statute, and not entitled to notice of resolution to improve. Forrester Plaster Co. v. Cleveland, 31 C. C. 231; 12 C. C. (N. S.) 123.

Service on lessee for ten years with privilege of purchase and in whose name property is assessed for taxation, held sufficient. Clemmer v. Cincinnati, 28 C. C. 89; 7 C. C. (N. S.) 31.

Service of notice on person in whose name property is assessed on tax duplicate, if not real owner, held not sufficient. Savings Co. v. Cincinnati, 12 Dec. 218.

State need not be served where property is forfeited to state for taxes. *Ib.*

(4) **To whom notice required.** —No notice seems required to be served except upon the owners of property *to be assessed.* Old § 2304 R. S., repealed, required notice to all owners of abutting property. The chief purpose of this notice was held to be the giving of an opportunity to file claims for damages. Savings Co. v. Cincinnati, 12 Dec. 218. The purpose of the notice now required seems to be two-fold, viz., (1) To give the owners of property to be assessed an opportunity to be heard against the improvement or the assessment therefor, and (2) To give such owners an opportunity to file any claims there may be for damages. It follows that the owner of property not to be assessed and to whom no notice of a proposed improvement is given, need not file a claim under § 3823 in order to recover damages sustained, but is left to his remedy against the municipality independent of such section. The property to be assessed, however, will usually include all that may be damaged by the improvement. See East End B. & T. Co. v. Cleveland, 1 N. P. (N. S.) 493; Anderson v.

Columbus, 1 N. P. (N. S.) 541; 14 Dec. 180.

Notice not waived by petitioning for improvement, unless expressly stated in petition. Joyce v. Barron, 67 O. S. 264.

(5) **Prima facie evidence.**—The return of the officer serving the notice was held *prima facie* evidence of service under old § 2315 R. S., repealed, and the burden of proof was said to be upon the property owner who denied the service. Strauss v. City, 23 B. 359.

FORM OF NOTICE TO OWNERS OF PROPERTY TO BE ASSESSED.

To.....:

You are hereby notified that on the.....day of....., 19...., the council of the city [*or* village] of....., State of Ohio, duly passed a resolution of which the following is a copy: (Set out copy of resolution).

By order of the council of the city [*or* village] of.....

.....

Clerk.

(If the assessment is to be by the front foot this notice should go to all abutting owners. If by percentage of tax value or according to benefits it should go to all whose property may be included in the subsequent assessing ordinance.)

FORM OF RETURN BY OFFICER SERVING NOTICE.

Received the above notice on the.....day of....., 19...., and served the same by delivering a true copy thereof personally, (or insert any other method in accordance with requirements of law for service of summons in civil actions) upon the following persons on the dates below specified:

Name.	Date of service.	Remarks.
		Clerk [*or* assistant] of council of the City [*or* Village] of.....

Sec. 3819. [Limitation of assessments.][1] The council shall limit all assessments to the special benefits[2] conferred upon the property assessed, and in no case shall there be levied upon any lot or parcel of land in the corporation any assessment or assessments for any or all purposes, within a period of five years, to exceed thirty-three and one-third per cent of the actual value thereof after improvement is made.[3] Assessments levied for the construction of main sewers[4] shall not exceed the sum that in the opinion of council[5] would be required to construct an ordinary street sewer or drain of sufficient capacity to drain or sewer the lots or lands to be assessed for such

improvement, nor shall any lots or lands be assessed that do not need local drainage or which are provided therewith.[6] [97 v. 126, § 53; 96 v. 40, § 53.]

(1) **Old sections.**—Old § 2264, R. S. (repealed). See also old § 2283 R. S. (repealed). For old section limiting assessments to percentage of tax valuation, see § 2270 R. S. (repealed). Former statutes limiting assessments to percentage of actual value were §§ 2271 and 2264*a* R. S. (repealed).

Compare also § 2380 R. S., repealed, relating to limitation of sewer assessments.

(2) **Limited to special benefits.**—Even without any statute expressly limiting assessments to the special benefits conferred, the courts have reached the conclusion that they must be so limited in order to be constitutional. In Walsh v. Barron, 61 O. S. 15, the court says that "it is a fundamental principle underlying special assessments that the property is specially benefited by the improvement beyond the benefit to the public and a ratable assessment to the extent of such benefit is proper and constitutional, but in no case can it exceed the benefits." See also Schroder v. Overman, 61 O. S. 1; Dayton v. Bauman, 66 O. S. 379; Walsh v. Sims, 65 O. S. 211.

Benefits from the improvement can not be estimated on basis that before improvement lots had become depreciated in value because municipality had improperly allowed street to become a public dump. Kummer v. Cincinnati, 27 C. C. 683; 6 C. C. (N. S.) 559.

Courts will not enjoin an assessment claimed to be in excess of special benefits where excess is because of depreciation in value since improvement. Murphy v. Sims, 13 Dec. 62; Borger v. Columbus, 27 C. C. 812; 6 C. C. (N. S.) 401.

An assessment merely showing that it is placed on "benefited property" will not be conclusively presumed to be limited to special benefits. Chamberlain v. Cleveland, 34 O. S. 551.

Where the assessment is according to benefits the whole amount of the benefit must be apportioned amongst the lots in proportion to the benefit of each. *Ib.*

But it is not necessary that the total excess of benefits be first ascertained before total assessment is distributed among the various lots. It is sufficient that the assessment of each lot does not exceed the benefit to that lot and that it bears only its just proportion of total assessment. Blair v. Cary, 24 C. C. 560; 2 C. C. (N. S.) 25; Ayers v. Toledo, 26 C. C. 767 (reversed on other grounds, 72 O. S. 651). See further, note under § 3847, *post.*

An ordinance which levies the assessment upon abutting property by the front foot without further provision, though it does not limit it to benefits, was held not void if in fact it could be shown that the assessment did not exceed the special benefits conferred. Queen City Foundry Co. v. Cincinnati, 8 N. P. 167; Shoemaker v. Cincinnati, 68 O. S. 603; Schroder v. Overman, 61 O. S. 1; Kibler v. Norwalk, 4 N. P. (N. S.) 641; Cormany v. Cincinnati, 10 Oh. App. 280, 30 O. C. A. 121;

and see Norwood v. Baker, 172 U. S. 267, as interpreted in French v. Barber Asphalt Co., 181 U. S. 324.

Benefits, how determined.—Potential as well as present use of property is to be taken into consideration in making assessments. Prentice v. Toledo, 30 C. C. 568; 11 C. C. (N. S.) 299.

Increase in market value is not the only indication that lot is benefited; question is whether there is any potential benefit derived from the improvement. McMaken v. Hayes, 29 C. C. 535; 10 C. C. (N. S.) 38, (aff'd, 78 O. S. 412).

A special assessment will not be enjoined on the ground that the benefits are not equal to the assessment unless it is clearly and convincingly shown, nor will the question of market value before and after the improvement alone be considered. Ice Co. v. Cincinnati, et al., 28 O. C. A. 511; 6 Oh. App. 109.

Increased light and air resulting from opening of street, cannot be considered in determining the benefits from a subsequent surface improvement of the street. Lanfersiek v. Cincinnati, 28 C. C. 822; 8 C. C. (N. S.) 472.

Where benefits exceeded; power of court.—Where the assessment has exceeded the benefits, the court, in a suit to collect the assessment or a suit to enjoin the collection, may determine what amount may properly be assessed and enjoin collection of the balance only. Walsh v. Sims, 65 O. S. 211; Benham v. Cincinnati, 26 C. C. 17.

Where, however, the proper municipal authorities have determined that the assessment does not exceed the benefits, such finding and assessment are *prima facie* correct, and the court should not interfere to disturb the assessment, unless so manifestly unjust as to be tantamount to fraud on the part of the authorities. Price v. Toledo, 25 C. C. 617; 4 C. C. (N. S.) 57; Benham v. Cincinnati, 26 C. C. 17; see also Chamberlain v. Cleveland, 34 O. S. 551; Mechlem v. Cincinnati, 28 C. C. 216; 7 C. C. (N. S.) 212; McMaken v. Hayes, 29 C. C. 535 (aff'd, 78 O. S. 412); King v. Dayton, 30 C. C. 480; 10 C. C. (N. S.) 522; Kibler v. Newark, 4 N. P. (N. S.) 641. The burden of proof is on the plaintiff to show that assessment exceeds benefits. Yost v. Railway Co., 24 C. C. 169; 2 C. C. (N. S.) 519; Prentice v. Toledo, 30 C. C. 568; 11 C. C. (N. S.) 299.

The principle that in error proceedings when error is shown, it is presumed to be prejudicial, does not apply to irregularities in apportioning improvement assessments; such cases are governed by the principle of liberal construction provided for in § 3911, *post*. Ridenour v. Biddle, 30 C. C. 237; 10 C. C. (N. S.) 438.

An informality in an improvement assessment is not sufficient grounds for setting aside the whole assessment unless it is shown that prejudice has resulted to the plaintiff by reason of such informality. *Ib.*

Waiver of limitation.—The limitation that assessments must not exceed benefits may be waived by contract by persons petitioning for the improvement. Thornton v. Cincinnati, 26 C. C. 33; 4 C. C. (N. S.) 31; Winchell v. Dennison, 27 O. C. A. 284; 5 Oh. App. 103.

For matters relating to estoppel to contest assessment as exceeding benefits, because of petitioning for

the improvement, see notes under § 3836, *post.*

(3) **Percentage of actual value.**—In no event can the lot owner be assessed for more than his ratable share of the actual cost and expense of the improvement, and he can not be assessed to the full amount of such proportion if that exceed the statutory limitation. Pike v. Cummings, 36 O. S. 213.

A property owner's assessment will not be reduced because subsequent to the improvement part of the property was dedicated to the city for street purposes. Wilson v. Cincinnati, 5 N. P. 68.

Determination of value.—Where there is a large tract of land assessed and the assessment does not exceed the percentage limitation of the entire tract assessed, the assessment on any part is not invalid because as to such part if standing alone, the assessment would exceed the percentage of value allowable. Schroder v. Overman, 61 O. S. 1.

By present law, value after improvement is made, governs. As to rule under former laws, see Chamberlain v. Cleveland, 34 O. S. 551.

Improvements included.—In ascertaining the value of lot or land for the purpose of determining the limit to which it may be assessed, the improvements are to be considered with the land. Findlay v. Frey, 51 O. S. 390.

Sidewalks and sewers.—The limitations of former sections on assessments were held to apply to sidewalks (Norwood v. Building Association, 7 C. C. 95), and to sewers (Cincinnati v. Connor, 55 O. S. 82). But as to sewers where a general plan has been adopted, see Cincinnati v. Wewell, 16 B. 287.

Improvements prior to enactment of statute.—This section is to be construed so that assessments levied prior to its enactment are to be considered in applying the limitation as to assessments subsequently levied. Gray v. Toledo, 80 O. S. 445.

Separate improvements.—The present section requires that no assessment *for any or all purposes* exceeding thirty-three and one-third per cent. of the actual value of the property assessed, shall be levied within the period of five years. This would seem to restrict the aggregate amount of assessments on any one piece of property within this period, whether the improvements were on the same or a different street, and whether the improvements were of the same or a different character.

Former sections limiting amount of assessments within a given period, were not of this broad character. § 2271 R. S. (repealed) limited the amount of assessments that could be made "for any improvement." This was held to mean any one improvement, and not to apply to two separate improvements such as a street improvement and a sidewalk improvement, neither of which exceeds the limitation, but which together might exceed it. Hunt v. Hunter, 11 C. C. 69; Cole v. Hunter, 5 N. P. 13; Cincinnati v. Fugman, 5 N. P. 14; Toledo v. Bank, 7 N. P. 330; Drake v. Cincinnati, 25 C. C. 373. § 2283 R. S. provided that the same territory "shall not be assessed for making two different streets or avenues." This was held to apply only to improvements on different streets, and not to separate and dis-

tinct improvements on the same street. Drake v. Cincinnati, 25 C. C. 373; but the limitation applied though the improvements on the different streets were not of the same character. Pretzinger v. Sunderland, 63 O. S. 132. These cases do not apply under the present section.

The limitation, § 3819 above, making assessments for municipal improvements in excess of 33 1-3 per cent. in five years illegal, does not apply to assessments for the cost of a particular improvement made upon petition of abutting owners therefor. But if other assessments for improvements later, added to those for the petitioned improvement, exceed in the five-year period the statutory limitation, the illegality attaches to the later assessments, and the collection of the excess will be enjoined. First Nat. Bank v. Cincinnati, 30 C. C. 694; 10 C. C. (N. S.) 602.

Under former statutes, see *contra*. Punshon v. Cincinnati, 27 B. 155.

Interest.—If the interest on bonds issued for a street improvement, being included in an assessment, makes the same exceed the percentage of the value of the property allowed by law to be assessed, injunction will lie to prevent its collection. Salem v. Mulford, 22 C. C. 397 (affirmed without report, 62 O. S. 632).

Interest on deferred installments, which increase the assessment beyond the statutory limitation, will not be enjoined so long as the property owner was given the option of paying it all in one payment. Wilcox v. Edgerton, 103 O. S. 267.

Excess only, void.—The whole assessment is not void because it exceeds the limitation. The excess is merely not collectible, and must be paid by municipality. Upington v. Oviatt, 24 O. S. 232.

Second assessment only, invalid.—Where there have been two assessments and the owner has paid the last in full, it was held that he can not resist the first because the two together have exceeded the limit, since the last only would be the defective one. Brooks v. Norwood, 12 C. C. 257. See also First N. B. v. Cincinnati, 30 C. C. 694; 10 C. C. (N. S.) 602.

Estoppel to dispute excess.—As to when owner is estopped by petitioning for improvement or otherwise to resist such part of assessment as exceeds the limitation, see notes under §§ 3835 and 3836, *post*.

Levied.—As used in this section "levied" means to fix the amount to be paid and not the collection. Wageman v. Cleveland, 17 C. C. (N. S.) 588.

(4) **Main sewers.**—As to what is a main sewer, see Cincinnati v. Standard Wagon Co., 1 N. P. 387.

Limitation of assessment.—Under former statutes it was said in Toledo v. Ry. Co., 4 C. C. 113, 128, "where a sewer has been constructed, whether the municipal corporation which constructed it has been divided into sewer districts or itself constitutes a sewer district; whether it is a main sewer, intended to furnish drainage for the whole territory lying within the district, or is a local sewer properly so-called—the power to levy special assessments to meet the cost and expenses of such an improvement is limited to what would be the fair cost of providing . . . 'an ordinary street sewer, or drain of sufficient capacity

to drain or sewer such lots and lands.'"

(5) **Opinion of council.**—Whether the opinion of council as to the size of sewer which will be of sufficient capacity to drain the lot would be overruled by the courts, *quere*. It certainly could not be overruled unless there has been gross abuse of discretion. Stanley v. Cincinnati, 13 Dec. 223.

(6) **Local drainage.—By municipal sewers.**—Under sections of a statute such as this, property already provided with sewers constructed by the city are exempt from further sewer assessment. But to claim the exemption on the ground that the city has already provided a sewer it must be shown that the sewer already constructed by the city is one for the use of the property, amongst others, of the one claiming the exemption, that is, it must have been intended for and used for the drainage and accommodation of the lots abutting on the street in which it is constructed. Toledo v. Brown, 2 N. P. 45.

But if sewer is provided, the fact that owner has not actually connected his property with it, does not prevent exemption from assessment for another sewer. Kirk v. Toledo, 13 C. C. (N. S.) 218; 32 C. C. 152 (aff'd, 83 O. S. 509).

If the city sewer is merely for the purpose of draining a pond into a trunk sewer, but not to accommodate lot owners, such owners can not claim exemption from future assessment. Toledo v. Brown, 2 N. P. 45. And this is so even though such lot owners had secretly made connection with such sewer. *Ib.*

So a sewer for surface drainage only, made before the street was improved to allow property owners to connect with a sewer temporarily on condition that they should pay when a regular sewer was built, is not local drainage that would exempt. Cincinnati v. Honnigfort, 32 B. 32. But in a case where property does not abut on the street in which the sewer is laid, but where non-abutting lot owners have the right to connect with such sewer, they will be held to be already provided with local drainage. Miller v. Toledo, 12 C. C. 706.

A sewer built by a city many years before, having no proper outlet, and not suited to the condition of the property at the later time, nor intended by the city even at the time as a part of its sewer system, but merely as a temporary expedient, will not be a provision for local drainage that will prevent assessment for sewer suited to the needs of the time. Avondale v. Scudder, 12 C. C. 770. So where the sewer built by the city had no proper outlet, merely emptying on private property, and subject to be closed at any time, it does not satisfy the requirements as being a provision for local drainage and no exemption can be claimed thereby. Wilson v. Cincinnati, 5 N. P. 68; so where existing sewer empties into a water course which is to be protected from further contamination by the new system. Ely v. Elyria, 15 C. C. (N. S.) 133.

The mere fact that an ordinance was passed by a municipality providing for sewer in front of property of the one claiming exemption, but which sewer was never constructed, would not exempt such property. Cincinnati v. Bickett, 26 O. S. 49.

A sewer of sufficient capacity

but which endangers the public health does not come within the exemption of this section. Ely v. Elyria, 15 C. C. (N. S.) 133.

By private sewers.—In order to give application to the exemption in the statute it is not necessary that the local drainage referred to should be provided by municipal authority. Ford v. Toledo, 64 O. S. 92, 98. But see Johnson v. Avondale, 1 C. C. 229, 232; Wewell v. Cincinnati, 45 O. S. 407. Thus, property though not supplied with a regular system of city sewerage, but which is completely drained by an extensive sewer constructed partly by the city, and partly by individuals, was held to be exempt from further assessment. Wewell v. Cincinnati, 45 O. S. 407. So where a railway company had constructed a permanent and expensive brick sewer that completely drained its property it was held to be already provided with sewerage and thus exempt. Toledo v. Railway Company, 4 C. C. 113. So a tile sewer constructed by a property owner receiving and discharging all surface and other drainage into trunk sewer will be held to constitute sufficient local drainage. Cincinnati v. Sullivan, 8 N. P. 22.

But to claim exemption because of the construction of a private sewer it must be shown that the sewer or drain was of such dimension, mode of construction, location, outlet, etc., as would belong to a sewer built by the municipality substantially in conformity to the requirements of the statute. Toledo v. Railway Co., 4 C. C. 113, 131. So draining by a wooden box drain as a temporary expedient would not be sufficient. Wewell v. Cincinnati, 45 O. S. 407, 422. Property owners are not exempt merely because they made such private arrangements for draining their property as are satisfactory to themselves. Johnson v. Avondale, 1 C. C. 229, 232.

A lot is not so provided with local drainage as to exempt it from assessment for the construction of a sewer in the street upon which such lot abuts, where it appears that its only drainage facilities are afforded by a privately constructed drain through the adjoining premises over which the owner of the lot in question has no control and no right to use and maintain such sewer. Cincinnati v. Polster, 96 O. S. 155.

But if private sewer affords adequate drainage, the fact that municipality is constructing a new and better sewer, will not make property owner liable for assessment. Lansmead v. Cincinnati, 29 C. C. 64.

The "adequate local drainage," in order to give exemption from assessment, must be such as to include both permanency of structure and control. Frey v. Milliken, 15 Dec. 122; Hildebrand v. Toledo, 27 C. C. 427.

So, a connection by drain through another lot, with a sewer, where control might be lost by sale of lot, held not adequate local drainage. Frey v. Millikin, 15 Dec. 122.

But where one person owns two lots, constituting one tract, and extending from one street to another, held that a sewer on one of said streets constituted sufficient drainage, and an assessment could not be levied for sewer in the other street. Cincinnati v. Doerger, 98 O. S. 161.

By natural sewer drainage.—Lands and lots within a municipal-

ity which are naturally sufficiently drained are exempt from assessment for sewers. Cincinnati v. Hess, 19 C. C. 252.

But the fact that there is a permanent water course to which a lot reaches back and into which it is drained, will not be sufficient to exempt it, for polluting such water course would be unlawful, even though the city is unlawfully emptying a sewer into such water course. Cincinnati v. Kasselmann, 23 B. 392; Hildebrand v. Toledo, 27 C. C. 427; 6 C. C. (N. S.) 450.

Connection with sewer designed for surface drainage only, is not sufficient to exempt. Kasselmann v. Cincinnati, 52 B. 143.

Property owner provided with a drain leading to a cesspool on his own property, is not exempt from assessment. Kibler v. Toledo, 4 N. P. (N. S.) 64.

In order to exempt the property owner, the drainage claimed must be such as he has a right to make, and can not be one that creates a nuisance. Hildebrand v. Toledo, 27 C. C. 427; 6 C. C. (N. S.) 450; Frey v. Millikin, 15 Dec. 122; and the fact that a lot is provided with drainage at a point beyond the average depths of lots will not exempt it. *Ib.*

House and lot whose sewage is properly discharged into sewer used for surface and house drainage with authority of municipality is supplied with local drainage. Scully v. Cincinnati, 52 B. 142.

Some proper and lawful connection with sewers permitted to be used by municipality for drainage is sufficient to constitute local drainage. Kasselmann v. Cincinnati, 52 B. 143.

The fact that the house sewage of the house on the lot and the surface water from the lot are carried off, is not sufficient to support the contention of complete local drainage. The lot is not completely drained unless the water is also carried off that would naturally flow on to it from other lots above it, or in the neighborhood. Stanley v. Cincinnati, 13 Dec. 223; 1 N. P. (N. S.) 235.

Surface drainage.—The fact that land within a municipality is supplied with sufficient surface drainage is not enough to entitle it to claim "local drainage" within the purview of the statute. The drainage must be such as provides the land with adequate drainage for the necessary and useful purposes of sewerage. Ford v. Toledo, 64 O. S. 92.

Unimproved property.—The fact that the property is entirely unimproved and that there is no immediate need for drainage, will not exempt it from assessment for sewerage purposes. Ford v. Toledo, 64 O. S. 92.

Such land is not exempt from assessment for general sewerage system, including sanitary as well as surface drainage. King v. Dayton, 30 C. C. 480; 10 C. C. (N. S.) 522.

Land not subdivided, if supplied with local drainage can not be partly assessed for a sewer on the ground that if subdivided the part near sewer would not be supplied with independent drainage. Knabe v. Cincinnati, 49 B. 37.

Proposed sewer not available.—It is no defense to a sewer assessment that the lots were below the level of the sewer or that the sewer was too small, and was therefore of

no benefit. City v. McDermott, 2 B. 240; Hildebrand v. Toledo, 27 C. C. 427; 6 C. C. (N. S.) 450; Ford v. Toledo, 64 O. S. 92; Conner v. Cincinnati, 11 C. C. 336. Nor that owner's lot was six feet below the sewer. Toledo v. Kohn, 2 N. P. 47; nor that the owner's cellars were deeper than the sewer. Cincinnati v. Bickett, 26 O. S. 49; nor that the owner's lot is a wharf on a river bank and is the lowest ground of all. Boeres v. Strader, 1 C. S. C. R. 57, 60.

How determined, generally.—Whether a lot is already supplied with sufficient local drainage is a question more or less of opinion and is governed by no fixed standard. Miller v. Cincinnati, 18 C. C. 869. The question is to be determined by all the facts and circumstances surrounding the property and existing at the time of assessing. Cincinnati v. Hess, 19 C. C. 252.

Conclusiveness of council's determination.—The decision of council as to what lots are already provided with local drainage will not conclude the court's inquiry into this question. Toledo v. Railway Co., 4 C. C. 113.

When provision applicable.—The provision of former § 2380 R. S., repealed, exempting from assessment for sewer purposes lots or lands which are provided with local drainage, was held applicable to lateral as well as main sewers. Stanley v. Cincinnati, 13 Dec. 223; 1. N. P. (N. S.) 235. See also Toledo v. Ry. Co., 4 C. C. 113. But see further Ford v. Toledo, 64 O. S. 92; Hartwell v. Bldg. Ass'n, 2 B. 287.

Uniformity.—A property owner is not exempt and can not resist an assessment for sewerage purpose on the ground that other abutting property is not assessed because already provided with drainage. Toledo v. Potter, 19 C. C. 661.

Or because some lots have been partly exempted, because assessed for a reduced frontage as authorized by statute. Cleneay v. Norwood, 14 O. F. D. 469; 2 O. L. R. 462.

Enjoining assessment. — Property being already provided with local drainage, the owner may enjoin assessment for the construction of a new sewer and need not wait until the assessment is actually levied. Potter v. Norwood, 21 C. C. 461.

The burden is upon the owner to show that local drainage has been provided which is adequate to meet the needs of such lot both for surface drainage and the usual purpose of sewerage. Cincinnati v. Polster, 96 O. S. 155.

Sec. 3820. [Municipality to pay portion of cost of improvement.][1] The corporation shall pay such part of the cost and expense of improvements for which special assessments are levied as council deems just, which part shall be not less than one-fiftieth of all such cost and expense, and in addition thereto, the corporation shall pay the cost of intersections.[2] [97 v. 126, § 53; 96 v. 40, § 53.]

(1) **Old sections.**—See old §§ 2273 and 2274 R. S. repealed.

(2) **Intersections.**—The requirement that the municipality shall pay

the cost of intersections has reference to intersections of street improvements, and has no application to intersections of street by sanitary sewer improvements. Close v. Parker, 30 C. C. 384; 11 C. C. (N. S.) 185 (aff'd, 79 O. S. 444).

City must pay cost of intersection of combined storm and sanitary sewer; intersection defined. Op. Atty. Gen. (1918), p. 410.

The provision requiring municipality to pay the cost of intersections when streets are improved includes all man-holes, catch-basins and tilings at such intersections and the municipality must pay for these. Ball v. Portsmouth, 82 O. S. 151.

But incidental expenses such as surveying and advertising the improvement are included in the 1-50 which must be paid by the municipality and the municipality is not required to pay in addition to the 1-50, the proportion of the cost of such incidental expenses as the cost of intersections bears to the total cost. Bass v. Portsmouth, 82 O. S. 151.

This section is limited by § 3822. See Op. Atty. Gen. (1923), No. 300.

Sec. 3821. [May issue bonds to pay share of cost.][1] A municipality may issue and sell bonds as other bonds are sold to pay the corporation's part of any such improvement,[2] and may levy taxes in addition to all other taxes authorized by law to pay such bonds and the interest thereon.[3] [97 v. 126, § 53; 96 v. 40, § 53.]

(1) **Old sections.**—Compare old §§ 2270 and 2275 R. S. repealed.

(2) **Bonds for municipality's portion of street improvement.**—This section is not to be construed as limiting the powers conferred by the Longworth Law (now §§ 3939 *et seq.* G. C.), but as a grant of additional power. Heffner v. Toledo, 75 O. S. 413.

Bonds to pay the municipality's portion of a street improvement may be issued either under authority of § 3821, or under §§ 3939 *et seq.;* if issued under § 3821, an ordinance providing for the specific improvement must first be passed, but such ordinance is not a prerequisite to the issuance of such bonds under §§ 3939 *et seq.* Heffner v. Toledo, 75 O. S. 413.

But as to the amount of such bonds that may be issued whether under authority of § 3821 or §§ 3939 *et seq.*, the limitations of §§ 3939 *et seq.* apply. *Ib.;* Cleveland v. Cleveland, 18 Dec. 619; 7 N. P. (N. S.) 249, (aff'd, 76 O. S. 594); Smith v. Rockford, 4 N. P. (N. S.) 513; 29 C. C. 478; 9 C. C. (N. S.) 465; 81 O. S. 16.

Maturities of bonds.—As to maximum maturities, and requirement of serial bonds, see §§ 2295-9 and 2295-12, under "Miscellaneous Statutes", in Part II.

(3) **Taxes.**—See § 5649-3*a* under title "Taxation" in Part II. And see Columbus v. Lazarus, 15 Dec. 187.

Sec. 3822. [Deduction of prior assessment for street reimprovement.][1] When an assessment is levied for the reimproving of any street, for the original improving of which an assessment has theretofore been levied and paid, there shall be deducted from the assessment calculated as an assessment for an original improvement, one-half of the amount paid on the highest prior assessment, but in no case shall the assessment for such reimprovement be reduced to less than fifty per cent of what it would have been as an original assessment, unless council deems a greater reduction equitable, and all amounts deducted under this section shall be paid as part of the municipal corporation's portion of the cost of the reimprovement.[2] [110 v. 134; 97 v. 126, § 53; 96 v. 40, § 53.]

(1) **Old section.**—See old § 2293 R. S. repealed.

(2) Under former law, repaving would include macadamizing a street formerly improved by graveling, and not more than one-half the cost of such macadamizing could be assessed against abutters. Baldwin v. Springfield, 10 N. P. (N. S.) 65; 20 Dec. 265; Page v. Columbus, 15 C. C. (N. S.) 40, aff'd 86 O. S. 333.

The provision as to limit of assessments for repaving did not apply to assessments for curbing or guttering if these were not a part of any former improvement. *Ib.*

Nor does it apply if the second assessment is merely for a part of the original work for which assessments were not before levied. O'Brien v. Columbus, 3 O. L. R. 434; 16 Dec. 338.

Change of grade.—Even if the grade is changed, the property can not be assessed that part of the expense of the improvement which includes damages awarded to abutting owners for the change of grade. McGlynn v. Toledo, 22 C. C. 34 (affirmed, 47 B. 712).

Section 3838 provides specially for case of change of grade. See that section and notes.

Sec. 3823. [Claims for damages to be filed with clerk; effect of failure.][1] An owner[2] of a lot, or of land, bounding or abutting[3] upon a proposed improvement, claiming that he will sustain damages by reason of the improvement, within two weeks after the service of the notice or the completion of the publication thereof, shall file a claim[4] in writing with the clerk of the council, setting forth the amount of the damages[5] claimed, with a general description of the property with respect to which it is claimed the injury will accrue. An owner who fails to do so, shall be deemed to have waived such dam-

ages and shall be barred from filing a claim or receiving damages. This provision shall apply to all damages which will obviously result from the improvement,[6] but shall not deprive the owner of his right to recover damages arising, without his fault, from the acts of the corporation, or its agents.[7] If subsequent to the filing of such claim, the owner sells the property, or any part thereof, the assignee shall have the same right to damages which the owner would have had without the transfer.[8] [97 v. 122, § 54; 96 v. 41, § 54.]

(1) **Old section.**—This is similar to old § 2315 R. S. repealed.

Constitutionality—Old § 2315 R. S. held valid in Cleveland v. Hyland, 18 C. C. 868. See also Reckner v. Warner, 22 O. S. 275; Cupp v. Commrs., 19 O. S. 173.

This section held valid. Farber v. Toledo, 104 O. S. 196.

Strict construction.—This section barring right to damages when claim not filed, should be strictly construed. East End B. & T. Co. v. Cleveland, 1 N. P. (N. S.) 493; 14 Dec. 33, (aff'd, Cir. Ct. 49 B. 33).

(2) **Who may claim damages.**—A mortgagee of property damaged has such an interest that he may claim damages for change of grade, and if he received no notice, may maintain action for such claim. Savings Co. v. Cincinnati, 12 Dec. 218.

(3) **Land not abutting on improvement.**—Old § 2315 R. S. was held not to apply to land abutting the street but not abutting proposed improvement (an elevated viaduct) and the owner of such land need not file claim. Cohen v. Cleveland, 43 O. S. 190. But municipality may be liable though land does not abut immediately upon the improvement. Keating v. Cincinnati, 38 O. S. 141.

A non-abutting owner must suffer a damage different in kind as well as degree from that of the general public to recover. Schmidt v. Cleveland, 15 C. C. (N. S.) 589 (aff'd 91 O. S. 410).

When improvement touches but one corner of lot, section held not to apply. Miller v. Cincinnati, 2 B. 156. On question of lands abutting improvement, see also R. R. Co. v. McLaughlin, 15 C. C. 1; Jackson v. Jackson, 16 O. S. 163; Birtwhistle v. Cincinnati, 8 B. 25; Eagle White Lead Co. v. Cincinnati, 1 C. S. C. R. 154; Hurst v. Akron, 23 C. C. (N. S.) 591; 1 Oh. App. 264.

(4) **Failure to file claim** is an absolute bar to recovery in all cases where statute applies. Hickox v. Cleveland, 8 O. 543; Cohen v. Cleveland, 43 O. S. 190; R. R. v. Defiance, 52 O. S. 262; Cleveland v. Hyland, 18 C. C. 868; Taber v. Bowling Green, 28 C. C. 173; 7 C. C. (N. S.) 385; Farber v. Toledo, 104 O. S. 196.

But before a property owner may be held to have waived his claim for damages, it must appear that he has had notice of such proposed change of grade. Farber v. Toledo, 104 O. S. 196.

A verbal claim is insufficient where statute requires that it shall be in writing. Anderson v. McKinney *et al.*, 24 O. S. 467.

(5) **Recovery limited to amount claimed.**—See Cleveland v. Hyland, 18 C. C. 868. But if property owner is deceived by statements of city engineer as to character of proposed improvement, the plans and profiles being unintelligible, and makes a compromise of his claim this will not bar a further recovery. Property Owner v. Akron, 7 N. P. 454.

Claim can not be increased after time for filing has expired. See Geib v. Cleveland, 7 N. P. 301.

When filing claim unnecessary.—In case of improvements which are not to be paid for in whole or in part by special assessments, no claim for damages need be filed to entitle property owner to recover. East End B. & T. Co. v. Cleveland, 1 N. P. (N. S.) 493; 14 Dec. 33, (aff'd, Cir. Ct. 49 B. 33); Schram v. Cincinnati, 14 N. P. (N. S.) 109; but claims for damages may be filed in such case at property owner's option. East End B. & T. Co. v. Cleveland, 1 N. P. (N. S.) 493; 14 Dec. 33, (aff'd, Cir. Ct. 49 B. 33).

An abutting property owner to whom no notice of proposed improvement was given need not file claim under this section. Jacobs v. Cincinnati, 2 N. P. 283; Toledo v. McMahon, 9 C. C. 194; McGee v. Avondale, 7 C. C. 246; Schram v. Cincinnati, 14 N. P. (N. S.) 109. As to sufficiency of notice, see Fenner v. Cincinnati, 4 N. P. 182. Where municipality makes one a party to suit to assess compensation his failure to file claim is waived. Cincinnati v. Sherike, 47 O. S. 217. Where property owner has been misinformed by city engineer as to change of grade and thus led not to file a claim, his failure will not prevent recovery. Youngstown v. Moore, 30 O. S. 133. If notice is not sufficient to inform property owner with reasonable certainty of the effect of proposed improvement upon his land he is not barred from recovering damages sustained by failure to file claim. Cincinnati v. Corry, 23 B. 359.

See further § 3830 and notes.

(6) **Basis of recovery.**—The basis of the recovery of damages is that the abutting owner has been misled by the municipality to his prejudice. Right of access to and from the street is property, and where an owner has improved his lot, relying upon a previously established grade or upon a reasonable grade thereafter to be established, and the municipality changes the established grade or establishes an unreasonable grade, in either case so as to injuriously affect the access of the abutting owner, he is entitled to recover the damages thereby sustained, for it is not just that he should bear the whole loss. Goodloe v. Cincinnati, 4 O. 500; Smith v. Cincinnati, 4 O. 514; Le Clercq v. Gallipolis, 7 O. 218; Hickox v. Cleveland, 8 O. 543; Rhodes v. Cleveland, 10 O. 159; Bingham v. Doane, 9 O. 165; Akron v. McComb, 18 O. 229; Crawford v. Delaware, 7 O. S. 459; Cincinnati v. Penny, 21 O. S. 499; Akron v. Chamberlain, 34 O. S. 328; Ryan v. Cinti, 1 C. C. 558; Cincinnati v. Weber, 23 C. C. 651; 3 C. C. (N. S.) 56; East End B. & T. Co. v. Cleveland, 1 N. P. (N. S.) 493; 14 Dec. 33 (aff'd, Cir. Ct. 49 B. 33); Hurst v. Akron, 23 C. C. (N. S.) 591.

The doctrine of liability, how-

ever, does not extend to cases in which no grade was established prior to the improvement of the property, and where the grade subsequently established is not unreasonable. Akron v. Huber, 78 O. S. 372.

Removal of lateral support.—Where a proposed street improvement will require such a cut or excavation along the property of an abutting owner as to interfere with the right to lateral support, there would be a taking of property within the meaning of the Constitution, for which the owner would be entitled to compensation. Orr v. Cincinnati, 17 N. P. (N. S.) 201.

Change of existing grade.—Municipality is liable where abutting owner has improved his lot with reference to an existing grade and the grade is subsequently changed to his damage. Akron v. Chamberlain, 34 O. S. 328, and other cases cited above. Where grade that is changed is that of an old highway adopted and used as a street, municipality is liable for damages to improvements made with reference to the old grade. Youngstown v. Moore, 30 O. S. 133; but change in the grade of a canal towpath gives no cause of action. Chatfield v. Cincinnati, 1 B. 125. Where turnpike grades are changed after becoming city streets, owners of abutting property damaged may recover. Cincinnati v. Williams, 10 Rec. 705.

An existing grade need not have been established by ordinance to justify property owners in improving it; its establishment may be shown by nature of surface improvement by municipality, provided same is not merely temporary. Akron v. Chamberlain, 34 O. S. 328, 336. Whether municipality has by use adopted a surface grade is a question for the jury. Chatfield v. Cincinnati, 1 B. 125. Improvements for temporary convenience do not indicate establishment of grade. McGee v. Avondale, 31 B. 163. Laying of sewers and sidewalks in an unimproved street does not establish a grade. Neubert v. Toledo, 9 C. C. 462. Long user may establish the grade of the traveled portion only of a street, and where improvements are made with reference to grade immediately in front of owner's premises city cannot be held for damages by changing the grade of the whole street. Cincinnati v. Roth, 20 C. C. 317; and the grade of the traveled and improved portion of the roadway determines the grade for the entire width. *Ib.*

An ordinance requiring the laying of a stone sidewalk and its laying at a grade designated by the city engineer constitutes a permanent fixing of the grade. Metcalf v. Elyria, 14 C. C. (N. S.) 465; 84 O. S. 501.

After municipality has established grade it must proceed with improvement within reasonable time, and when this is not done a property owner building with reference to old grade, but after establishment of new, may recover damages. Nolte v. Cincinnati, 3 C. C. 503. And where city fails for six months to pay damages awarded for change of grade, it will be held to have abandoned the improvement. Toledo v. Jacobson, 11 C. C. 220. Where an agreement of annexation of a village to a city, provided that grades of the village streets should not be changed without consent of, and

compensation to the owners of abutting property, it was held that such agreement merely secured to such owners the same rights as if such streets had been established by the city. Thale v. Cincinnati, 1 N. P. 427. Municipality cannot bind itself by agreement not to change the grade of a street. *Ib.* See also Gas Light and Coke Co. v. Columbus, 50 O. S. 65; Corry v. Cincinnati, 22 B. 194. As to effect of consent of property owner to change of grade see Feuerstein v. Jackson, 8 C. C. 396.

Establishment of unreasonable grade.—Municipality is liable where abutting owner improves before any grade is established and subsequently an unreasonable grade is made. Akron v. Chamberlain, 34 O. S. 328; but owner in improving must anticipate a reasonable grade. *Ib.* But where owner makes improvements after a grade has been established but before the street is built to conform to it, he cannot recover, even though such grade is unreasonable. Cincinnati v. Weber, 23 C. C. 651; 3 C. C. (N. S.) 56.

When no grade has been established by ordinance or user, property owner is not entitled to damages when grade is established, unless it is an unreasonable grade. Ross v. Cincinnati, 24 C. C. 43; 2 C. C. (N. S.) 594, (affirmed, 67 O. S. 521); Taber v. Bowling Green, 28 C. C. 173; 7 C. C. (N. S.) 385; Middletown v. Doty, 28 O. C. A. 465; 6 Oh. App. 333.

What is a reasonable grade.—Establishment by municipality is not conclusive of reasonableness. Pitton v. Cincinnati, 3 C. C. 593. Reasonableness of grade is a question for the jury. *Ib.* Reasonableness of grade cannot be shown by opinion of a witness, but jury must determine this from facts put in evidence. Feuerstein v. Jackson, 8 C. C. 396, 399.

The question whether a grade established by council is unreasonable must be determined as of the time of its establishment. St. Bernard v. Goham, 10 Oh. App. 402.

Owner of unimproved lot cannot recover damages for change of grade, being presumed to purchase with a view to a reasonable improvement of the street. Crawford v. Delaware, 7 O. S. 459; Leonard v. Cassidy, 8 C. C. 529.

What is an improved lot.—Buildings constitute improvement, and damages to them are recoverable. Crawford v. Delaware, 7 O. S. 459; Akron v. Chamberlain, 34 O. S. 328; Keating v. Cincinnati, 38 O. S. 141.

Where a grade has been established by improvement and user, damages to property by reason of injury to, or destruction of shade trees, caused exclusively by change of grade, may be recovered. Dayton v. Haines, 12 Oh. App. 439.

Where an owner uses three adjoining lots in one inclosure as a homestead, he is entitled to damages to all of them caused by the establishment of an unwarranted and unreasonable grade of the street, even though there are no buildings upon two of the lots. Hurst v. Akron, 23 C. C. (N. S.) 591.

Grading to an established grade is an improvement, and when the change destroys the value of such grading the same may be recovered, not exceeding in amount the value

of the lot. Seasongood v. Cincinnati, 5 C. C. 225, (aff'd, 51 O. S. 611). Upon the same principle the building of fences and walls and the planting of trees, hedges and shrubbery are improvements. Cincinnati v. Williams, 10 Rec. 705; so is a sidewalk. Kellner v. Dayton, 7 Dayton, 28.

Measure of damages.—The owner is entitled to that sum which represents the diminution in value of his property caused by change of grade or the establishment of an unreasonable grade. General benefits derived from the improvement cannot be offset, though special and local benefits not such as are conferred upon other abutting property may be so offset. Martin v. Bond Hill, 7 C. C. 271; Cincinnati v. Williams, 10 Rec. 705; R. R. Co. v. Gardner, 45 O. S. 309, 323; Carlisle v. Cincinnati, 8 C. C. (N. S.) 46. The measure of damages is the difference in value of the property as a whole, and the owner cannot recover for injury to trade or business or extra expense connected therewith, caused by the change of grade. Cincinnati v. Whetstone, 12 B. 247. Where the established grade is unreasonable the measure is the difference between the amount of damages which would have resulted to the property from the establishment of a reasonable and proper grade and that resulting from the grade actually established. St. Bernard v. Goham, 10 Oh. App. 402. Property owner can not recover for unsightliness of his premises or obstruction of view caused by the improvement. Cincinnati v. Williams, 10 Rec. 705. Recovery is limited to diminution in value of the improvements on owner's property. *Ib.;* and where buildings are just as conveniently located with respect to new grade as they were with respect to old he cannot recover. Lotze v. Cincinnati, 61 O. S. 272. On measure of damages, see also R. R. Co. v. Martin, 10 W. L. J. 54; Chatfield v. Cincinnati, 1 B. 125; White v. Cincinnati, 47 B. 169, *edit.;* Toledo v. Meinert, 15 C. C. (N. S.) 545.

When damages payable.—The property owner is entitled to compensation before the improvement is made. Ryan v. Cincinnati, 1 C. C. 558; Crawford v. Delaware, 7 O. S. 459; Ry. Co. v. Cumminsville, 14 O. S. 523.

Property owner entitled to interest on award of damages from time change of grade is made. Cincinnati v. Whetstone, 47 O. S. 196; and this is from the time the work is begun. Cincinnati v. Williams, 9 B. 243. When interest alone not paid, separate action may be brought for it. Toledo v. Scott, 23 B. 238.

Street acquired by dedication or appropriation may be improved to a reasonable grade without liability to abutting owner for any injury resulting therefrom, including the removal of lateral support, all such damages being considered waived by dedication or included in the award. Grant v. Village of Hyde Park, 47 B. 831, 67 O. S. 166; Tenney v. Cincinnati, 47 B. 832; 24 C. C. 237; 67 O. S. 518; Ross v. Cincinnati, 24 C. C. 43; 2 C. C. (N. S.) 594 (affirmed, 67 O. S. 521). But see *contra,* Harlow v. City, Cin. Court Index, June 9, 1902; Columbus v. Williard, 7 C. C. 113.

Damages cannot be included in assessment.—See McGlynn v. Toledo, 22 C. C. 34 (aff'd, 47 B.

712); Carlisle v. Cincinnati, 8 C. C. (N. S.) 46; see note (1) under § 3896.

Enjoining public improvement.—When proposed change of grade threatens injury to private property and ultimate relief is compensation, court may refuse injunction, East End B. & T. Co. v. Cleveland, 1 N. P. (N. S.) 493; 14 Dec. 33; and retain case for assessment of damages. Turnpike Co. v. Commrs., 5 N. P. 423.

Injunction refused against city's proceeding with improvement where damages for change of grade have been paid, but plaintiff had not been paid for sloping fill. Fogarty v. Cincinnati. 7 N. P. 100.

Property owner to whom jury in change of grade case allowed no damage must seek remedy in error proceedings; he cannot enjoin the improvement. Frevert v. Finfrock, 31 O. S. 621.

Property owner showing threatened injury may enjoin when authority to fix the new grade has been unlawfully delegated by council to city engineer. Lippleman v. Cincinnati, 4 C. C. 327.

The owner of an unimproved lot cannot prevent by injunction a change of grade in front of his property, but he may enjoin the taking of a portion of his land for the construction of a viaduct where compensation has not first been paid. Leonard v. Cassidy, 8 C. C. 529.

The construction of approaches to a county bridge which will change the grade in front of plaintiff's improved property may be enjoined until compensation is paid. Gawn v. Wilson, 7 N. P. 33.

Pleading, practice and evidence.—Muncipality is bound by its plans and specifications and cannot show by its officers that the proposed improvement will be made in some different manner. Martin v. Bond Hill, 7 C. C. 271; nor can municipality show by its officers that a grade will be established according to law where an improvement is proceeding without required action of the authorities. Feuerstein v. Jackson, 8 C. C. 396, 399.

Compliance with the statutory requirement as to filing claim is sufficiently shown in the absence of direct evidence offered in chief, by testimony drawn out by the city, although introduced for an entirely different purpose. Toledo v. Meinert, 15 C. C. (N. S.) 545.

Damages may be proven by testimony either showing the value of the property immediately before and immediately after the improvement, or showing the cost of adjusting the property to the new grade by cutting down, filling, restoring or repairing buildings, fences, etc. But opinion of witness that property is damaged or stating the amount of the damage is not admissible. R. R. Co. v. Ball, 5 O. S. 568.

Testimony tending to show that property will be benefited by the change of grade, when no special or local benefit different from that conferred upon other property abutting the improvement is claimed, is not admissible. Martin v. Bond Hill, 7 C. C. 271; R. R. Co. v. Gardner, 45 O. S. 309, 323. But special benefits, peculiar to the particular property, may be shown. Lotze v. Cincinnati, 61 O. S. 272. Property owner's remedy, if no damages are allowed, is by proceedings in error. See § 3831 *post*; and see also Frevert v. Fin-

frock, 31 O. S. 621. He cannot enjoin the improvement. *Ib.*

Where the record does not show what the answer to the question would have been, an exception is not properly taken to a refusal of the court to allow witnesses to testify to the reasonableness or unreasonableness of a grade. Cincinnati v. Weber, 23 C. C. 651. In a suit to contest an assessment plaintiff cannot show damages to the property assessed as set-off against the assessment. Ulm v. Cincinnati, 7 N. P. 278; Strauss v. City, 23 B. 359. But in a suit by property owner for damages for change of grade municipality may offset unpaid assessment for such improvement, though such assessment could not under later decisions include the damages awarded. Toledo v. Breyman, 23 B. 242. In suit by taxpayer to enjoin a change of grade on ground that action proposed is unreasonable and an abuse of corporate power it is not sufficient to show that the old grade had been long established and improved to by private owners and public authorities. Corry v. Cincinnati, 22 B. 194.

An ordinance repealing a former ordinance establishing a grade is competent in an action for damages from a later change of grade. Toledo v. Meinert, 15 C. C. (N. S.) 545.

A city engineer's book levels are not admissible to show a grade established by ordinance, but may be introduced to prove levels as taken. Incl. Plane R. R. Co. v. Pfau, 9 B. 200.

A petition for damages for change of grade, filed after the change is made, and not alleging that the same was done contrary to law, is demurrable. Kratochwill v. West Carrollton, 1 Dayton 35.

NOTE.—For full discussion of the principles involved in change of grade cases, including the right of recovery and the measure of damages, see article in 10 Am. Law Rec. 705, by Mr. Frank M. Coppock, of the Cincinnati bar.

Other causes of action.—For cases involving injuries to property by the making of street improvements, and not affected by this section, see notes to § 3714, *ante*.

(7) **Damages for Negligence.**—When a municipality removes earth from a hillside in improving a street, the soil of which hill is known to be slip soil, without shoring up the bank the support of which is thus removed, and a slide upon the lot of an abutting owner results after a hard rain, liability for the damage thus suffered cannot be escaped on the ground that the work was being done by an independent contractor, or that the city was the owner of the dominant tenement, or that the slipping of the hillside following a heavy storm and downpour was an act of God. Cincinnati v. Filser, 19 C. C. (N. S.) 112; but such damages cannot include the full salary of one of the officers of a railway company who was compelled to devote much of his time during the period of repair to overseeing the work. Cincinnati v. Railway, 21 C. C. (N. S.) 573.

(8) **When right to compensation becomes vested.**—The right of an abutting owner to compensation on account of a change of grade vests not later than the time when the work of changing the

grade has so far progressed as to materially obstruct and interfere with access to the property; and in the absence of an agreement to the contrary the right to receive such compensation remains in such owner, and does not pass to a grantee to whom the property was transferred subsequent to such vesting. Cleveland v. Stone Co., 13 N. P. (N. S.) 209.

FORM OF CLAIM FOR DAMAGES.

....., 19....

To the Clerk of the Council of the City [*or* Village] of....., State of Ohio:

The undersigned is the owner of the following described property in the city [*or* village] of.....: (Here insert general description of property), bounding and abutting upon.....street, between..... and.....(state termini of proposed improvement).

And claims that said property will be damaged in the sum of..... dollars by the proposed improvement of.....street under the resolution passed therefor on the .....day of....., 19....

Sec. 3824. [Determination of council as to claims for damages.][1] At the expiration of the time limited for so filing claims for damages, the council shall determine whether it will proceed with the proposed improvement or not, and whether the claims for damages so filed shall be judicially inquired into, as hereinafter provided, before commencing, or after the completion of the proposed improvements.[2] [97 v. 122, § 55; 96 v. 41, § 55.]

(1) **Old section** 2316 R. S. repealed.

(2) **Validity** of provision allowing the inquiry to be postponed until after the improvement made, sustained. Toledo v. Preston, 50 O. S. 361. See also Orr v. Cincinnati, 17 N. P. (N. S.) 201.

Ordinance should be passed only after time limited for filing claims. See Joyce v. Barron, 67 O. S. 267 But see Toledo v. Ry. Co., 4 C. C. 113.

Sec. 3825. [Ordinance for improvement; what to contain.][1] If the council decides to proceed with the improvement, an ordinance for the purpose shall be passed.[2] Such ordinance shall set forth specifically the lots and lands to be assessed for the improvement,[3] shall contain a statement of the general nature of the improvement, the character of the materials which may be bid upon therefor, the mode of payment therefor, a reference to the resolution theretofore passed for such improvement

with date of its passage, and a statement of the intention of council to proceed therewith in accordance with such resolution and in accordance with the plans, specifications, estimates and profiles provided for such improvement.[4] [97 v. 122, § 55; 96 v. 41, § 55.]

(1) **Old section 2316 R. S. repealed.**

(2) **Effect of ordinance** as to binding municipality, see Shehan v. Cincinnati, 25 B. 212 (aff'd, 27 B. 375), and see Hays v. Cincinnati, 62 O. S. 116, 122.

(3) **Sufficient of description.**—Ordinance need not fix the depth of lots subdivided. Wilson v. Cincinnati, 5 N. P. 68. Ordinance may describe lots and lands by referring to a resolution describing them. *Ib.*

(4) **Requirements of ordinance.**—An ordinance not specifically ordering cost to be assessed on abutting property, but incorporating by reference the preceding resolution, which did so order cost to be paid, was held to fulfill the requirements. Cincinnati v. Goodman, 5 Rec. 153.

So an ordinance not mentioning drains and culverts, but referring to the resolution which did provide for them, was held to have sufficiently ordered drains and culverts. Schroeder v. Overman, 18 C. C. 385; 61 O. S. 1.

Statement in an ordinance providing for improvement of a street, that the paving shall be asphalt, brick or other material as may thereafter be determined, meets the requirement that the ordinance shall contain a statement of the general nature of the improvement and the character of the materials which may be bid upon therefor. Emmert v. Elyria, 74 O. S. 185.

The intention of the legislature was to require council to designate, not the particular material with which the street should be paved, but to state the general character of the same. Scott v. Hamilton, 7 C. C. (N. S.) 493; 29 C. C. 652; Preuer v. Bardes, 18 Dec. 176.

Mistake in publication of this ordinance held not fatal to contract. Newark v. Fromholtz, 102 O. S. 81.

See § 3834, *post.*

FORM OF ORDINANCE TO PROCEED WITH THE IMPROVEMENT.

Ordinance No.....

Determining to proceed with the improvement of.....street, from .....to....., by paving [constructing sewer or making other improvement].

Be it ordained by the council of the city [or village] of....., State of Ohio, three-fourths of all members elected thereto concurring:

Sec. 1. That it is hereby determined to proceed with the improvement of.....street, from.....to....., by.....(here insert general nature of improvement and character of materials to be used), in accordance with Resolution No....., passed on the.....day of ....., 19...., and in accordance with the plans, specifications esti-

mates and profiles heretofore approved and now on file in the office of the director of public service [*or, in villages,* of the clerk].

Sec. 2. That all claims for damages resulting therefrom shall be judicially inquired into before commencing [*or* after the completion] of the proposed improvement, and the solicitor [*or* mayor] be and he is hereby authorized and directed to institute proceedings in a court of competent jurisdiction to inquire into such claims.

Sec. 3. That the whole cost of said improvement less one..... thereof (not less than one-fiftieth) and the cost of intersections shall be assessed by a percentage of the tax value thereof (or, "in proportion to the benefits which may result from the improvement," or, "by the foot front") upon the following described lots and lands, to-wit: all lots and lands bounding and abutting upon the proposed improvement (or, here describe specifically benefited territory to be assessed) which said lots and lands are hereby determined to be specially benefited by said improvement; and the cost of said improvement shall include the expense of the preliminary and other surveys, and of printing and publishing the notices, resolutions and ordinances, required, and the serving of said notices, and cost of construction, together with interest on bonds issued in anticipation of the collection of deferred assessments, and all other necessary expenditures.

Sec. 4. That the assessments so to be levied shall be paid in..... (not more than ten) annual installments, with interest on deferred payments at the same rate as shall be borne by the bonds to be issued in anticipation of the collection thereof; provided that the owner of any property assessed may, at his option, pay such assessment in cash within thirty days after the passage of the assessing ordinance.

Sec. 5. That bonds of the city (*or* village) of.....shall be issued in anticipation of the collection of assessments by installments and in an amount equal thereto.

Sec. 6. That to pay the remainder of the cost of said improvement, there be and is hereby appropriated from the.....fund the sum of $.....

Sec. 7. (*In cities.*) That the director of public service be and he is hereby authorized and directed to make and execute a contract for said improvement with the lowest and best bidder after advertisement, according to law.

Sec. 7. (*In villages.*) That the clerk be and he is hereby authorized and directed to advertise for bids for the construction of said improvement according to law.

Sec. 8. This ordinance shall take effect and be in force from and after the earliest period allowed by law.

Passed....., 19....

Attest:

.....

Clerk.

.....

President of Council.

(In view of the provisions of § 3835, it seems advisable that the above ordinance should be passed by a three-fourths vote of council, though this is not explicitly required, as in case of resolution of necessity. This ordinance should have the certificate of the auditor (*or in villages*, the clerk), as to the funds necessary to pay the municipality's share of the cost. (§ 3806.)

FORM OF ASSESSING ORDINANCE.

Ordinance No.....

To levy special assessments for the improvement of ..... . Street from ..... to ..... by (here describe character of the improvement).

Be it ordained by the council of the City [*or* Village] of ....., State of Ohio:

Sec. 1. That the assessment of the cost and expense of improving ..... Street from ..... to ..... by (describe character of improvement), amounting in the aggregate to $..... as reported to this council on the ....., day of ....., 19...., by the City Engineer (or other designated officer, *or, if assessment is by benefits*, "by the board heretofore appointed to estimate said assessments"), notice of the filing of which assessment has been given as required by law, be and the same is hereby adopted and confirmed, and that there be and is hereby levied upon the lots and lands bounding and abutting upon said improvement [*if other property is to be assessed, add:*] and upon the following other specially benefited property, to wit: (here describe as per § 3826), the several amounts reported as aforesaid, which assessments, together with the description of said lots and lands, are now on file in the office of the clerk of this council, and which assessments are at the rate of $..... per front foot [*or* "are ..... percent of the tax value of the property assessed," *or, if assessment is by benefits*, "are in proportion to the special benefits"], and are not in excess of the special benefits to said property.

(NOTE: If the assessment is by benefits upon report of an equalizing board, the above section should be modified as follows:)

Sec. 1. That the assessment of the cost and expense of improving ..... Street from ..... to ..... by (describe character of improvement), amounting in the aggregate to $..... as reported to this council on the ..... day of ....., 19...., by the board heretofore appointed by this council to hear all objections to, and to equalize said assessments, be and the same is hereby adopted and confirmed, and that there be and is hereby levied and assessed, *etc.*

Sec. 2. That the total assessment against each lot or parcel of land shall be payable in cash within thirty days from and after the passage of this ordinance, or, at the option of the owner, in ..... annual installments with interest at the rate of .... percent per annum [same rate as borne by the bonds, if same have been issued, or if not issued, "at

the same rate as shall be borne by the bonds to be issued in anticipation of the collection of the same"]. All cash payments shall be made to the treasurer of said city [*or* village]. All assessments and installments thereof remaining unpaid at the expiration of said thirty days shall be certified by the clerk of this council to the county auditor, as provided by law, to be by him placed on the tax duplicate and collected as other taxes are collected.

Sec. 3. This ordinance shall take effect and be in force from and after the earliest period allowed by law.

.....
President of Council.

Passed.....

Attest:.....
Clerk.

NOTE.—Section 3892 requires that such installments shall be certified by the clerk of the council to the county auditor annually and collected as other taxes. In cities, this may be done by the city auditor delivering a record of such installments to the clerk of council and the latter certifying them to the county auditor.

FORM OF CERTIFICATE OF FISCAL OFFICER.

.....Ohio.....19...

To the council of the City (*or* Village) of.....

Pursuant to Sec. 2295-7 general code of Ohio, I hereby certify that the estimated life of the improvement of.....Street from .....to....., contemplated by the proposed ordinance hereto annexed is.....years, and I further certify pursuant to Secs. 2295-9 and 2295-10 that the maximum maturity permitted by law of the bonds authorized in said ordinance is.....years from a date twelve months prior to the date of the earliest maturity of said bonds and that the same has been calculated in accordance with Sec. 2295-9 of the general code of Ohio.

.....
City Auditor [*or* Village Clerk].

Note that the above certificate must be made prior to the passage of the ordinance.

FORM OF ORDINANCE TO ISSUE BONDS IN ANTICIPATION OF THE COLLECTION OF ASSESSMENTS.

(Sec. 3914 *et seq.*)

Ordinance No.....

To issue bonds in anticipation of the collection of special assessments for the improvement of ..... Street, from ..... to .....

Whereas, the Council of the City [*or* Village] of ....., Ohio, has heretofore, by resolution duly passed on the ..... day of ....., 19...., declared the necessity of improving ..... Street, from ..... to ....., by ....., and of levying a special assessment upon the property abutting on said street to pay for said improvement, all in strict conformity to law, and

Whereas, the City Auditor [*or* Village Clerk] has certified to this council the estimated life of said improvement as.....years, and has further certified the maximum maturity of the bonds hereinafter provided for as .....years; and

Whereas, this council estimates that a tax for said bonds will first appear on the duplicate for the tax year 19.., and that the final tax settlement with the County Treasurer next following the inclusion of a tax for this issue in the Annual Budget by the County Auditor, as provided by law, will be obtained not earlier than the first day of September, 19___, and will require $.... for interest until such taxes are collected and available;

Now, therefore,

Be It Ordained by the Council of the City [*or* Village] of ....., State of Ohio:

Sec. 1. That for the purpose of raising money in anticipation of the collection of special assessments for the improvement of..... Street, from ..... to ....., by (here describe character of improvement) bonds of said city [*or* village] shall be issued to the amount of ..... Dollars.

Sec. 2. Said bonds shall be designated as the "..... Street improvement bonds"; shall be of the denomination of $..... each (except, etc., to take care of any odd denominations which may result); shall be dated not later than ....., 19....; shall draw interest at the rate of ..... per centum per annum, payable semi-annually on the ..... days of ..... and, ... in each year, upon presentation and surrender of interest coupons to be attached to said bonds, bearing the facsimile signature of the Auditor [*or* Clerk], and shall be due and payable as follows: (Show the aggregate amount maturing at each maturity date. All bonds must be serial bonds, and must mature in substantially equal installments. § 2295-12. Note the pro-

visions of § 2295-12 as to the earliest maturity allowed, and § 2295-9 as to the latest maturity. See these sections under "Miscellaneous Statutes" in Part II.)

Sec. 3. Said bonds shall be prepared by the City [*or* Village] Solicitor, signed by the Mayor and City Auditor [*or* Village Clerk], sealed with the city [*or* village] seal, and (in case of *city* bonds only) recorded in the office of the Sinking Fund Trustees; shall express upon their face the purpose for which they are issued, and the fact that they are issued pursuant to law, and this ordinance; shall be payable, both principal and interest, at the office of the Treasurer of the City [*or* Village] of ....., or at the office of the ..... Bank, in the City [*or* Village] of .....; shall be issued and sold under the direction of the finance committee of Council, and shall bear such consecutive numbers as said committee or the proper officers of the city [*or* village] may determine.

Sec. 4. That upon sale of said bonds, any premiums and the accrued interest realized therefrom, shall be paid to the Sinking Fund Trustees. The par value realized from the sale of said bonds shall be placed in the city [*or* village] treasury, to the credit of the ..... Street improvement fund, and shall be disbursed from said fund on proper vouchers, in payment of the expense of the improvement aforesaid, and (if notes have been issued) to the payment of the notes heretofore issued for such purpose, and the interest thereon, for which purpose said money is hereby appropriated.

Sec. 5. In the event any of the owners of any of said property so specially assessed shall pay their total assessments in cash within thirty days of the date of the final passage of the ordinance levying such special assessments, the aggregate amount of bonds to be issued shall be reduced by deducting the amount so paid in cash from the total amount of the bonds to be issued, and the bonds herein provided for first maturing shall be correspondingly reduced by the omission of so many thereof as shall equal the amount of assessments so paid, or by changing the denomination of one of said bonds, or both, as the case may be, and the amount to be credited to the foregoing fund from the sale of said bonds shall be likewise reduced by the amount of the assessments so paid in cash for such improvement.

Sec. 6. That all installments of said assessments and all portions thereof, together with interest thereon, shall be applied to the payment of said bonds and interest as the same shall become due, and to no other purpose whatsoever.

Sec. 7. That the faith, revenue and credit of the City [*or* Village] of ..... are hereby pledged for the prompt payment of both principal and interest of the bonds hereinbefore described in accordance with the laws and constitution of the State of Ohio.

Sec. 8. That for the purpose of providing the necessary funds to pay the interest on the foregoing issue of bonds promptly when and as the

same falls due, and also to create and maintain a fund sufficient to discharge the said bonds at maturity, there shall be, and is hereby levied on all the taxable property of the City [*or* Village] of..... in addition to all other taxes, a direct tax annually during the period for which said bonds are to run in an amount sufficient to provide a fund for the discharge of the principal of said serial bonds at maturity, which tax shall not be less than the interest and sinking fund tax required by section 11 of article XII of the constitution. Provided, however, that in each year that the assessments anticipated by said bonds are payable and are applicable to the payment of such interest and principal and are appropriated for such purpose, the amount of such tax shall be reduced by the amount of the assessment so appropriated.

That said tax shall be and is hereby ordered computed, certified, levied and extended upon the tax duplicate and collected by the same officers, in the same manner and at the same time that the taxes for general purposes for each of said years are certified, extended and collected. Said tax shall be placed before and in preference to all other items, and for the full amount thereof. All funds derived from said tax levies hereby required, shall be placed in a separate and distinct fund, which, together with all interest collected on the same, shall be irrevocably pledged for the payment of the interest and principal of said bonds when and as the same fall due.

Sec. 9. This ordinance shall take effect and be in force from and after the earliest period allowed by law.

.....
President of Council.

Passed.....

Attest:.....
Clerk.

Sec. 3826. [How lots and lands to be described.] In setting forth specifically the lots and lands abutting upon the improvement and to be assessed therefor, it shall be sufficient to describe them as all the lots and lands bounding and abutting upon such improvement between and including the termini of the improvement, and in describing those which do not so abut it shall be sufficient to describe the lots by their appropriate lot numbers, and the lands by metes and bounds, and this rule of description shall apply in all proceedings in which lots or lands are to be charged with special assessment. [97 v. 122, § 55; 96 v. 41, § 55.]

Sec. 3827. [Assessment of damages.][1] When claims for damages are filed within the time limited, and the council, having passed an ordinance for making the improvement, determines that the damages shall be assessed before commencing it, the mayor or solicitor shall make a written application for a jury, to the court of common pleas, or a judge thereof in vacation, or to the probate court[2] of the county in which the corporation or the larger part of it is situated. The court or judge shall direct the summoning of a jury in the manner provided for the appropriation of property,[3] and fix the time and place for the inquiry and the assessment of such damages, which inquiry and assessment shall be confined to such claims.[4] [96 v. 42, § 56.]

(1) **Old section 2317 R. S., repealed.**

(2) **Jurisdiction of Probate Court.**—No constitutional objection to conferring on probate court jurisdiction to inquire by jury into claims for damages. Toledo v. Preston, 50 O. S. 361.

(3) **Procedure.**—See note (3) to § 3683, *ante*.

(4) **Damages assessed before commencing improvement** must be paid to property owner before work is begun in front of his property, Ryan v. Cincinnati, 1 C. C. 558; interest must be paid on amount if compensation is deferred, Cincinnati v. Williams, 9 B. 243; and where the owner sues for damages the corporation having failed to have damages assessed, owner is entitled to interest from the time the work was begun, Cincinnati v. Whetstone, 47 O. S. 196.

Failure to pay award.—Where municipality fails to pay award of damages and to enter upon improvement it shall be held to have abandoned the improvement and property owners who were defendants in the action to assess damages may have costs and attorney fees allowed as in case where city fails to pay for or take possession of property after appropriation proceeding. Toledo v. Jacobson, 11 C. C. 220 (dismissed, 38 B. 248).

Estoppel to deny filing of claim.—Where municipality has made a property owner defendant in an action to assess damages and submitted his claim to a jury, it cannot defeat his recovery by showing that he did not file his claim in time. Cincinnati v. Sherike, 47 O. S. 217.

FORM OF APPLICATION TO ASSESS DAMAGES.

.....Court,.....County, Ohio. The City [*or* Village] of ....., Plaintiff, v. (Here insert names of all persons who have filed claims within time required by law), Defendants.	Application to assess damages.

Now comes the city [*or* village] of ..... and represents that it is a city [*or* village] under the laws of Ohio, and that its council by resolution duly passed on the.....day of....., 19...., declared it to be necessary to improve.....street, from ..... to ....., by .....(here describe nature of proposed improvement).

And that notice of the passage of said resolution was given according to law, to all persons whose property is to be assessed to pay any portion of the cost of said improvement.

Plaintiff further represents that on the.....day of..... 19...., its council determined by ordinance duly passed to proceed with the proposed improvement and that claims for damages should be judicially inquired into, before commencing said improvement and directed the solicitor [*or* mayor] to make this application.

Plaintiff further represents that the following named persons, defendants herein, filed claims in writing, on the dates hereinafter shown, with the clerk of council, setting forth the damages claimed to be sustained by reason of said improvement, as follows:

1. ..... claiming to be the owner of.....(here describe property as set forth in claim for damages), filed a claim on the..... day of....., 19...., as follows: (here insert claim).

2. ..... etc., etc.

Wherefore, plaintiff asks the court to cause a jury to be impaneled to make inquiry into and assess the damages, if any, which will be sustained by defendants' lots and lands, by reason of the proposed improvement, as provided in said resolution and ordinances.

.....
Solicitor [*or* Mayor].

(No verification required.)

PRECIPE.

To the Clerk:

Issue notice to the defendants named in the above application that plaintiff will, on the.....day of....., 19...., at....M., apply to the Honorable....., judge of the.....Court of.....

county. for the impaneling of a jury to make inquiry into and assess, the damages, if any, to be paid by the city [*or* village] of.....to the persons having filed claims therefor according to law, under the ordinance to improve.....street, from.....to....., passed on the .....day of....., 19....

.....
Solicitor [*or* Mayor].

Sec. 3828. [Proceedings of jury.] The jury shall be sworn to inquire into and assess the actual damages[1] in each case separately, under such rules and instructions as shall be given it by the court. When the jury can not agree, it may be discharged, but the court may receive its verdict as to one or more of the claimants, and discharge it with respect to parties concerning whose claims it can not agree. In case of the discharge of the jury because of disagreement as to any or all of the claims, a new jury shall be summoned, and the same proceedings shall be had, with respect to the claims concerning which there was no verdict, as on the original trial. [R. S. Sec. 2318; 66 v. 246.]

(1) **Measure of damages.**—For full discussion of character and measure of damages, see notes under section 3823, *ante*.

Sec. 3829. [Assessment after completion of improvement.][1] When the council determines to assess the damages after the completion of an improvement provided for by this chapter, for which a claim for damages has been filed as herein provided, the mayor or solicitor shall, within ten days after the completion of such improvement, make written application to the court of common pleas, or a judge thereof in vacation, or to the probate court of the county in which the corporation or the larger part thereof is situated, to summon a jury in the manner provided in this division for the appropriation of property, to assess the amount of damage in each particular case and such court or judge shall fix the time and place of inquiry, and the assessment of damages, in the manner hereinbefore provided. [R. S. Sec. 2321; 67 v. 82.]

(1) **City may be compelled by mandamus to take action to ascertain damages.** Orr v. Cincinnati, 17 N. P. (N. S.) 201.

Sec. 3830. [Time allowed before suit can be brought.] No person who claims damages, arising from any cause,[1] shall commence a suit therefor against the corporation until he files a claim for such damages with the clerk of the corporation, and sixty days elapse thereafter, to enable the corporation to take such steps as it deems proper to settle or adjust the claim,[2] but this provision shall not apply to an application for an injunction, or other proceeding to which it may be necessary for such applicant to resort in case of urgent necessity. [R. S. Sec. 2326; 66 v. 247.]

(1) **What claims included.**—This section applies only to such damages as will obviously result from a street improvement. It does not include damages for a nuisance created and maintained by the municipality; nor damages for personal injuries; and claims for such damages need not be filed. Ironton v. Wiehle, 78 O. S. 41; Warren v. Davis, 43 O. S. 447.

A claim for damages against a village and contractor for causing and permitting trees to be recklessly and unnecessarily mutilated in stringing electric wires for street lighting, need not be filed under this section. Village of Amelia v. Hicks, 28 O. C. A. 582; 7 Oh. App. 295.

The question of the failure of plaintiff to comply with this section must be raised at the outset of the trial. St. Bernard v. Goham, 31 O. C. A. 273.

Where no notice received, of resolution to improve, property owner is not barred from commencing a suit for damages. Jacobs v. Cincinnati, 2 N. P. 283.

This section relating to filing claims does not extinguish the cause of action, but is merely procedural and with design to give the city an opportunity to investigate or adjust the claim without cost. St. Bernard v. Goham, 10 Oh. App. 402.

(2) **Power to compromise** and adjust damage claims without judicial determination is clearly recognized in this section. Quinby v. Cleveland, 16 O. F. D. 583.

Sec. 3831. [Prosecution of error.] The provisions of this title for the appropriation of real estate shall apply to the municipal corporation, or the owners of any property who may desire to prosecute error as in other cases.[1] [96 v. 42, § 57.]

(1) **Review.**—See § 3695, *ante*, and notes thereunder.

Sec. 3832. [Costs of inquiry.] If the jury finds no damages, the costs of the inquiry shall be taxed against the claimant, and collected on execution. In other cases the costs shall be paid by the corporation. [96 v. 42, § 58.]

(1) **Old section** 2320 R. S., repealed.

(2) **On failure to pay award** or take possession within six months, the costs which must be paid to property owner, include attorney's fees. Toledo v. Jacobson, 11 C. C. 220.

Owner not allowed damages cannot enjoin improvement. He must seek his remedy by error proceedings. Frevert v. Finfrock, 31 O. S. 621.

Sec. 3833. [How contract to be let.][1] The contract for any such improvement shall be let by the director of public service, in the same manner as other contracts, and in case all bids be rejected such director in cities and the council in villages may order a readvertisement for bids.[2] [96 v. 42, § 59.]

(1) **Old section.**—See old § 2303 R. S., repealed, for former provision as to contracts for improvements.

(2) **Advertisement for bids.**—An advertisement for bids which gave no information about the work except by referring to plans and specifications, which were not made until within less than time required for advertising before making bids, was held not valid. Steese v. Oviatt, 24 O. S. 248, 252.

The requirement of proper advertisement is designed to protect the taxpayers and is peremptory and without it contract and assessment are invalid. Upington v. Oviatt, 24 O. S. 232.

As to what defects in advertising are covered by a curative act curing technical irregularities, see Wilder v. Cincinnati, 26 O. S. 284, 285; Cincinnati v. Goodman, 5 Rec. 153; Burgett v. Norris, 25 O. S. 308; Taylor v. Wapakoneta, 26 C. C. 285.

Forms.—For forms of advertisement, bid, etc., in letting of contracts, see §§ 4328 *et seq.* and notes thereto.

Procedure.—See further § 4403.

Sec. 3834. [When certain special assessments deemed valid and binding.] When special assessments are made upon property for the construction of an improvement, and several kinds of material have been named in the ordinance, or ordinances, providing therefor, and on which bids have been received for the construction of such improvements with any or all of such materials, such assessments shall be valid and binding assessments upon the property so assessed. In the construction of sewers, excepting main or district sewers,[1] notice of the passage of the resolution therefor shall be made in the manner hereinbefore provided. [97 v. 123, § 60.]

(1) **Validity.**—This section does not violate any constitutional provision by dispensing with the requirement for personal notice to

resident owners as a prerequisite to making an assessment on their property for the cost of constructing a main or district sewer, as no personal liability for the assessment attaches to the owners, and in such case a notice given by publication is sufficient. Thatcher v. Toledo, 22 C. C. (N. S.) 193; 2 Oh. App. 357.

Sec. 3835. [Council not to proceed with improvement without concurrence of three-fourths; exception.][1] No public improvement, the cost or part of cost of which is to be specially assessed on the owners of property, shall be made without the concurrence of three-fourths of the members elected to council, unless the owners of a majority of the foot frontage to be assessed, petition in writing therefor, in which event the council, a majority of the members elected thereto concurring, may proceed with the improvement in the manner herein provided.[2] [96 v. 42, § 61.]

(1) **Old section** 2267 R. S., (repealed.) § 2267, amended, 95 O. L. 35 (repealed.)

(2) **How majority determined.**—For cases as to determining the majority in petitions for highway improvements, see Burgett v. Norris, 25 O. S. 308; Campbell v. Park, 32 O. S. 544; Parker v. Burgett, 29 O. S. 513.

The owner of a corner lot signing for the full length of his sidewise frontage will not be counted for that frontage as against his copetitioners in determining the majority, although he himself may be estopped. Andrew v. Auditor, 5 N. P. 123.

A city cannot be counted as a petitioner because of the fact that an ordinance for the improvement has been passed. Tone v. Columbus, 1 C. C. 305.

Verbal declaration in favor of improvement will not be equivalent to signing petition. Tone v. Columbus, 1 C. C. 305.

Collateral attack.—The finding that the requisite number petitioned for the improvement is not conclusive of the fact. Corry v. Gaynor, 22 O. S. 584; Stephan v. Daniels, 27 O. S. 527; Hayes v. Jones, 27 O. S. 218; Lima v. McBride, 34 O. S. 338; Anderson v. Commissioners, 12 O. S. 635.

Names on separate papers.—Though the names are signed on separate papers, yet if together they constitute the requisite majority, the petition will be sufficient, Braden v. Commissioners, 31 O. S. 386; and petitioners for the same improvement signing on another paper but asking to be counted as petitioners will be so counted. Commissioners v. Young, 36 O. S. 288; where two petitions ask for practically the same improvement they will be counted together to make up the requisite number. Wamelink v. Cleveland, 40 O. S. 381; but those who signed the petition seeking a different kind of improvement, which has been abandoned, cannot be added to a new petition to make up the required majority, Makemson v. Kauffman, 35 O. S.

444; signers to a petition which was rejected because deemed informal, but where the names were not withdrawn or revoked, and the petition remained on file may be added to the signers on a second petition to make up the majority. Campbell v. Park, 32 O. S. 544.

Defect in petitions.—The fact that one of the petitions was not properly recorded or acted upon will not affect the question of determining the majority of signatures, Braden v. Commissioners, 31 O. S. 386; Campbell v. Park, 32 O. S. 544; nor will the fact that the petition has been addressed to the wrong board. It will be deemed addressed to the body in charge of such matters. Ryan v. Cincinnati, 21 B. 62.

Authority to sign.—General manager and secretary of a corporation in the absence of express authority appearing, are not authorized to sign such a petition, Minor v. Board, 20 C. C. 4; the school board may sign for property under its control, Becker v. Columbus, 18 C. C. 888; the signature of a widow ratified by all the children was held valid, Corry v. Cincinnati, 6 N. P. 325; one entitled to dower in the property, but signing before assignment of dower cannot be counted as signer, Corry v. Gaynor, 22 O. S. 584, 594; tenants in common signing are to be separately counted as owners in severalty, Makemson v. Kauffman. 35 O. S. 444; owners of undivided interest may be counted for their proportion although all owners did not sign, Tone v. Columbus, 1 C. C. 305, 308; lessee holding under perpetual lease with privilege of purchase may be counted as owner, Laird v. Cincinnati, 5 B. 903; Harman v. Columbus, 15 Dec. 509; Clemmer v. Cincinnati, 28 C. C. 89; 7 C. C. (N. S.) 31; so of an owner conveying the fee to secure a loan and having a lease back with privilege of purchase, *Ib.;* so of an agent signing his own name for his principal, Columbus v. Sohl, 44 O. S. 479; those signing because induced to do so by certain promises of others may be counted. Makemson v. Kauffman, 35 O. S. 444; life tenant may bind the property. Herman v. Columbus, 15 Dec. 509; 3 N. P. (N. S.) 216.

Time of ownership.—Only those signers can be counted who owned the property and signed before the ordinance was passed. Tone v. Columbus, 1 C. C. 305, 310; Herman v. Columbus, 15 Dec. 509; 3 N. P. (N. S.) 216.

Withdrawal. — Signers may withdraw their names at any time before the improvement is ordered. Hayes v. Jones, 27 O. S. 218; McGonnigle v. Arthur, 27 O. S. 251. But the withdrawal or remonstrance after a city has started with the work and has no longer authority to stop it, is not permissible. Columbus v. Slyh, 44 O. S. 484.

Where petitioner died before final order to make the improvement, this will not constitute a withdrawal unless his successor in title withdraws the same. Makemson v. Kauffman, 35 O. S. 444.

Change of plan.—Where an improvement is justified by petition only it will not be valid if the municipal authorities have changed the work from that petitioned for, such as lengthening or decreasing the part of the street which the petition sought to have improved. Minor v. Board, 20 C. C. 4.

A wholly different improvement from that ordered may be effected as well by substracting from as by adding to it, and stopping the work before completion would result in an improvement which would fail to accomplish the purpose intended by the improvement as asked for. Cincinnati v. Avenue Co., 26 O. S. 345.

Burden of proof.—The burden of proof is on those denying that a petition was properly signed and contained a majority. Tone v. Columbus, 1 C. C. 305; 39 O. S. 281.

Estoppel by signing petition.—Petitioners for an improvement would ordinarily be estopped from claiming that the assessment exceeded the benefits, or that the law under which the assessment was made was unconstitutional. Murphy v. Sims, 27 C. C. 825; 7 C. C. (N. S.) 193; see also Birdseye v. Clyde, 61 O. S. 27; but see Borger v. Columbus, 27 C. C. 812; 6 C. C. (N. S.) 401; Richter v. Norwood, 11 Dec. 801; Hildebrand v. Toledo, 27 C. C. 427; 6 C. C. (N. S.) 450; Shepard v. Barron, 14 O. F. D. 417.

The question whether such petitioners are estopped to dispute the validity of the proceeding depends generally upon the question of the construction of their petition. Hendrickson v. Toledo, 23 C. C. 256; 3 C. C. (N. S.) 355.

Where the owner of property abutting on a street in a village signs a petition, with others, to the council of such village, asking for the improvement of such street, under the provisions of Section 3836, General Code, he thereby waives the limitation of assessments for the method of assessment designated in said petition, not, however, in excess of the special benefits conferred on his property by the construction of such improvement. Winchell v. Dennison, 27 O. C. A. 284; 5 Oh. App. 103.

If the petition does not agree that the signers shall be assessed certain expenses that they might have a right to contest if they did not so agree, and if they are signing under the belief that council is to proceed under valid laws, they are not estopped to dispute the legality of the proceedings or to contest an invalid assessment. McGlynn v. Toledo, 22 C. C. 34, (aff'd, 47 B. 712.)

But where the property owners in a petition expressly agree that all the cost of the improvement may be assessed upon them they are estopped from denying the validity of the assessment even though the assessment is otherwise invalid as being, for example, for the cost of lands condemned. Hendrickson v. Toledo, 23 C. C. 256; 3 C. C. (N. S.) 355; Whipple v. Toledo, 7 C. C. (N. S.) 520; 29 C. C. 42.

When petitioners agreed to pay costs of improvement "less that portion of corner lots exempted by law," it was held petitioners could nevertheless be assessed the cost of improvement along entire length of corner lots. Steiner v. Lima, 8 N. P. (N. S.) 509.

No estoppel arises from signing petition, which is referred back to property owners to file a new petition, and signer does not join in new petition. Carlisle v. Cincinnati, 8 C. C. (N. S.) 46.

See further as to estoppel same subject under § 3836, *post.*

When petition not necessary.

—When the requisite three-fourths of council concur in the resolution, etc., the petition of abutting property owners is not necessary. Jessings v. Columbus, 1 C. C. 90.

Resolution awarding contract.

—Resolution awarding a contract for the improvement is not within the requirement as to vote of council given. Cincinnati v. Bickett, 26 O. S. 49; see also Cincinnati v. Avenue Co., 26 O. S. 345.

FORM OF PETITION BY MAJORITY OWNERS.

....., 19....

To the Council of the City [*or* Village] of..... State of Ohio:

We, the undersigned, owners of the number of feet of property set opposite our names below, the same being a majority of the foot frontage on.....street, between.....and.....(here insert termini of proposed improvement), hereby respectfully petition your honorable board to pass the necessary legislation therefor and to improve said street between the points aforesaid by (here describe character of improvement desired) and that so much of the entire cost and expense thereof as may be lawfully assessed upon the adjacent, contiguous or other specially benefited lots and lands, be assessed by a percentage of the tax value thereof [*or* "by the front foot," *or* "in proportion to the benefits that will result from said improvement"] upon the lots and lands bounding and abutting on said.....street between the points aforesaid, said assessments to be paid in.....annual installments or in cash, at the option of the owner of property assessed, in the manner provided by law for the levy and collection of assessments:

Owner.	No. of feet front.	Lot Number.

NOTE.—The petition may be made by the owners of a majority of the foot frontage of property in any territory or district that may be assessed for the improvement.

The petition need not propose any method of assessment, but it would seem that it may do so.

FORMS OF RESOLUTION AND ORDINANCES AFTER MAJORITY PETITION.

1.

RESOLUTION OF NECESSITY.

Resolution.

Declaring it necessary to improve.....street, between..... and....., by (here describe character of improvement petitioned for).

Whereas, the owners of a majority of the foot frontage of property on .....street, between.....and.....(here insert termini of proposed improvement), have petitioned in writing for the improvement of said street, between the points named, by (here describe character of improvement petitioned for), now therefore.

Be it resolved by the council of the city [*or* village] of..... State of Ohio, Sec. 1. That it is necessary to improve, etc., (from here follow form of resolution under § 3815, *ante*, making method of assessment conform to that petitioned for, if any method is requested in petition.)

2.

ORDINANCE TO PROCEED WITH IMPROVEMENT.

Ordinance No.....

Determining to proceed with the improvement of.....street, from .....to....., by (here state nature of improvement).

Be it ordained by the council of the city [*or* village] of..... State of Ohio:

Sec. 1. That it is hereby determined to proceed with the improvement of.....street, from.....to....., by (here insert nature of improvement and character of materials to be used) in accordance with a resolution passed on the.....day of....., 19....., and the petition of property owners described in said resolution, and in accordance with the plans, specifications, etc., (from here follow form of ordinance to proceed under § 3825, *ante*, making method of assessment conform to that, if any, petitioned for).

3.

ASSESSING ORDINANCE.

(Follow form given under § 3825, making method of assessment conform as above.)

Sec. 3836. [Improvement on petition of owners of abutting property.][1] When a petition subscribed by three-fourths in interest of the owners of property abutting upon a street or highway of any description between designated points, in a municipal corporation, is regularly presented to the council

for that purpose, the entire cost of any improvement of such street or highway, without reference to the value of the lands of those who subscribed such petition, may be assessed and collected in equal annual installments, proportioned to the whole assessment, in a manner to be indicated in the petition, or if not so indicated, then in the manner which may be fixed by the council. The interest on any bonds issued by the corporation, together with the annual installments herein provided for, and the costs of such proceedings and assessments, shall be assessed upon the property so improved. When the lot or land of one who did not subscribe the petition is assessed, such assessment shall not exceed thirty-three and one-third per cent. of the actual value of his lot or land after improvement is made. The guardian of infants or insane persons may sign such petition on behalf of their wards only when expressly authorized by the probate court on good cause shown.[2] [107 v. 180; 96 v. 43, § 62.]

(1) **Old sections** 2272 and 2305 R. S., repealed.

(2) **Three-fourths how determined.**—Three-fourths in interest is determined by the abutting feet and not by the feet assessable. Mocker v. Cincinnati, 5 N. P. 242. See also Andrew v. Auditor, 5 N. P. 123.

Separate petitions. — When there are separate petitions asking for practically the same improvement they may be counted together to make the required three-fourths. Wamelink v. Cleveland, 40 O. S. 381, 386. As to what is practically the same improvement, see Wamelink v. Cleveland, 40 O. S. 381.

Conditional signing.—As to effect of signature made on condition that another should pay the assessment and the condition not being fulfilled, see Mills v. Norwood, 38 B. 249.

The fact that a petition by three-fourths of property owners was endorsed "filed until signers agree to pay any deficiency" will not prevent its binding the signers. Bush v. Cincinnati, 18 C. C. 605.

Authority to sign.—The lessee of a perpetual lease may sign and bind his property to an unlimited assessment. St. Bernard v. Kemper, 60 O. S. 244. So may a trustee with power to dispose of property. Andrew v. Auditor, 5 N. P. 123. But a surviving partner may not sign such a petition. Andrew v. Auditor. *Ib.* Nor general manager and secretary of a corporation without express authority. Minor v. Board, 20 C. C. 4. See further, notes under this reading § 3835, *ante.*

Withdrawal of names.—See note this heading under § 3835, *ante.*

When less than three-fourths sign.—Generally. — A petition signed by less than three-fourths in interest not having been acted upon was held not to be good under a

subsequent change of law by which a less number of signers was made sufficient. Hays v. Cincinnati, 62 O. S. 116.

Where a petition is signed by less than three-fourths and the signers guarantee the city against deficiency in collection from nonsigners such a petition is conditioned on three-fourths signing, and signers are not to be subjected to the extra liability if improvement is made without the necessary signatures. Goodall v. City, 5 N. P. 428; Whipple v. Toledo, 7 C. C. (N. S.) 520.

The fact that the petition was not signed by the requisite three-fourths will not give one that did sign the right to enjoin the assessment or obtain damages. Farrell v. Cincinnati, 12 C. D. 724.

Estoppel to deny frontage.—Petitioner stating in the petition the number of feet front of his property, is estopped after work is done to claim that a less number of feet front is assessable. Cincinnati v. Manss, 54 O. S. 257; Carson v. Delhi, 12 C. D. 723.

So a petitioner owning a corner lot and signing for the frontage on the lengthwise side is estopped to resist assessment for the number of feet on that side. Doppes v. Cincinnati, 16 C. C. 183; Frampton v. Sims, 1 N. P. (N. S.) 355; 14 Dec. 271.

But such owner is not estopped to claim to be assessed only for the narrow frontage if he did not state the length of the lot in signing the petition, especially where the city had examined the frontage. Gibson v. Cincinnati, 9 C. C. 243; Baker v. Schott, 10 C. C. 81.

An owner is not estopped to deny the frontage stated in his petition if the petition was not signed by the requisite three-fourths. Baker v. Schott, 10 C. C. 81; and such owner is not estopped, if the petition was not necessary to enable the municipality to improve. Edwards v. Columbus, 7 N. P. 614.

Estoppel to claim limitation on amount.—Where a petition was presented asking that the entire cost be assessed on abutting property, but was not signed by the requisite number, it was held that the signers could be assessed only up to the limitation allowed by the general law, and were not estopped to contest assessment of entire cost. Hays v. Cincinnati, 62 O. S. 116. See further Storer v. Cincinnati, 4 C. C. 279; Nevin v. Dayton, 4 N. P. 203.

Where petitioners agree to pay the entire cost irrespective of the number of signers to the petition they are estopped to assert the statutory limitation on assessments. Thornton v. Cincinnati, 4 C. C. (N. S.) 31.

Estoppel by signing petition. See Roebling v. Cincinnati, 102 O. S. 460.

As to estoppel where signers for such a petition had notice that council intended to exceed the limit and made no objection to the proceeding and permitted council to go on and contract for the improvement, see Storer v. Cincinnati, 4 C. C. 279. See further Frey v. Findlay, 7 C. C. 311, 326. For other cases on estoppel, see Locke v. Cincinnati, 7 N. P. 318; Kemper v. St. Bernard, 14 C. C. 134; Punshon v. Cincinnati, 27 B. 155.

Where petitioners agreed under former statutes to assessment on abutting property to pay costs of appropriating property for a street,

they were held not estopped to contest an assessment of the entire cost on the signers, but were liable only for their fair share, considering all the property abutting upon the part of the street improved. Whipple v. Toledo, 7 C. C. (N. S.) 520; 29 C. C. 42.

Mortgagee, who becomes owner by foreclosure, is estopped where mortgagor joined in petition. Cincinnati, B. D. Co. v. Cincinnati, 30 C. C. 501; 10 C. C. (N. S.) 31.

Irregularity in proceedings.—Persons petitioning for improvement may be estopped to contest assessment on ground that council did not proceed in strict accordance with statutory requirements. Johnson v. Cleveland, 18 Dec. 363; 6 N. P. (N. S.) 183.

Jurisdiction acquired. — The city acquires jurisdiction when the petition is presented, and if a signer is then owner, the fact that he afterwards conveys the property is not material. Laird v. Cincinnati, 5 B. 903. But see Herman v. Columbus, 15 Dec. 509.

A petition becomes absolute when it is acted upon by the municipality. Andrew v. Auditor, 5 N. P. 123.

A petition properly signed, filed and attached to another petition will be deemed to have come to the knowledge of council. Squier v. Cincinnati, 5 C. C. 400.

Council does not lose jurisdiction over petition by reason of delay of two years in acting thereon. Whipple v. Toledo, 7 C. C. (N. S.) 520.

Change of plan.—In making an improvement petitioned for, council cannot improve more or less of the street than was asked to be improved, or make a wholly different improvement from that requested. Minor v. Board, 20 C. C. 4. See further, Cincinnati v. Avenue Co., 26 O. S. 345; McGlynn v. Toledo, 22 C. C. 34 (aff'd, 47 B. 712); Deuyer v. Shonert, 1 C. C. 73.

But additional incidental work, such as a tile drain, deemed necessary, may be put in, though not petitioned for. Burke v. Wapakoneta, 4 C. C. (N. S.) 482; Taylor v. Wapakoneta, 26 C. C. 285.

But where petitioners designated a particular material, such as brick, it was held council did not have to provide for such material, but might leave to the department of public service the discretion to choose any one of several kinds of material, after receiving bids therefor. Scott v. Hamilton, 12 C. C. (N. S.) 493; 29 C. C. 652.

Where manner of improvement was that petitioned for, petitioners cannot enjoin assessment on ground that improvement was improperly constructed. Breuer v. Gibson, 29 C. C. 266; 14 C. C. (N. S.) 48.

As to case where petition does not specify manner of assessment or plan of proceeding, see Whipple v. Toledo, 7 C. C. (N. S.) 520.

Assessment cannot exceed value of property.—Where owner signs a three-fourths petition he may be assessed to the full value of the land abutting the improvement, but municipality cannot have a personal judgment for remainder of assessment not satisfied. Laird v. Cincinnati, 5 B. 903.

FORM OF PETITION BY OWNERS OF THREE-FOURTHS IN INTEREST.

To the Council of the City [*or* Village] of....., State of Ohio:

We, the undersigned, being the owners of the number of feet of property set opposite our names below, and being three-fourths or more in interest of the owners of property abutting upon.....street, between.....and....., (here state termini of proposed improvement) respectfully petition your honorable board for the improvement of said street between the points aforesaid by (here describe character of improvement desired), and that the entire cost of said improvement, except only such portion thereof as is by law chargeable against the municipality, be assessed by a percentage of the tax value thereof [*or* "by the foot frontage," *or*, "in proportion to the benefits that will result from said improvement,"] upon the lots and lands bounding and abutting upon said.....street, between the points aforesaid.

And the undersigned and each of them consent and request that said assessments be levied and collected without reference to the value of the property of subscribers hereto, and waive all benefits of the statute limiting assessments to 33 1-3 per cent. of the actual value of property assessed; said assessments to be payable in.....annual installment, proportioned to the whole assessment, or in cash, at the option of the owner of property assessed, in the manner provided by law for the levy and collection of assessments:

Owner.	Number of feet front.	Lot Number.

NOTE.—Although upon petition under § 3836, council is authorized to assess the "entire cost" upon the property of those so petitioning, yet, in view of the words which follow, it appears that the object of the petition is to exclude the petitioners from the benefit of the 33 1-3 per cent. limitation, and not to avoid payment by the municipality of its share under § 3820, or of the cost of property condemned or of damages to property abutting, (when the improvement involves these). But the petition for the improvement may be so drawn as to estop the petitioners from complaining of an assessment which includes even the cost of appropriating property as well as damages awarded to abutting owners. See Note 1 to § 3896 *post*, notes on estoppel by petition under § 3835, *ante*, and Hendrickson v. Toledo, 3 C. C. (N. S.) 355; 23 C. C. 256.

FORMS OF RESOLUTION AND ORDINANCES AFTER THREE-FOURTHS PETITION.

(These may be adapted from forms given where the owners of a majority of the foot frontage to be assessed petition for the improvement, under § 3835, *ante.*)

Sec. 3837. [Assessment on property of the corporation.][1] When the whole or any portion of an improvement authorized by this title passes by or through a public wharf, market space, park, cemetery, structure for the fire department, water-works, school building, infirmary, market building, workhouse, hospital, house of refuge, gas works, public prison, or any other public structure or public grounds within and belonging to the corporation, the council may authorize the proper proportion of the estimated costs and expenses of the improvement to be certified by the auditor or clerk of the corporation to the county auditor, and entered upon the tax list of all taxable real and personal property in the corporation, and they shall be collected as other taxes.[2] [96 v. 43, § 63.].

(1) **Old section** 2276 R. S., repealed.

(2) **School property** belonging to the board of education, is not liable for street or sidewalk assessments. Toledo v. Board, 48 O. S. 83; Board v. Toledo, 48 O. S. 87; Board v. Auditor, 35 B. 294.

Lien of assessment not defeated by subsequent purchase by Board of Education for school purposes. Board of Education v. Bowland, 15 Dec. 334; 3 N. P. (N. S.) 122.

Assessments on municipal property.—Subject discussed under former laws in Dick v. Toledo, 11 C. C. 349.

This section applies only when the improvement either passes through the public ground or the public ground abuts upon the improvement, and does not require deduction of assessment because of the proximity of a public park not abutting upon the improvement. Close v. Parker, 30 C. C. 384; 11 C. C. (N. S.) 85 (aff'd, 79 O. S. 444).

STREET IMPROVEMENTS.

Sec. 3838. [Expense of changing established grades; how paid.][1] When a street, alley, public highway, wharf, or landing, within the corporation is graded or pavements are constructed in conformity to grades established by the authorities of the corporation, and the expense is assessed on the lots or lands benefited, the owners shall not be subject to any special assessment occasioned by any subsequent change of grade in

such pavement, sidewalk, street, alley, public highway, wharf, or landing, unless a petition[2] for such change is subscribed by a majority of the owners of such lots or lands. The expense of improvements occasioned by such change of grade, not so petitioned for, shall be chargeable to the general fund of the corporation.[3] [96 v. 43, § 64.]

(1) **Old section** 2301 R. S.

(2) **Petition.**—For cases relating to signing of petition, etc., see notes to §§ 3835 and 3836, *ante*.

Where change of grade is petitioned for the cost of lowering water pipes may be included in the assessment. See Op. Atty. Gen. (1920), p. 869.

(3) **Damages awarded abutters** cannot be included in the assessment on abutting property for change of grade. McGlynn v. Toledo, 22 C. C. 34, (aff'd, 47 B. 712). But if owners petitioning ask that *all* expenses be assessed on them whether they will be estopped to dispute assessment to pay such damages, see Hendrickson v. Toledo, 23 C. C. 256; 3 C. C. (N. S.) 355.

Sec. 3839. [Sprinkling, sweeping and cleaning streets.][1] Municipal corporations may sprinkle with water, sweep, and clean any streets or alleys, or parts thereof. All such work may be done by contract or by and through the officers of the corporation. Before such work shall be done by or through such officers, the council thereof shall pass an ordinance authorizing the officer or officers having the care of streets and alleys to purchase or rent the necessary tools, machinery and appliances, to employ the necessary labor, and to do such work.[2] [98 v. 78, § 65; 97 v. 163; 96 v. 43, § 65.]

(1) **Old sections.**—For former provisions see §§ 2307 to 2312 R. S., inclusive (repealed).

Other provisions—By other provisions, power is given cities and villages through council, director of public service and street commissioner to improve, light, clean and sprinkle streets, make contracts therefor and pay the expense by levy of taxes. (See §§ 3714, 4325, 4364, 3784).

Special provision is made also (§§ 3745-3748) for sprinkling streets upon petition of electors.

Under § 3812 the cost of any of these things, including the cost of planting shade trees, may be paid for by special assessment.

(2) **When work done by municipality.**—Specifications need not be prepared, as in case where work is let by contract. Andrix v. Columbus, 15 Dec. 672; 3 N. P. (N. S.) 368; (51 B. 227).

May not purchase street flusher out of current appropriation. Op. Atty. Gen. (1918), p. 1320.

Sec. 3840. [Commissioners of streets and alleys.] In cities, the director of public service may appoint two electors, owners of real estate abutting on each street or alley, or part thereof, who shall act as commissioners for such street or alley, or part thereof, and who shall serve without compensation. The commissioners shall be appointed for the term of five years, or until their successors are appointed, and any vacancy may be filled by the director by the appointment of a qualified person, [98 v. 78, § 65; 97 v. 163; 96 v. 43, § 65.]

Sec. 3841. [Duties of commissioners.] Within ten days after such appointment, and in each year thereafter at such time as the director of public service requires, the commissioners shall file with him a written statement of the sprinkling with water, sweeping, or cleaning, that in their opinion will be necessary to be done upon such street or alley, or part thereof, within any period between the first day of January and the thirty-first day of December of the year for which such statement is filed. From the statements so filed and from such other information as may come to his knowledge, or upon failure of the commissioners to file such statement, the director of public service may determine and recommend to the council, as provided in the next section, what work is necessary to be done, upon such streets or alleys, or parts thereof, within any such period. [98 v. 78, § 65; 97 v. 163; 96 v. 43, § 65.]

Sec. 3842. [Ordinance for sprinkling, sweeping and cleaning.] The council of a city upon the recommendation of the director of public service, or the council of a village, may provide by ordinance for sprinkling with water, sweeping, or cleaning of such streets or alleys, or parts thereof. For the purpose of carrying out the provisions of this section and of the three next preceding sections, one ordinance may be made to include one or more streets or alleys, or parts thereof, and one or more of the powers granted by such sections. [98 v. 79, § 66; 97 v. 163; 96 v. 44, § 66.]

Sec. 3842-1. [Street lighting may be assessed upon abutting property; procedure.][1] When a petition signed by three-fourths in interest of the owners of property abutting upon

any street, avenue or other public place or any part thereof, is presented to the council or other legislative body of any municipality for the improvement thereof by an improved system of lighting commonly known as boulevard or white way lighting, to be paid for in whole or in part by special assessments upon the adjacent, abutting or specially benefited property, the legislative authority of such municipality may provide by ordinance for such system of lighting, and in a separate ordinance for the levy and collection of special assessments therefor. For the purpose of carrying out the provisions of this section and of the two next succeeding sections, one ordinance providing for such system of lighting and one ordinance providing for the assessments may be made to include one or more streets, avenues or public places or parts thereof. [108 v. 1224.]

(1) **Ornamental lighting.**—§§ 3812 and 3842-1 et seq., General Code, so far as they relate to the subject of street lighting improvement, are in pari materia and are not irreconcilable; they furnish concurrent methods for initiating such improvement, and, since there was no express repeal of the former statute in that respect, there was no repeal thereof by implication. Leipsic v. Wagner, 105 O. S. 466.

Sec. 3842-2. [Notice of passage of ordinance.] Notice of the passage of any such ordinance providing for such system of lighting shall be given the owners of lots and lands to be assessed for the payment of the cost and expenses of such system of lighting, by publishing the ordinance in the manner provided for the publication of ordinances by section 4228 of the General Code, and no other or further notice shall be required. [108 v. 1224, 1225.]

Sec. 3842-3. [Percentage of cost fixed by ordinance; contract; installments; collection; issue of bonds or certificates of indebtedness.] The council shall, in the ordinance providing for such system of lighting, determine and fix the percentage of the whole cost and expense to be assessed upon the abutting, adjacent or other specially benefited property and to be paid by the owners thereof, and the remaining percentage shall be paid by the municipality, and such portion of the cost to be specially assessed, whether such system of lighting be done by contract or through the officers of the

municipality, shall be by ordinance assessed upon the abutting or other specially benefited property by one of the methods provided for in the first section of this chapter. Any such ordinance providing for such system of lighting shall determine the general nature of the lighting and shall approve the plans, specifications and estimates therefor, which shall be on file when the ordinance is passed, in the case of a city with the clerk of its municipality and in the case of a village with the village clerk, and said ordinance shall determine the method by which the assessments shall be made and in how many installments they shall be paid. The assessments so levied may be collected in one or more installments in the manner provided in the case of assessments for street improvements, and the legislatve body may levy and provide for the collection of such assessments at any time before or after the completion of such system of lighting. Any such assessing ordinance may be made to include the property specially benefited by such system of lighting and may include property abutting upon any one or more streets, avenues or public places or parts thereof lighted. Bonds, notes or certificates of indebtedness may be issued and sold before or after such system of lighting is done in anticipation of the levy or collection of such assessments, as may be authorized and provided for in the assessing ordinance or in a separate ordinance, but no publication of such assessing ordinance or of the ordinance authorizing and providing for such notes, bonds or certificates of indebtedness shall in any case be required. If any person objects to an assessment, he shall file his objections in writing with the clerk within two weeks after the date of taking effect of such assessing ordinance, and thereupon the legislative body shall appoint three disinterested freeholders of the corporation to act as an equalizing board. On the day appointed by the legislative body for that purpose, the equalizing board, after taking an oath before the proper officials to honestly and impartially discharge their duties, shall hear and determine all objections to the assessments and shall equalize as they think proper, which equalized assessments they shall report to the legislative body which may confirm or set the same aside and cause new assessments

to be made, and appoint a new equalizing board possessing the same qualifications, which shall proceed in the same manner above provided.

[Assessment a lien.] When the assessments are confirmed by the legislative body, they shall be complete and final and shall be recorded in the office of the clerk. Every assessment shall be a lien on the lands charged from the time the legislative body determines the amounts assessed against each parcel of land; and the clerk shall certify such assessments to the county auditor to be placed upon the duplicate for collection by the treasurer as and in addition to other taxes. [108 v. 1224, 1225.]

Sec. 3843. [Notice to owners of lots and lands.] Notice of the passage of such ordinance[1] shall be given the owners of lots and lands to be assessed for the payment of the cost and expense of the work provided for therein, by publishing the ordinance at least once in a newspaper published and of general circulation within the corporation and no other or further notice shall be required. [98 v. 79, § 66; 97 v. 163.]

(1) This and the three following sections refer to proceedings for sprinkling and cleaning, as provided in § 3842.

Sec. 3844. [Assessment of costs and collection thereof.] The entire cost and expense connected with any such work in any year, except as herein provided, whether done by contract, or by and through the officers of the corporation, may, by ordinance, be assessed upon the abutting or other specially benefited property, and by any one of the methods mentioned in the first section of this chapter. The assessments so levied may be collected in one installment in the manner provided in the case of assessments for street improvements, but if it deems expedient the council may levy and collect such assessments, at any time, before or after the completion of the work. Such assessing ordinance may be made to include the property abutting upon any one or more streets or alleys, or parts thereof, and one or more of the powers granted in the preceding five sections. [98 v. 79, § 67; 97 v. 164; 96 v. 44, § 67.]

Sec. 3845. [Bonds may be issued and sold.][1] Bonds, notes or certificates of indebtedness may be issued and sold before or after doing such work in anticipation of the levy or collection of such assessments, and may be authorized and provided for in the assessing ordinance, or in a separate ordinance, but no publication of such assessing ordinance or of the ordinance authorizing and providing for such notes, bonds and certificates of indebtedness shall in any case be required. [98 v. 79, § 67.]

(1) Cannot issue bonds to purchase a street flusher. Op. Atty. Gen. (1918), p. 1320.

Bonds issued under this section are not subject to the requirements of § § 2295-9 and 2295-12. Op. Atty. Gen. (1922), p. 217.

Sec. 3846. [City may pay part of cost.] No part of the cost and expense connected with such work shall be paid by the municipal corporation, except when the whole or any portion of a street or alley upon which work shall be done passes by or through a public wharf, market space, park, cemetery, structure for the fire department, waterworks, school building, infirmary, market building, workhouse, hospital, house of refuge, gas works, public prison, or any other public structure or public grounds within and belonging to the corporation, and, subject to the limitation hereinbefore imposed in this chapter,[1] the council may authorize the proper proportion of the estimated cost and expense of such work to be certified by the clerk of the corporation to the county auditor and entered upon the tax list of all taxable real and personal property in the corporation, and they shall be collected as, and in addition to, all other taxes. The right of the corporation to levy such assessments shall not be affected by the tax valuation of the property to be assessed or by the amount of assessments theretofore levied upon such property. [98 v. 79, § 67.]

(1) **Limited to benefits.** — In the case of sprinkling, cleaning and repairing streets, the work may not enhance the market value of the property, and yet there would be a benefit, within the meaning of the assessment laws, because its value for use by the owner would be enhanced. Andrix v. Columbus, 15 Dec. 673; 3 N. P. (N. S.) 368 (51 B. 227). See also Walsh v. Sims, 65 O. S. 211, 217.

Sec. 3847. [Appointment of board to report estimate of assessments.[1]] When it is determined to assess the whole or part of the cost of an improvement in proportion to the benefit which may result therefrom, as provided for herein, the council may appoint three disinterested freeholders of the corporation to report to it the estimated assessment of such cost on the lots and lands to be charged therewith, in proportion as nearly as may be, to the benefits which may result from the improvement to the several lots or parcels of land so assessed, a copy of which assessment shall be filed in the office of the clerk of the corporation for public inspection.[2] [96 v. 44, § 68.]

(1) **Old section** 2277 R. S., repealed.

Assessments by benefits.—The above section, together with §§ 3848, 3849 and 3850 following, and § 3895 under the sub-head *"Collection of Assessments,"* relate to assessments by benefits. See note under § 3895, *post*, as to application of that section to other assessments.

(2) **Necessity for board.**—Under old § 2277 R. S. it was held that, if council determines to assess the cost of an improvement, not only on such lots and lands as abut on the improvement, but on such adjacent and contiguous or other property designated therein as benefited, in proportion to benefits, the amount of the assessment on such property cannot be fixed by council by the front foot, but must be fixed and determined in the first instance by the board of freeholders. It was held that old § 2277 R. S. must be read in connection with old § 2264 R. S. (now § 3812 G. C.); Klein v. Cincinnati, 7 C. C. 266, (52 O. S. 650).

Apportionment.—Such part of the cost may be assessed as is equivalent to the special benefit, but it must not exceed the benefit. Chamberlain v. Cleveland, 34 O. S. 551.

The assessing committee need not determine the total excess of benefits over amount of assessment, before apportioning the assessment. It is sufficient if, in the case of each lot, the assessment does not exceed the benefit and the lot bears only its just proportion of the total assessment. Blair v. Cary, 24 C. C. 560; 2 C. C. (N. S.) 25.

Irregularities in the proceedings by which the amount to be assessed on each lot was obtained will not invalidate the assessment, if a just result was reached. The committee need not proceed in any prescribed manner. *Ib.*

A street assessment levied on the benefit plan will be presumed to have been correctly levied where the report of the estimating board was confirmed without exception; and abutting owners seeking a reduction of the assessment as to their lots on the ground that it should have been laid by the front foot plan will not be heard. Funk v. Cincinnati, 21 N. P. (N. S.) 13.

The presumption that members of an estimating board did their duty

will not obtain as to duties not required of them, and it will not be presumed that they estimated and apportioned special benefits, but this must affirmatively appear of record. Hill v. Cleveland, 2 Clev. 385.

Review of proceedings of a board estimating assessments, see Cordes v. Brooks, 18 C. C. 801; Toledo v. Ford, 20 C. C. 290; Price v. Toledo, 25 C. C. 617; 4 C. C. (N. S.) 57; Benham v. Cincinnati, 26 C. C. 17.

Under former statutes.—Other cases, under former statutes on this subject, see Krumberg v. Cincinnati, 29 O. S. 69; Meissner v. Toledo, 31 O. S. 387; Glenn v. Waddel, 23 O. S. 605. And see Cincinnati v. Batsche, 52 O. S. 324.

Notice of assessment must be published. See § 3895, *post*, and note thereunder.

Office of city clerk. See § 4210 and note (3) thereunder.

ORDER OF PROCEDURE FOR ASSESSMENTS BY BENEFITS.

1. *Follow "order of procedure,"* given under § 3814, *ante*, from "1" to "10," inclusive.
2. *Resolution appointing estimating board.* (§ 3847.)
3. *Report of estimating board.* (§3847.)
4. *Notice of assessment* made by estimating board, to be published. (§ 3895.)
5. *Objections* filed by property owners assessed. (§ 3848.)
6. *Resolution appointing equalizing board* and fixing a day for hearing objections, if any objections have been duly filed. (§§ 3848, 3849, 3850.)
7. *Hearing of objections,* if any duly filed. (§ 3850.)
8. *Report of equalizing board.* (§ 3850.)
9. *Assessing ordinance,* confirming report of equalizing board, or adopting assessment made by estimating board (in case no objections thereto have been filed) and otherwise in same form as assessing ordinance under § 3825, *ante.*

10. *Ordinance to issue bonds* in anticipation of collection of assessments. (§ 3914.) No publication of this ordinance required. (§ 3914.) For form of ordinance see § 3825. Form of bonds, see § 3939.

FORM OF RESOLUTION APPOINTING ESTIMATING BOARD.

Resolution.

Appointing board to report estimated assessment to pay the cost and expenses of improving.....

Whereas, it has been determined by council to assess the whole cost less 1-50 thereof and the cost of intersections [*or* ".....per cent. of the whole cost, less the cost of intersections"] of the improvement of .....street, from..... to..... in proportion to the benefits which may result from said improvement.

Now therefore:

Be it resolved by the council of the city [*or* village] of ....., State of Ohio, that..... .....and....., three disinter-

ested freeholders of said city [*or* village] be and they are hereby appointed a board to estimate the assessment of such cost on the lots and lands to be charged therewith as set forth in an ordinance No.....to improve said street, passed....., 19...., in proportion as nearly as may be to the benefits which may result from the improvement to the several lots or parcels of land so assessed and to report to this council the said estimated assessment.

Passed....., 19....

Attest: .....

..... President of Council.

Clerk.

FORM OF REPORT OF ESTIMATING BOARD.

....., 19....

To the Council of the City [*or* Village] of.....

The undersigned, an estimating board, appointed and acting in pursuance of your resolution, passed on the.....day of....., 19...., respectfully report the following estimated assessment of the cost and expenses of improving..... ...street, from..... to....., upon the lots and lands to be assessed in accordance with Ordinance No. .....to improve said street, passed on the.....day of....., 19....:

Assessment.

Owner.	Description of Property.	Frontage and Depth.	Dollars.	Cents.

The above assessments are in proportion to the benefits which will result to such lots and lands from said improvement, and are limited as to each lot and parcel by the special benefit conferred thereon.

.....

.....

.....

Estimating Board.

(A copy of the above report must be filed in the office of the clerk of the city council or village clerk for public inspection.)

FORM OF NOTICE OF ASSESSMENT.

Legal Notice.

Notice is hereby given that the estimated assessment of the cost of improving.....street, from .....to....., by (here insert character of improvement), on the lots and lands benefited and to be charged therewith as set forth in a resolution No....., to improve said street, passed....., 19...., has been made and reported to council and said estimated assessment is now on file in the office of the clerk of council of the city [*or* village] of....., for the inspection and examination of all persons interested therein.

By order of the Council of the City [*or* Village] of.....

.....

...., 19.... Clerk.

Sec. 3848. [Equalizing board, where objections are filed.] If any person objects to an assessment, he shall file his objections, in writing, with the clerk, within two weeks after the expiration of such notice,[1] and thereupon the council shall appoint three disinterested freeholders of the corporation to act as an equalizing board. [R. S. Sec. 2279; 66 v. 249.]

(1) **Notice.** — The notice here referred to is that provided in § 3895 G. C.

Failure to object.—Failure on the part of an owner of property to file objections to a proposed assessment for a street improvement under the benefit plan under the provisions of § 3848, does not bar him from bringing an action under § 12075 to enjoin the collection of such assessment, where the ground of the injunction is that no benefit whatever has been conferred by reason of the improvement upon the lands so assessed. Cormany v. Cincinnati, 26 C. C. (N. S.) 140; 7 Oh. App. 179; or where the provisions of the law relating to assessment in proportion to benefits have been clearly violated. Kelly v. Cincinnati, 28 O. C. A. 376; 6 Oh. App. 466.

FORM OF RESOLUTION APPOINTING EQUALIZING BOARD.

Be it resolved by the council of the city [*or* village] of..... State of Ohio, two-thirds of the members of council concurring,

That....., ...and....., three disinterested freeholders of said city [*or* village] be, and they are hereby appointed to act as an equalizing board to hear all objections to the estimated assessment heretofore reported to council by the estimating board appointed under a resolution passed on the.....day of.....,19...., of the cost of improving.....street, from.....to.....and to equalize the same as to them seems proper, in accordance with law.

Said board shall meet for the above purpose at.....(insert place) on the.....day of..... 19...., at....M., and upon the completion of such equalization shall report such equalized assessment to council.

Passed....., 19....

Attest:

.....

Clerk.

.....

President of Council.

Sec. 3849. [Appointment of equalizing board.] A concurrence of two-thirds of the members of the council shall be necessary to appoint the equalizing board and to confirm its assessment. [R. S. Sec. 2282; 66 v. 249.]

Sec. 3850. [Equalization of assessments.][1] On a day appointed by the council for that purpose, the equalization board, after taking an oath before the proper officers, to honestly and impartially discharge their duties, shall hear and determine all objections to the assessment, and shall equalize it, as they think proper, which equalized assessment they shall report to the council, which may confirm, or set it aside, and cause a new assessment to be made and appoint a new equalizing board possessing the same qualifications, which shall proceed in the manner above provided.[2] When the assessment is confirmed by the council it shall be complete and final, and shall be recorded in the office of the clerk of council. [96 v. 44, § 69.]

(1) **Old section** 2280 R. S., repealed.

(2) **Notice** of time of meeting of board or of filing report need not be given. Chamberlain v. Cleveland, 34 O. S. 551.

Power of board.—Board cannot add to or reduce total amount of assessment reported, except that it may add compensation for services of board. Chamberlain v. Cleveland, 34 O. S. 551. See also notes under § 3847, *ante.*

Sec. 3851. [Assessment, lien on land charged.] Every such assessment shall be a lien on the lands charged from the time the council determines the amount assessed against each parcel of land.[1] [R. S. Sec. 2313; 66 v. 221.]

(1) **Application of section.**—While the location of the above section indicates that it refers to assessments by benefits, it is to be noted that the original section 2313 R. S., of which the above section is a revision, related only to assessments for the sprinkling of streets.

It followed section 2312 R S., providing for assessments for the sprinkling of streets and the headnote of section 2313 was: "Assessments for sprinkling, etc., lien on land charged." Section 2313 R. S. was not re-enacted in the Municipal Code of 1902 nor was it expressly repealed.

Sec. 3852. [Expense of collecting to be added to assessment.][1] In placing such assessment on the tax-list, the county auditor is required to add to each assessment such per cent as he deems necessary to defray the expenses of collecting it. [R. S. Sec. 2314; 66 v. 222.]

(1) **Application of section.**— Section 2314 R. S., of which the above section is a revision, related to assessments for the sprinkling of streets. It followed section 2313 R. S. See note to section 3851, *ante*.

Sec. 3852-1. [Special assessments for boulevards, parkways, etc.] Each municipal corporation shall have special power to levy and collect special assessments for the following improvements, to be exercised in the manner provided by law. Any municipal corporation may assess upon the abutting, adjacent and contiguous or other specially benefited lots or lands in the corporation, any part not to exceed fifty per cent of the entire cost of an expense connected with the constructing or improving of any boulevard, parkway or park entrance by any of the following methods:

1. By a percentage of the tax value of the property assessed.

2. In proportion to the benefits which may result from the improvement.

3. By the foot front of the property bounding and abutting on the improvement. [106 v. 308.]

Sec. 3852-2. [Proceedings for levying and collecting.] Proceedings for the levying and collecting of any such special assessments, including the issuance and sale of bonds in anticipation of the collection of such special assessment, shall be as provided by law for the levy and collection of special assessments and the issuance and sale of bonds in anticipation of the collection of such assessments, for street improvements; provided that, in municipal corporations which may have established a board of park commissioners, resolutions

of necessity, and determinations to proceed with the improvements, the making of the assessments and letting of contracts, the appointment of estimating and equalizing boards in cases of assessments in proportion to benefits, the authorizing for the issuance and sale of bonds in anticipation of the levy or collection of such assessments and all other steps and proceedings preceding or relating to the levy of such assessments shall be adopted, passed, made, taken or performed by such board of park commissioners, and such boards are hereby granted full power to adopt, pass, make, take and perform all such resolutions, steps and proceedings, and in such municipal corporations, the plans, specifications and estimates shall, at the time of the passage of the resolution of necessity, be on file in the office of said board and notice of such resolution shall be served by said board on any person or persons designated by it for the purpose and objections to assessments and property-owners' claims for damages shall be filed with the clerk or secretary of said board and said board shall determine whether claims for damages shall be judicially inquired into before commencement or after completion of the improvement, and, in general, all steps required by law to be taken by or with the clerk of council shall, as regards said improvement in said municipal corporations, be taken by or with the clerk or secretary of such board of park commissioners. [106 v. 308.]

Sec. 3852-3. [Limitations; credit of collections.] Assessments for the above purpose shall be subject to the limitations provided by law for assessments for street and other improvements. All collections made pursuant to this act, shall be credited by the city auditor to the respective improvements. [106 v. 308.]

Sec. 3852-4. [Improvement of park boulevards lying within or adjacent to municipality; apportionment of costs and expenses; issue of bonds.] Whenever a park boulevard extends from a municipality to which it belongs into or adjacent to one or more other municipalities and it is desired by the several municipalities so situated to improve said boulevard by grading, draining, curbing, paving or repaving, surfacing or resurfacing, or otherwise improving said boulevard, it shall

be lawful for the several municipalities so interested in said boulevard to apportion the cost of such improvement between the municipalities so interested in such manner as the councils of the several municipalities may agree upon, and the amount so agreed upon to be borne by each municipality may be defrayed out of the general fund of such municipalities, or by the issue of bonds, provided, however, that where such boulevard adjoins private property abutting thereon, and benefited thereby such private property may be assessed a portion of the cost of such improvement by the municipality in which such property is situated in the same manner and to the same extent and subject to the same limitations as is provided for the levying and collection of special assessments for street improvements. [109 v. 335.]

Sec. 3852-5. [Bond issue in anticipation of assessments.] In the event that a part of the cost of such improvement is to be specially assessed upon the abutting property the municipality in which such property is situated may issue bonds in anticipation of the collection of such assessments in the same manner in which bonds are authorized to be issued and sold in anticipation of the collection of special assessments for the improvement of streets and highways. [109 v. 335.]

Sec. 3852-6. [Contract and supervision of work.] That the amount so agreed to be paid by the municipalities in which or adjacent to which said park boulevard may be situated shall be paid to the treasurer of the municipality owning such park boulevard and the contract shall be let by and the work shall be done under the supervision of said municipality so owning said park boulevard in the same manner as is provided by law for the letting and execution of contracts for the improvement of streets in such municipality. [109 v. 335.]

SIDEWALKS AND GUTTERS.

Sec. 3853. [Construction and care of sidewalks.][1] The council of municipal corporations may provide by ordinance[2] for the construction and repair of necessary sidewalks, curbing, or gutters, or parts thereof, within the limits of the corporation, and may require by imposition of suitable penalties or other-

wise, the owners and occupants of abutting lots and lands to keep the sidewalks, curbing and gutters in repair, free from snow or any nuisance.[3] [97 v. 123, § 70; 96 v. 45, § 70.]

(1) **Old section** 2328 R. S., repealed.

(2) **Sidewalk ordinance** is of general nature and must be read on three different days. See note (1) under § 4224, *post*.

Council having passed a general ordinance for improvement of sidewalks, no special ordinance for any particular sidewalk is required, in order to assess abutting owner. Westenhaver v. Hoytsville, 28 C. C. 357.

(3) **Validity.**—It is not unconstitutional to impose upon lot owners the duty of making sidewalks. Bonsall v. Lebanon, 19 O. 418.

Scope of power.—Council may prescribe by resolution that portion of a street which shall be used as a sidewalk. Cox v. Lancaster, 24 C. C. 265; 2 C. C. (N. S.) 218 (aff'd, 69 O. S. 576); and council may narrow sidewalks already constructed without compensation to abutting owner. Anderson v. Columbus, 1 N. P. (N. S.) 541; 14 Dec. 180; but where an abutting owner has constructed a sidewalk in conformity with an established grade, council cannot compel him to remove the sidewalk and construct on a higher level to conform to existing sidewalks constructed by other owners. McGuire v. East Cleveland, 1 C. C. (N. S.) 435; 25 C. C. 497.

As to reasonableness of ordinance requiring sidewalk on one side only and assessing owners on both sides, see Mills v. Norwood, 6 C. C. 305, and § 3867, *post*.

It is an abuse of discretion for council to compel owner to change sidewalk in good repair from brick to cement, while permitting other owners on the same square to maintain brick walks. Detmers v. Columbus, 15 Dec. 212; 2 N. P. (N. S.) 657; Livingston v. Cincinnati, 22 C. C. (N. S.) 383; 4 Oh. App. 338; 28 C. D. 514.

The power to determine when it is necessary to improve or repair a sidewalk is vested in the council of a city, but this power cannot be exercised in an arbitrary manner regardless of the public necessity or the rights of the property owners. A court of equity will intervene to prevent arbitrary action amounting to a manifest abuse of discretion. Thompson v. Cincinnati, 28 O. C. A. 469; 6 Oh. App. 420.

Discretion of council in location of sidewalk, will not be reviewed by the courts, in absence of fraud, and sidewalk improvement will not be enjoined because it will cause destruction of shade trees. Sparks v. Sabina, 10 N. P. (N. S.) 138; 20 Dec. 333.

Discretion of council upheld. Mitchell v. Cincinnati, 21 N. P. (N. S.) 175.

Where lot owner has planted shade trees in portion of street designated for sidewalks, his property right in the trees is subject to the right of the municipality to improve the street, even though such improvement destroys the trees. *Ib.*

Construction of sidewalks some feet below present grade of intersecting street, but on level with

proposed grade, does not invalidate assessment. Huddle v. Madisonville, 13 C. C. (N. S.) 61; 32 C. C. 308.

Procedure.—See on subject of proper procedure under § 3853, et *seq.*, Meek v. Collinwood, 30 C. C. 63; 10 C. C. (N. S.) 9; Westenhaven v. Hoytsville, 28 C. C. 357; 8 C. C. (N. S.) 284.

Injunction denied.—Where no action has been taken except by the passage of an ordinance under this section, injunction will not be allowed. Ry. Co. v. Hartford, 15 Ohio App. 305.

Curbing.—Whether curbing is a part of a street improvement or a sidewalk improvement, is a question of fact to be determined from all the circumstances. Ehni v. Columbus, 3 C. C. 494.

Subsequent assessment for general improvement.—See note to Sec. 3812, *ante.*

Municipal liability for failure to keep sidewalks free from nuisance, see notes under §3714, *ante.*

Liability of abutting owner.—Violation by owner of municipal ordinance enacted under this section compelling the removal of snow and ice from sidewalk, does not form the basis for a cause of action by one who fell and was injured. Steinbeck v. Brewing Co., 26 C. C. (N. S.) 283; 7 Oh. App. 18.

ORDER OF PROCEDURE IN SIDEWALK IMPROVEMENTS.

1. *Council may pass a General Ordinance* for the construction, repair and keeping in repair and free from snow or other nuisance of all sidewalks in the corporation. (§ 3853.) Such ordinance would be governed by §§ 4325, 4328, 4221, and 4364, with respect to the supervision of work and the letting of contracts.

2. *Resolution to construct or repair* certain specified sidewalks (where cost is to be paid by abutting owner) passed by council. § 3854.

3. *Notice to owner or agent* of the passage of said resolution; served as summons in a civil action, or if such owner is a nonresident, or if neither such owner nor agent, nor their place of residence can be found, then publication of a copy of said resolution, as street improvements resolutions are published. (See § 3814, *ante.*) §§ 3854, 3855, 3856.

4. *Work to be done by municipality at owners' expense,* if such sidewalks are not constructed within fifteen days or repaired within five days from service of notice or completion of publication. §§ 3857, 3859. The supervision of such construction or repair and the letting of contracts therefor would be governed by §§ 4325, 4328, 4221 and 4364.

5. *Assessing Ordinance* to pay cost of constructing or repairing sidewalks under §§ 3857, 3859, or the cost of constructing sidewalks and issuing bonds therefor under §§ 3864 and 3865, levying assessments therefor in any of the methods provided for street assessments. Such assessing ordinance would be governed by the limitations of §§ 3819 and 3820. (Norwood v. Bldg. Ass'n, 7 C. C. 95; Cincinnati v. Connor, 55 O. S. 82.)

6. *Sidewalks constructed as street improvements.* The special method given in §§ 3854, 3861, 3864 and 3865, for the construction and repair of sidewalks, and outlined in the order of procedure from 2 to 5 in-

clusive, above, does not seem necessarily to exclude the exercise of the general authority given in § 3812 *et seq.* to the councils of all municipal corporations to improve streets "by constructing sidewalks" along the same, and to assess the cost thereof as in other cases of street improvements. (See Westenhaver v. Hoytsville, 28 C. C. 357; Baldwin v. Springfield. 10 N. P. (N. S.) 65; 20 Dec. 265.)

Sec. 3854. [Notice to construct or repair sidewalks; return.][1] When the council of a municipal corporation declares by resolution[2] that certain specified sidewalks, curbing or gutters shall be constructed or repaired, the clerk of council shall cause a written notice[3] of the passage of such resolution to be served upon the owner or agent of the owner of each parcel of land abutting on such sidewalk, who may be a resident of the corporation, in the manner provided by law for the service of summons in a civil action, and shall return a copy of the notice with the time and manner of service indorsed thereon, signed by the officer serving it, to the director of public service in cities, and to council in villages which shall file and preserve it. [97 v. 123, § 71; 96 v. 45, § 71.]

(1) **Old section** 2329 R. S., repealed.

(2) **Resolution ordering sidewalk** in front of a piece of property was held to be of a permanent nature and to require three readings. Thatcher v. Toledo, 19 C. C. 311. If not so read, the construction of the sidewalk by city and assessment on owner who did not construct as ordered, will be invalid. *Ib.* And see Cincinnati v. Johnson, 17 C. C. 291.

(3) **Necessity for notice.**—City has no power to make the sidewalk itself unless the property owner has been notified and has had an opportunity to make it. Hunt v. Hunter, 11 C. C. 69. If the notice is not given, the assessment for constructing is wholly void. Schmidt v. Elmwood Place, 15 C. C. 351; Hunt v. Norwood, 20 N. P. (N. S.) 437.

Character of notice.—The notice must be reasonably specific as to place. Where a property owner owns 385 feet and the notice calls for 185 feet, not locating it, the owner is not in default for disregarding it. It is not his duty to locate the sidewalk. Cincinnati v. Mfg. Co., 7 B. 30.

Describing the property on a certain corner of two streets, without giving the number of feet to be paved, was, however, held sufficient. Cincinnati v. Gordon, 7 B. 79.

Notice to repair as showing knowledge of the city of defective condition, which caused an injury, see Shelby v. Clagett, 46 O. S. 549.

Service of notice was held to be necessary upon an owner who lives in the county but not in the municipality, 39 B. 113 (edit.)

Sufficiency of sidewalk.—The council's determination as to the sufficiency of the sidewalk as con-

structed by the property owner is not to be reviewed by the court, or if reviewable, the property owner must show its sufficiency so clearly as to leave but little doubt. Cincinnati v. Longworth. 22 B. 153.

FORM OF RESOLUTION TO CONSTRUCT OR REPAIR SIDEWALKS.

Be it resolved by the council of the city [*or* village] of....., State of Ohio:

That a sidewalk shall be constructed on the.....side of .....street, from.....to.....of the character and in the manner following: (Here state character of sidewalk, manner of constructing, materials to be used, etc.; or use the words, where applicable, "in accordance with the plans and specifications therefor on file in the office of the Director of Public Service," or, in villages, "of street commissioner.")

[*Or, in case of repair,* That the sidewalk in front of the premises of ....., on the.....side of.....street, between .....and....., being lot No. .....of ..... subdivision, and known as No. ....., ...street, be repaired in the following manner: (Here describe character of repairs required).]

That the clerk of council be and he is hereby directed to cause a written notice of the passage of this resolution to be served as required by law.

Passed....., 19....

Attest:

.....

Clerk.

.....

President of Council.

FORM OF NOTICE TO CONSTRUCT OR REPAIR SIDEWALKS.

To.....:

You are hereby notified that in accordance with a resolution passed by the council of the city [*or* village] of....., State of Ohio, you are required to construct [*or* repair] a [*or* the] sidewalk in front of your premises on the.....side of.....street, between..... and....., being lot No. .....of.....subdivision, and known as No. ....., ...street, of the character (in case of construction) and in the manner following: (Here repeat requirements of resolution.)

If said sidewalk is not constructed within fifteen days [*or*, repaired within five days] from the service of this notice, the director of public service [*or in villages*, the council] will have the same done at your expense, and such expense will be assessed upon your property and made a lien

thereon and be collected in the manner provided by law, with penalty and interest if not paid as required in the levy of assessment.

..... 19....

....
Clerk of Council.

FORM OF RETURN.

Received the within notice on the.....day of....., 19.... and served the same by delivering a true copy thereof personally (or insert any other method in conformity with requirements of law for service in civil actions) upon ....., on the ..... day of ....., 19....., at.....M.

.....
(Officer serving notice.)

If curbing and gutters are also to be provided for, the forms given may be easily adapted.

Sec. 3855. [Service upon agent or owner.][1] For the purpose of such service, if the owner is not a resident of the corporation, any person charged with the collection of rents or the payment of taxes on such property or having general control thereof in any way, shall be regarded as the agent of the owner, and the return shall have the like force and effect as the sheriff's return on summons in a civil action. [97 v. 123, § 71; 96 v. 45, § 71.]

(1) **Old section,** 2329 R. S., repealed.

Sec. 3856. [Notice to nonresidents and persons not found.][1] If it appears in any such return, that the owner is a nonresident of the county, or that neither such owner, agent, or his place of residence could be found, publication of a copy of the resolution in a newspaper of general circulation in the corporation, in the manner provided for service by publication of resolutions for street improvements,[2] shall be deemed sufficient notice to such owner, but no publication of the resolution shall be necessary in the case of construction or repair of sidewalks, curbing and gutters where the notice is served upon the owner or agent as provided in the preceding two sections. [97 v. 124, § 72; 96 v. 45, § 72.]

(1) **Old section,** 2329 R. S., repealed.

(2) **See section,** 3818, *ante.*

Sec. 3857. [When construction or repair to be done at expense of owner.] If such sidewalks, curbing or gutters are not constructed within fifteen days or not repaired within five days from the service of notice, or completion of the publication, the director of public service in cities may do or have it done at the expense of the owner,[2] and all such expenses shall be assessed on all the property abounding or abutting thereon.[3] Such assessments shall be collected in the same manner with a penalty of five per cent. and interest for failure to pay at the time fixed by the assessing ordinance, as in cases of improvements. [98 v. 301, § 73; 97 v. 124; 96 v. 45, § 73.]

(1) **Old section** 2330 R. S., repealed, § 2330*d* repealed.

(2) **Validity.**—A provision such as this held constitutional. Bonsall v. Lebanon, 19 O. 418.

Notice.—Necessity of, before city can construct and charge abutting owner, see Hunt v. Hunter, 11 C. C. 69; Schmidt v. Elmwood Place, 15 C. C. 351.

Purchaser of property, after notice to previous owner, is not entitled to notice before municipality improves. Kahn v. Cincinnati, 30 C. C. 809; 11 C. C. (N. S.) 440. If property owner is notified to improve sidewalk, and fails to do so, no further notice is required before municipality makes the improvement. *Ib.*

Where the provisions of § 4224 have been complied with in the passage of a side-walk ordinance and resolution, but the village clerk has failed to record the action of council and plaintiff has acquiesced in the construction of a side-walk which specially benefits his property, he is not entitled to an injunction against the assessment. Vinton v. James, 108 O. S. 220.

Owner's right to build. — A property owner is entitled to an election whether to build the sidewalk himself or have the city build it. The fact that he petitioned to have the improvement made will not estop him from having an assessment enjoined where he has had no such election. Johnson v. Glenville, 16 C. C. (N. S.) 607.

Change of materials.—Property owner is not bound to pay for sidewalk where materials used were different from those specified in a resolution providing for the walk and the notice sent to lot owners, and collection of assessment for such different walks will be enjoined. Meek v. Collinwood, 30 C. C. 63; 10 C. C. (N. S.) 9.

(3) **Limitation of sidewalk assessments.**—As to the application of the limitations in §§ 3819 and 3820 to sidewalk assessments, see Norwood v. Bldg. Ass'n, 7 C. C. 95. See also Cincinnati v. Connor, 55 O. S. 82; Huddle v. Madisonville, 32 C. C. 308; 13 C. C. (N. S.) 61 (limitations apply). But see Westenhaver v. Hoytsville, 28 C. C. 357.

Form of assessing ordinance may be adapted from form under § 3864, *post.*

Sec. 3858. [Other proceedings not necessary; limit on amount of assessment.] No other or further proceedings for the construction or repair of sidewalks, curbing or gutters and levying assessments therefor, shall be necessary by the director of public service, than the proceedings required under this and the preceding four sections.[1] In any case in which special assessments have been made on property for all the cost of the construction or repair of sidewalks, curbing or gutters under such sections, such assessments, within the limitation of benefits and the limits of thirty-three per cent of the taxed value of the property, shall be valid assessments upon such property. [98 v. 301, § 73; 97 v. 124.]

(1) **Method of improvement.** —The method given in this and sections immediately preceding is intended to be distinct from method provided in § 3812 *et seq.*, under which sidewalks may also be constructed and repaired. The legislature had in view an alternative procedure for sidewalk improvements. Westenhaver v. Hoytsville, 28 C. C. 357.

Sec. 3859. [Sidewalks, curbing and gutters in villages.] If such sidewalks, curbing or gutters are not constructed within fifteen days, or not repaired within five days from the service of the notice, or completion of the publication, the council in villages may have it done at the expense of the owner and report the cost thereof to such owner.[1] Such cost shall constitute a lien on the property abutting on such sidewalks from the date it is so reported to the owner, and shall be paid by him to the treasurer of the municipality. If it is not paid within ten days from the time it was reported to such owner, the clerk in villages shall certify it, with a penalty of five per cent thereon to the county auditor, who shall place it on the tax duplicate and collect such costs and penalties in the same manner as other taxes are collected. [98 v. 301, § 73; 97 v. 124; 96 v. 45, § 73.]

(1) See notes under section 3857, *ante*.

Sec. 3860. [Assessment of cost for construction or repair of sidewalks, curbing or gutters.] When sidewalks, curbing or gutters are constructed or repaired in accordance with the preceding three sections, the assessment for the cost thereof

may be made payable in full not less than thirty nor more than sixty days from the levy thereof or in not exceeding five annual installments, as council determines. In anticipation of the collection of such assessments, bonds of the municipal corporation may be issued bearing interest not exceeding six per cent per annum and the proceeds thereof used in the payment of the cost incurred by reason of such construction or repair. [97 v. 384, § 73a.]

Sec. 3861. [What the resolution may contain.] In the passage of the resolution declaring that certain specified sidewalks, curbing or gutters shall be constructed or repaired and in all the subsequent procedure necessary to secure the construction or repair of sidewalks, curbing or gutters, and collect the assessment therefor, sidewalks, curbing or gutters, although upon different streets and abutting upon lots or land owned by different persons, may be provided for in the same resolution, notice, contract, and ordinance or other step in such procedure. [97 v. 384, § 73a.]

Sec. 3862. [Notice to owners of abutting property to clean sidewalks.] When the council in villages declares by resolution or the director of public service in cities orders that a certain specified sidewalk or sidewalks, curbing or gutters shall be cleaned so as to be free from weeds, grass, dirt, snow or any other objectionable substance, the clerk of the council in villages or the director of public service in cities, shall cause notice of the passage of such resolution, or of such order, to be served upon the owners of each parcel of land abutting on the sidewalk ordered cleaned. The notice shall be given in the same manner as is provided for service of notice to construct sidewalks. [97 v. 124, § 74; 96 v. 46, § 74.]

Sec. 3863. [When it may be done at expense of owners.] If such sidewalks, curbing or gutters are not cleaned within five days, except if the objectionable substance be snow, then within one day, after the service of the notice or completion of the publication, the director of public service in cities and the street commissioner in villages shall have it done at the expense of the owner and report the cost thereof to him, and

to the council in villages, or to the director of public service in cities.[1] The cost of such cleaning shall constitute a lien upon the property abutting on such sidewalks from the date it is so reported, and shall be paid by the owner to the treasurer of the municipality. If the cost of the cleaning is not paid within ten days from the time it was so reported, the clerk in villages or the director of public service in cities shall certify it, together with a penalty of five per cent thereon to the county auditor, who shall place it on the tax duplicate and collect such costs and penalties in the same manner as other taxes are collected. [97 v. 124, § 74; 96 v. 46, § 74.]

(1) See notes to § 3857, *ante*. **Forms** of resolution and notice may be adapted from those under § 3854, *ante*.

Sec. 3864. [Construction of sidewalks, curbing or gutters.][1] In municipal corporations, when sidewalks, curbing or gutters are to be constructed pursuant to a resolution of council, the director of public service in cities and council in villages, may construct such sidewalk or parts thereof, or curbing or gutters or parts thereof,[2] and assess the cost and expense thereof upon the abutting, adjacent and contiguous or other specially benefited property according to the rule heretofore provided for street improvements.[3] [96 v. 46, § 75.]

(1) **Old sections,** see §§ 2330*a*, 2330*b*, R. S., repealed.

(2) **Certificate of money** in treasury was held not to be required in case of a contract for construction of sidewalks where the act contemplates that the money shall not be in the treasury by providing that the money is to be raised by a bond issue. Trowbridge v. Hudson, 24 C. C. 76.

Discretion of council as to rejection of bids under former § 2330*b*, R. S. See Trowbridge v. Hudson, 24 C. C. 76.

(3) **Assessing ordinance — How passed**—The language used above indicates that the assessment for sidewalk improvements is to be made, in cities, by the director of public service. Doubtless the intention was to give the power to *construct* sidewalks to the department of public service in cities and to councils in villages and the power to *levy assessments therefor* to council in all municipalities. This is in harmony with §§ 3814 and 3819, *ante*, empowering *council only* to levy assessments to pay the cost of all improvements, including sidewalks, and imposing the duty upon council to limit such assessments, as well as many other provisions of the Code. It would seem the better course, therefore, that the assessing ordinance above referred to be passed by council, though any

question as to regularity may be avoided by concurrence in such ordinance by the director of public service.

Damages for change of grade. —Provisions relating thereto held to apply to sidewalk improvements. City v. Gordon, 7 B. 79.

Corner lot doctrine, whether applicable to sidewalk assessments, see Baker v. Schott, 10 C. C. 81.

Estoppel to contest assessment by petitioning for improvement, see Huddle v. Madisonville, 13 C. C. (N. S.) 61; 32 C. C. 308.

FORM OF ASSESSING ORDINANCE FOR SIDEWALK IMPROVEMENT.

Ordinance No.....

To levy special assessment for the construction of sidewalks on .....street, between.....and.....

Be it ordained by the council of the city [*or* village] of....., State of Ohio:

Sec. 1. That to pay the cost and expenses of constructing sidewalks on .....street, between.....and....., in accordance with the resolution of council passed on the.....day of....., 19.... there be levied and assessed upon the lots and lands hereinafter described the several amounts herein set forth, viz:

Assessment.

Owner.	Description of property.	Dollars.	Cents.

Which assessments are.....dollars and.....cents per front foot of the property bounding and abutting on the.....side of.....street, between .....and.....

(In case of assessments by a percentage of tax value or according to benefits, see form under § 3825, *ante.*)

Sec. 2. (Same as § 2 of assessing ordinance under § 3825, *ante,* and see requirements of §§ 3860 and 3861.)

Sec. 3. That to provide a fund for the payment of the cost and expenses of constructing sidewalks as aforesaid, the mayor and auditor [*or in villages,* clerk], be and they are hereby authorized to issue and sell the bonds of the city [*or* village] of....., according to law, (bonds must not exceed $1,000 in denomination, they must be serial bonds, payable in not less than one, nor more than ten years; see §§ 2295-12, 3865, 3914, 3922, 3924), and the proceeds arising from such bonds shall be applied to the cost of such construction of sidewalks, the expenses of issu-

ing such bonds, the payment of interest thereon, and to no other purpose whatsoever; and for the payment of said bonds and interest thereon the revenue and faith and all the real and personal property of the city [*or* village] are hereby pledged; provided, that if within the time above specified, and before the sale of the said bonds any of the owners of said property shall pay their total assessments in cash, the aggregate sum in bonds shall be reduced by deducting the amount so paid from the total amount of the fund to be provided, and the bonds issued shall be reduced accordingly.

Sec. 4. That the proceeds arising from the sale of said bonds, together with all moneys received from the cash payments of assessments, shall be placed in the city [*or* village] treasury, and disbursed upon proper vouchers for the purposes herein provided.

Sec. 5. That for the purpose of providing the necessary funds to pay the interest on the foregoing issue of bonds promptly when and as the same falls due, and also to create and maintain a sinking fund sufficient to discharge the said bonds at maturity, there shall be, and is hereby levied on all the taxable property of the city [*or* village] of....., in addition to all other taxes, a direct tax annually during the period for which said bonds are to run in an amount sufficient to provide for any deficiency in the levy, payment or collection of said assessments as the same fall due. That said tax shall be and is hereby ordered computed, certified, levied and extended upon the tax duplicate and collected by the same officers, in the same manner and at the same time that the taxes for general purposes for each of said years are certified, extended and collected. That all funds derived from said tax levies hereby required, shall be placed in a separate and distinct fund, which, together with all interest collected on the same, shall be irrevocably pledged for the payment of the interest and principal of said bonds when and as the same fall due.

Sec. 6. That the installments of assessments and all portions thereof, shall be applied to the payment of said bonds and interest, as the same shall become due, and to no other purpose whatsoever.

Sec. 7. That this ordinance shall take effect and be in force from and after the earliest period allowed by law.

Passed....., 19....

Attest:

.....

Clerk.

.....

President of Council.

(Note: Instead of the above form combining assessment and bond ordinance, the separate forms under § 3825 may be used. All assessments not certified to the county auditor must be paid to the city or village treasurer. See § 3893.)

Sec. 3865. [Bond issue authorized.] To carry out such purpose, council may issue bonds of the municipality in denominations not to exceed one thousand dollars, each to be payable in not less than one nor more than ten years,[1] and to bear interest at the rate not to exceed six per cent per annum, which bonds shall not be sold for less than their par value and the proceeds arising from such sales shall be applied to the cost of the improvements, the cost of issuing the bonds, the payment of interest thereon, and to no other purpose. The assessments shall be in such amounts as will be sufficient to provide for the payment of the bonds and the interest due thereon as they mature, and the assessments shall be certified to the auditor of the county in which the municipality is situated, to be placed upon the duplicate, and shall be a lien upon all property so assessed if the assessment is not paid within the time fixed in the assessing ordinance. [96 v. 46, § 75.]

(1) **Serial bonds and maturities.**— For provisions relating to all bonds, see §§ 2295-9 and 2295-12 under "Miscellaneous Statutes", in Part II, supra.

Sec. 3866. [Construction of sidewalks along property of the corporation.][1] When deemed necessary by a municipal corporation to build or repair sidewalks, curbing or gutters along that portion of a street, alley or public highway which passes by or through public wharves, market spaces, parks, cemeteries, public grounds or buildings, the proper proportion of the estimated expenses thereof shall be, by the council of such corporation levied, certified and collected in the manner provided herein for the assessment of street improvements. [97 v. 125, § 76; 96 v. 47, § 76.]

(1) **Old section 2334 R. S., repealed, and 95 O. L. 416, repealed.**

Sec. 3867. [Construction of sidewalks on one side only; upon other side.] If the council of a municipal corporation deem it necessary to construct a sidewalk or gutter on one side only of a street, alley, turnpike or plank road with proper crossings from one side to the other, it may assess and collect the charge therefor on the owners of the lots or

lands abutting on both sides of such street, alley or road in like manner as if such sidewalk or gutter had been constructed on both sides.[1] When a sidewalk or gutter is so constructed, if it is deemed necessary to construct a sidewalk or gutter on the other or corresponding side of such street, alley or road, the charge therefor shall be assessed on the owners of the lots and lands on both sides. [R. S. Sec. 2332; 90 v. 213; 66 v. 250.]

(1) **Ordinance unreasonable.** —Where an ordinance provides for constructing a sidewalk on one side only, leaving no space for sidewalk on other side and assessing cost on both sides, it is unreasonable. Mills v. Norwood, 26 B. 348, C. C. C. 305.

Sec. 3868. [Construction of sidewalks in villages.] The council of villages, upon the petition of the owners of two-thirds of the front feet of lots or lands abutting upon one or both sides of a street or portion of street between points designated in the petition, may provide by ordinance for the construction of sidewalks along such street or portion thereof, on one or both sides, and of such materials and width as is designated in such petition. The supervision of the construction of such sidewalks shall be by the council or a proper committee thereof. The construction of such sidewalks shall be governed in all respects by the provisions of this title relating to the improvement of streets. One-half of the cost and expenses of such sidewalks shall be defrayed by the village and the other half shall be assessed against the property abutting on such street or portion of street between the points designated in the petition, in the manner designated in the petition. [97 v. 481, § 1.]

Sec. 3869. [Assessments; bonds in anticipation thereof.] When council orders sidewalks to be constructed in accordance with the prayer of such petition, it shall also provide for the payment of the property owner's one-half of the cost and expenses thereof, in two or more equal annual installments, and make corresponding annual assessments therefor on the property abutting upon such improvement. Such assessment shall be collected or certified as assessments for street improvements, and be a lien upon the property as-

sessed. The council may issue bonds in anticipation of the collection of the amount chargeable against the property owners, which bonds shall bear interest at a rate not to exceed six per cent per annum, and shall be sold for not less than par. [97 v. 481, § 2.]

Sec. 3870. [Bonds to pay village's portion of cost.][1] For the purpose of paying the village's portion of the cost and expenses of constructing such sidewalks, the council may borrow money at such times and in such amounts as may be required, and issue bonds of the village therefor at a rate of interest not to exceed six per cent per annum, payable semi-annually, and of such denomination as the council may determine. The issuing and sale of such bonds shall be governed by the provisions of law applicable to the issuing and sale of municipal corporation bonds. The council may levy upon all the taxable property of the village, in addition to the taxes allowed by law, such tax as may be necessary to pay the principal and interest of such bonds as they mature. Such tax shall be levied and collected in the same manner as taxes for general purposes in villages are levied and collected. [97 v. 482, § 3.]

(1) **Serial bonds required.**—For provisions relating to all bonds see §§ 2295-6, et seq. under "Miscellaneous Statutes" in Part II, *supra.*

Sec. 3870-1. [Powers of councils as to canals, etc.] That the councils of cities and villages where and so far as it shall be necessary for the free, convenient or safe navigation of any navigable canal, ship canal or watercourse located wholly or in part within the corporate limits or lying contiguous or adjacent thereto, may provide against the subsidence, washing, falling or depositing therein of earth or any other material from the abutting land by reason of any works or structures erected or maintained or material deposited or operations conducted thereon, by the imposition of suitable penalties and by requiring the construction of such retaining works and structures and such repair of any existing works or structures as shall be suitable and necessary to prevent the same. [101 v. 148, § 1.]

Sec. 3870-2. [Resolution; failure to comply with terms of resolution; collection by taxation.] Whenever the council of any city or village declares by resolution that such a condition exists and that for the purpose mentioned in section 1 it is necessary that such retaining works or structures be constructed or any existing works or structures be repaired along the shore or in front of any specified parcel or parcels of land abutting on such waterway, the clerk of the council shall cause a written notice of the passage of such resolution to be served upon the owner or owners of such parcel or parcels or his agent, which notice shall be served and returned or published in the manner provided in sections 3854, 3855 and 3856 of the General Code.

If sufficient retaining works or structures be not constructed or any existing works or structures be not sufficiently repaired within such number of days from the service of notice or completion of the publication, as may be specified in the resolution of the council, the department of public service in cities and the council in villages may do or have the same done at the expense of the owner and report the cost thereof to such owner in the same manner as provided for giving notice as aforesaid, and the cost of such construction or repair shall constitute a lien against such property from the date the same is so reported to such owner, and shall be paid by the owner to the treasurer of the municipality, and if the cost of said construction or repair is not so paid within ten days from the time the same has been reported to such owner, the clerk shall certify the same, together with a penalty of five per centum thereon to the county auditor, who shall place the same on the tax duplicate and collect such costs and penalties in the same manner as other taxes are collected. [101 v. 148, § 2.]

SEWERS.

Sec. 3871. [City engineer to devise plan of sewerage.][1] In addition to the power herein conferred to construct sewers and levy assessments therefor, council of a municipal corporation may provide a system of sewerage for such municipal corporation or any part thereof. The engineer of such corporation, or some person employed by the municipality, shall

devise and form, or cause to be devised and formed, a plan of the sewerage of the whole corporation, or such part thereof as may be designated by the council. Such plan shall be devised with regard to the present and prospective needs and interests of the whole corporation, and shall be by him reported to the council for its confirmation.[2] [96 v. 47, § 77.]

(1) **Old section.**—Compare § 2366 R. S., repealed.

(2) **Adoption of system** of sewerage was held, under former laws, not necessary to be first made before a single independent sewer could be constructed. The general power to build sewers given to municipalities would not be restricted by provision as to a sewerage system, unless a system had been previously found necessary. Hartwell v. R. R. Co., 40 O. S. 155.

Where a system is adopted, failure to provide plans and specifications and estimates of expense, was held not jurisdictional and no defense to sewer assessments. Toledo v. R. R. Co., 4 C. C. 113.

Discretion of council in devising a plan of sewerage cannot be interfered with by the court unless grossly abused. Johnson v. Avondale, 1 C. C. 229.

House connections.—It was held that an act giving authority to a municipality to provide "a plan of sewerage and drainage" would not give the municipality power to make house connections, unless such house connections were made part of the plans and specifications and duly published. Cordeman v. Cincinnati, 23 O. S. 499, 507.

But as to power under present statutes, see § 3812-1, *ante*.

Tapping Sewers.—Old § 2402 R. S., repealed, provided expressly for tapping sewers for private use. But the authority to construct and maintain sewers doubtless includes the authority to provide by ordinance rules and regulations for tapping sewers for private use. In the enumeration of powers (§ 3637) authority is given to provide by ordinance for licensing sewer-tappers. For questions arising under former laws as to tapping sewers, see State *ex rel.* v. Board, 4 B., 293; Herrmann v. State *ex rel.*, 54 O. S. 506; Springmeyer v. State, 1 C. C. 501; State v. Graydon, 6 C. C., 634.

Municipal liability.—Failure to provide sewers would not make a municipality liable for damages resulting from its neglect. Springfield v. Spence, 39 O. S. 665, 669; Dayton v. Taylor's adm'r, 62 O. S. 11.

Thus, injury caused by failure of municipality to provide for carrying off surface water was held not to make it liable. *Ib.*

Defect in plans.—Nor will the municipality be liable because the plans it has adopted are not sufficient or proper. The manner in which drainage may be accomplished is peculiarly within the discretion of the municipal corporation and it cannot be called to account by the courts for its errors of judgment in the plans of a public improvement for drainage adopted by it. Wheeler v. Cincinnati, 19 O. S. 19, 22; Dayton v. Taylor's adm'r, 62 O. S. 11.

Negligence in constructing.—But for damages due to negligence in the construction of a sewer, the municipality will be liable. Cummings v. Toledo, 12 C. C. 650; Columbus v. Jaeger, 36 B. 191; see also Dayton v. Taylor's adm'r, 62 O. S. 11, 16.

But injuries resulting from construction, if not caused by the city's negligence in the work, will not make the municipality liable. Columbus v. Jaeger, 36 B. 91; Cummings v. Toledo, 12 C. C. 650. And see generally, Cincinnati v. Penny, 21 O. S. 499.

Municipality is not liable for destroying, in the course of construction of a sewer, local drainage connections made without its consent. Miller v. Toledo, 12 C. C. 706.

Where damage is caused by construction of insufficient drain in such manner as to obstruct the flow of water through it, the municipality is liable. Cincinnati v. Johnson, 28 C. C. 377.

Municipality not liable for injury caused by collapse of sewer in time of extraordinary flood. McWilliams v. Cincinnati, 7 O. L. R. 88.

Failure to keep in repair will also make the municipality liable, if notice is brought home to the municipality that street not reasonably safe because of faulty construction. Dayton v. Taylor's adm'r. 62 O. S. 11, 16; Cincinnati v. Frey, 16 Dec. 77; 3 N. P. (N. S.) 627.

A municipality is liable in damages for maintaining a defective sewer in such condition that sewage is allowed to seep or percolate through the subsoil, and into the cellar of an adjoining property owner. Krazeweski v. Berea, 21 C. C. (N. S.) 449.

Overloading sewer.—A municipal corporation is liable for damages to a lot owner by the flowing back into his cellar of filth from a sewer with which it is attached, by reason of the negligent overloading of said sewer by the municipality. Merzweiler v. Akron, 18 C. C. (N. S.) 138.

There can be no recovery from a municipality on account of the flooding of a basement or cellar by reason of the obstruction of a sewer, where notice of the obstruction is not shown and no negligence appears in the construction, maintenance or care of the sewer. Norwood v. Gobrecht, 19 C. C. (N. S.) 175.

Pollution of a watercourse by a municipality in discharge of its sewerage will make it liable, as an individual would be liable. Cleveland v. Beaumont, 4 B. 345; Cilly v. Cincinnati, 2 B. 135; Mansfield v. Balliett, 65 O. S. 451; Rhodes v. Cleveland, 10 O. 160; Mansfield v. Hunt, 19 C. C. 488.

Such pollution, if continued for a period of twenty-one years, would give municipality prescriptive right, and it will not thereafter be liable to riparian owners for such pollution. Cleveland v. Standard Bag & Paper Co., 72 O. S. 324; Tepe v. Norwood, 48 B. 876; Mansfield v. Hunt, 19 C. C. 488; Norwalk v. Blatz, 29 C. C. 307; 9 C. C. (N. S.) 417. See also Schrenck v. Cincinnati, 31 C. C. 118; 10 C. C. (N. S.) 135. Riparian owner cannot recover against municipality damages for pollution if he contributes to such pollution. Tepe v. Norwood, 48 B. 876, (aff'd, 71 O. S. 520); Kemper v. Home, 6 Dec. Re. 1049. See also

Cleveland v. Standard Bag & Paper Co., 72 O. S. 324.

Limitation of action.—Action against municipality for damages growing out of overflow of plaintiff's lands from negligent construction of municipal drains, is an action of trespass and nuisance and four-year limitation is applicable. Norwalk v. Blatz, 29 C. C. 306.

Injunction to restrain the municipality from emptying sewage into a stream to plaintiff's injury would lie. Cilly v. Cincinnati, 2 B. 135; Whitney v. Toledo, 29 C. C. 74.

Evidence.—Proof of adoption of sewerage system and plan of districting must be made by the ordinances and not by the testimony of the engineer. Cleveland v. Beaumont, 4 B. 345.

Errors not prejudicial, see Cincinnati v. Roettinger, 11 C. C. (N. S.) 501.

Measure of damages where owner's property is injured by break in sewer, see Toledo v. Grasser, 12 C. C. 520.

Where municipality with others causes injury to riparian proprietor by pollution of stream, municipality is liable only for its proportion of damage, and jury should be instructed to separate the damage done by municipality from that done by others, notwithstanding difficulty of apportionment. Columbus v. Rohr, 30 C. C. 155; 10 C. C. (N. S.) 320. Apportionment should be based on amount of sewage discharged by each and degree of polluting properties. *Ib.*

ORDER OF PROCEDURE IN SEWER IMPROVEMENTS UNDER GENERAL PLAN.

1. *Adoption of general plan.* Where it is desirable to make sewer improvements under a general plan or system, council should, by resolution, direct the engineer of the city or village to prepare such plans, either for the whole municipality or for such portion as council may determine. (§ 3871.)

The engineer should then prepare such plans observing the requirement of §§ 3872 and 3873, and report the same to council.

2. *Notice of completion of plan* and that the same is ready for public inspection should be given by publication for ten days. (§ 3874.)

3. *Objection to plan* by persons interested may then be filed with council, and council may thereupon, amend the plan. (§ 3875.) The plan, as originally presented or as amended, as the case may be, should then be confirmed by council by ordinance, setting out the plan, and the plan should be filed in the office of the auditor (in cities) or clerk (in villages).

4. *Designation of part to be constructed.* Council should next, by resolution, designate the part of the general plan that is to be carried out in the particular improvement to be made. The resolution should show what district, giving its boundaries, or what part of a district, is to be improved. (§ 3877.) The resolution may order the engineer to make an estimate of the cost of constructing sewers in accordance with the part of the plan designated, and report the estimated cost to council.

5. *Resolution declaring necessity* of the proposed sewer improvements which should contain (1) a statement of the district or part of district proposed to be improved, giving its boundaries as in the designated resolution; (2) the character of the materials to be used; (3) a statement that the improvement is to be made in accordance with the plans and specifications of the engineer, referred to in the resolution, together with a statement as to place where they are on file; (4) the mode of payment for the improvement, determining the proportion to be assessed and the method of the assessment, as well as the method of payment of the remainder of the costs, whether by levy upon the general tax list or by special bond issue. (§ 3878.)

As to notice to owners, of this resolution, see § 3834.

6. *Ordinance to improve*, which should contain (1) an expression of council's determination to proceed with the improvement; (2) a description of the district or part of district to be improved, as given in the preceding resolution; (3) a statement of the character of material to be used; (4) a statement that the improvement is to be made according to the plans and specifications of the engineer; (5) the mode of payment as in the preceding resolution, and naming the lots and lands to be assessed, in each district, or part of district, separately (§ 3879).

7. *Advertisement for bids and award of contract* as in case of other street improvements. (§§ 3880, 3833, 4221, 4325, 4328, 4403.)

8. *Certificate of Engineer* showing completion of work, made to council. (§ 3881.)

9. *Assessing ordinance* in conformity with ordinance to improve, making the assessment by districts and giving the amount of assessment on each lot or land. (§ 3881.)

NOTE.—The procedure above is only for cases where council adopts a general plan of sewerage. Improvement by constructing sewers where no general plan has been adopted, may be made in the manner provided in § 3812 *et seq.*, relating to street improvements generally. (§ 3871.) (See Kohler Brick Co. v. Toledo, 29 C. C. 599, 10 C. C. (N. S.) 137.)

Sec. 3872. [Sewer districts.][1] The plan so devised shall be formed with a view of the division of the corporation into as many sewer districts as may be deemed necessary for securing efficient sewerage. Each of the districts shall be designated by a name and number, and shall consist of one or more main sewers, with the necessary branch or connecting sewers, the main sewers having their outlet in a river, or other proper place.[2] The districts shall be so arranged as to be independent of each other, so far as practicable. [96 v. 47, § 78.]

(1) **Old section 2370 R. S., repealed.**

(2) **Discretion of council** in determining what is a proper outlet cannot be interfered with by the courts, unless grossly abused. Johnson v. Avondale, 1 C. C. 229, 232.

An extension, giving a proper out-

let, which was contemplated at the time the sewer was built, would satisfy the statute. Wilson v. Cincinnati, 5 N. P. 68.

Sec. 3873. [How plan to be prepared.][1] The plan shall be so prepared as to show the size, location, inclination and depth below the surface of all main sewers and all branch sewers connected therewith. [96 v. 47, § 79.]

(1) **Old section** 2374 R. S., repealed.

Sec. 3874. [Notice of completion of plan to be advertised.][1] When such plan of sewerage has been prepared, the council shall give at least ten days' notice[2] in one newspaper of general circulation in the corporation, stating that such plans have been prepared and are filed in the office of the clerk for examination and inspection by parties interested. [96 v. 47, § 80.]

(1) **Old section** 2375 R. S., repealed.

(2) **Necessity of notice.**—Omission to advertise was held not jurisdictional under former statutes, and did not invalidate assessments. Cincinnati v. Honnigfort, 32 B. 32; Columbus v. Bohl, 13 Dec. 569; 1 N. P. (N. S.) 469.

FORM OF NOTICE OF COMPLETION OF PLAN FOR SEWERAGE.

Legal Notice.

Notice is hereby given that plans for the sewerage of the city [*or* village] of.....[*or* for the sewerage of the following described territory of the city, *or* village of.....(here describe part of municipality designated by council)], have been prepared and are now on file in the office of the clerk of council of the city [*or* village clerk] for examination and inspection by parties interested, and any objection thereto may be filed with council.

.....,19....

By order of the Council of the City [*or* Village] of.....

.....

Clerk.

Sec. 3875. [Objections to plan.][1] Any objection to such plan of sewerage shall then be made to the council, and it may, if it deems proper, amend or correct such plan, and shall thereupon file it as amended, or if no amendments be

made, the original plan, duly certified by it, in the office of the auditor or clerk. [96 v. 48, § 81.]

(1) **Old section** 2376 R. S., repealed.

Sec. 3876. [Amendment of plan.][1] At any time after the construction of all or a part of the sewers provided for by such plan of sewerage, council may amend such plan by providing for such intercepting sewers, without regard to sewer districts, as shall be necessary to furnish an additional outlet for the system so adopted, and to provide for the construction thereof as herein provided, and apportion the cost and expense thereof, equally among the districts directly or indirectly sewered in whole or in part thereby, and assess and collect the amount apportioned to each district, or the council may apportion a part only of such cost and expense among the districts directly or indirectly sewered in whole or in part thereby, and provide for the payment of the residue thereof by the city at large. The council may also amend such plan by making new sewer districts, or by subdividing districts already established, giving a name and number thereto, and provide for the construction of the main and branch sewers therein, and may assess the cost and expense thereof upon the lots and lands within the corporation according to benefits. [96 v. 48, § 82.]

(1) **Old section** 2376 R. S., repealed.

Sec. 3877. [Designation of portions for immediate construction.][1] After such plan has been adopted and approved, the council shall designate such portions of the work as may be required for immediate use, and the designation shall be by districts, and shall show what districts or part thereof, is to be improved and may order the engineer to make an estimate of the cost and expense of constructing the work, or such portions thereof as may have been designated in accordance with the last section, according to such plan, and report them to council.[2] [96 v. 48, § 83.]

(1) **Old sections** 2373 and 2377 R. S., repealed.

(2) **Necessity of estimate.**— Failure to cause estimate to be made held not a defense to assessment. Toledo v. Ry., 4 C. C. 113.

Curative provisions of §§ 2289 and 2327 R. S., (now §§ 3901 and 3911 G. C.) held to extend to irregularities or defects in the estimate of cost for sewerage. Wewell v. Cincinnati, 45 O. S. 407.

Sec. 3878. [Resolution of necessity and notice thereof.][1] When it is deemed necessary by a municipal corporation to construct all or a part of the sewers provided for in such plan, the council shall declare by resolution the necessity thereof.[2] Such resolution shall contain a declaration of the necessity of such improvement, a statement of the district or districts or parts thereof proposed to be constructed, the character of the materials to be used, a reference to the plans and specifications, where they are on file, and the mode of payment therefor, and shall cause the resolution to be published once a week for not less than two nor more than four consecutive weeks in one newspaper of general circulation in the corporation.[3] [96 v. 48, § 84.]

(1) **Old section.**—Compare § 2378 R. S. (repealed) requiring only the ordinance to improve. But old § 2304 R. S. (repealed) required resolution of necessity for all public improvements.

(2) **Necessity, object, etc., of resolution.**—See notes to § 3814.

(3) **Published notice.**—Where published notice describes property by streets and omits certain streets, and these streets were also omitted in the resolution,—as to validity of assessment on such streets, see Cincinnati v. Honnigfort, 32 B. 32.

Notice to owners.—See § 3834.

FORM OF RESOLUTION DECLARING NECESSITY.

Resolution.

Declaring it necessary to construct sewers in district.....[*or* part of district....., *or* district consisting of territory bounded .....].

Be it resolved by the council of the city [*or* village] of....., State of Ohio;

That it is necessary to construct all [*or* a certain part hereinafter described] of the sewers provided for in a general plan for a system of sewerage, for said city [*or* village] (or, if the plan was for a part only, of the municipality, then say "for the territory bounded as follows," inserting boundaries in general plan) which general plan was adopted by council on the.....day of....., 19...., and is now on file in the office of the auditor of said city [*or* clerk of said village]; and that the portions of the work provided for in said general plan, which it is hereby determined to construct are as follows: (Here describe by districts or part of districts, the territory that is to be improved, giving the boundaries of each district

or part of district included, following the description in the resolution designating the part to be improved).

Be it further resolved, That said sewers shall be constructed in accordance with plans and specifications, on file in the office of the auditor of said city [*or* clerk of said village] and shall be of..... (here insert materials to be used).

Be it further resolved, That the costs ..... (Here follows form of resolution to improve under § 3815.)

Be it further resolved, That the clerk be and he is hereby directed to cause this resolution to be published in the manner provided by law.

Passed....., 19....

Attest:

.....

Clerk.

.....

President of Council.

Sec. 3879. [Ordinance authorizing construction; what to contain.][1] After the publication of such notice, the council shall determine whether it shall proceed with the proposed improvement or not, and if it decides to proceed therewith, an ordinance for the purpose shall be passed.[2] Such ordinance shall contain a statement of the district or districts or parts thereof proposed to be constructed, the character of the material to be used, a reference to the plans and specifications, the mode of payment therefor, and shall provide for assessing the cost and expenses of the improvement upon the lots and lands in each district as other assessments are levied, and the lots and lands in each district shall be assessed by districts, except that the cost of the construction of any main sewer which serves as a common outlet for two or more districts shall be apportioned between the districts, and the cost assessed on the lots and lands in the respective districts in proportion to the benefits accruing thereto.[3] [96 v. 49, § 85.]

(1) **Old section** 2378 R. S., repealed, and see old §§ 2372 and 2379 R. S., repealed.

(2) **Ordinance to construct.**—*Time of passage.* An ordinance passed prematurely was held not invalid. Since failure to publish the preliminary resolution is a defect covered by the curative statutes, an ordinance passed before that publication is complete, would not be fatally defective. Toledo v. Ry. Co., 4 C. C. 113.

Publication of ordinance held not to be required. Kohler Brick Co. v. Toledo, 29 C. C. 599; 10 C. C. (N. S.) 137.

Method of improvement.—The

special provisions with respect to the construction of sewers in pursuance of a plan already adopted control the council and are independent of the method provided in § 3812, *et seq.* Kohler Brick Co. v. Toledo, 29 C. C. 599; 10 C. C. (N. S.) 137. See, under former laws, Cincinnati v. Wewell, 16 B. 287; Nitzell v. St. Bernard, 3 N. P. 317; Stallo v. Cincinnati, 17 Dec. 714. But council might provide for construction of sewers, where no general plan had been adopted, and proceed in the manner provided in § 3812 *et seq.*, Kohler Brick Co. v. Toledo, 29 C. C. 590; 10 C. C. (N. S.) 137.

Sewers. — How cost of main sewer may be assessed; how cost of main sewer and sewage disposal plant outside of municipal corporation may be assessed. Op. Atty. Gen. (1916), p. 1951.

(3) **Assessment by districts,** provided for also by former laws was held not jurisdictional, and an assessment for a sewer in parts of two districts was held valid under previous statutes. Cincinnati v. Honnigfort. 32 B. 32.

Lands in whole district will be deemed benefited and may be assessed, though property not improved so as to make sewer connections immediately available, if sewer so located that it may be utilized in the future. King v. Dayton, 30 C. C., 480; 10 C. C. (N. S.) 522.

Improvement of separated portions of a street by sewering, is fully recognized in the statutes, and such improvement made in sections and assessed per front foot is valid. Erkenbreker v. Cincinnati, 30 C. C. 822; 10 C. C. (N. S.) 103. See also Wilder v. Cincinnati, 26 O. S., 284.

Fair average depth of lots for purposes of assessment may be fixed by council, though no statutory provision therefor when assessment by benefits. Kohler Brick Co. v. Toledo, 29 C. C., 599; 10 C. C. (N. S.) 137.

Pumping station is a necessary part of a sewer equipment, and under this section, the cost of construction of such plant may properly be included in the amount assessed for a main sewer. King v. Dayton, 30 C. C., 480; 10 C. C. (N. S.) 522.

FORM OF ORDINANCE AUTHORIZING CONSTRUCTION.

Ordinance No.....

Determining to proceed with the construction of sewers in district..... .....[*or* part of district....., *or* district consisting of territory bounded .....].

Be it ordained by the council of the city [*or* village] of....., State of Ohio.

Sec. 1. That it is hereby determined to proceed with the construction of sewers in the district [*or* districts *or* part of district] bounded and described as follows: (Here copy boundary of district as given in the resolution of necessity), pursuant to a resolution passed on the.....day of ....., 19....., and in accordance with the plans and specifications heretofore prepared by the engineer of said city [*or* village] for a system of sewerage therein [*or* in said district], adopted by council on the.....

day of....., 19...., and now on file in the office of the auditor of said city [*or* clerk of said village], and to be of.....(Here insert materials to be used).

Sec. 2. That the cost.....(Here repeat mode of payment for the improvement, as determined in the resolution of necessity).

Sec. 3. That the following lots and lands shall be assessed for said improvement, as above determined:

In District.....

Streets.	Lot Numbers.

Sec. 4. (In cities) That the director of public service be and hereby is authorized and directed to make and execute a contract for the construction of said improvement with the lowest and best bidder, after advertisement, according to law.

Or,

Sec. 4. (In villages) That the clerk be and hereby is authorized and directed to advertise for bids for the construction of said improvement according to law.

Sec. 5. This ordinance shall take effect and be in force from and after the earliest period allowed by law.

Passed .....19....

Attest:

....

Clerk. President of Council.

Sec. 3880. [How contract let.][1] The work shall be advertised, and the contract shall be awarded to the lowest and best bidder, in the manner heretofore provided for the improvement of streets. [96 v. 49, § 86.]

(1) See § 3833.

As to changes or alterations in sewer contract under former laws, see Gano v. Eshelby, 21 B. 177.

Sec. 3881. [Ordinance for assessment of costs; bonds in anticipation of assessments.] If it deems expedient, council may by ordinance assess the real estate as provided in the ordinance to improve, and cause such assessments to be collected, or, at its option, may issue bonds in anticipation of the

collection of such assessments, before the work is done or contracted for. Or council may, at its option, delay such assessment until the work is completed, and then, upon the certificate of the engineer showing the completion of the work, by ordinance assess the real estate as provided in the ordinance to improve.[1] Any person so assessed shall have the option of paying his proportion of the assessment in cash within the period of thirty days from the date of the levy thereof upon due notice being given. [97 v. 51, § 87; 96 v. 49, § 87.]

(1) **Assessment.**—The assessment is to be made as provided in the ordinance to improve and must be levied as other assessments are levied. See § 3812 *et seq.*

Installments.—It was held that sewer assessments might be made on the installment plan though the section relating to sewers did not expressly so provide. Nitzel v. St. Bernard, 3 N. P. 317.

Miscellaneous.—The cost of sewers on several streets may be added together and the assessment made equally on all the lands adjacent to the several streets. Johnson v. Avondale, 1 C. C. 229.

It was held under former statute that assessing district need not be established in assessment for trunk sewer. Wilson v. Cincinnati, 5 N. P. 68.

Street and sewer improvements can not be assessed in one assessment. Nitzel v. St. Bernard, 3 N. P. 317.

As to validity of sewer assessment on property abutting on one side of the street only, see Toledo v. Beaumont, 3 N. P. 287.

Change of plan.—A slight change in the plan originally adopted for sewer system, not rendering the sewer less serviceable or more expensive, does not invalidate the proceedings or assessment. Kohler Brick Co. v. Toledo, 29 C. C. 599; 10 C. C. (N. S.) 137; Close v. Parker, 30 C. C. 384; 11 C. C. (N. S.) 85, (aff'd, 70 O. S. 444).

Intersections.—It was held that the rule that intersections must be paid for by the city does not apply to sewer assessments for local sanitary sewer. Cincinnati v. Wewell, 16 B. 287; Close v. Parker, 11 C. C. (N. S.) 85; 30 C. C. 384.

See note "Real front, corner lots" under § 3812 and see Davis v. Hartwell, 10 N. P. (N. S.) 46.

Property subject to assessment.—Farming property. Toledo v. Andrews, 18 C. C. 861.

Wharf property is liable for sewerage. Boeres v. Strader, 1 C. S. C. R. 57.

Limitation of assessments.—The former limitation to percentage of value of land in the general assessment laws was held to apply to sewer assessments. Cincinnati v. Connor, 55 O. S. 82. See further § 3819 and note "Separate improvements" thereunder.

What costs and expenses included.—Assessment held not void because it included the cost of board sheeting used in making the

sewer, although the proceedings did not provide for such expense. Hastings v. Columbus, 42 O. S. 585. See Cincinnati v. Anchor White Lead Co., 44 O. S. 243.

Assessment can not include cost of material not in fact used in the sewer construction. Toledo v. Beaumont, 3 N. P. 287.

Municipal corporations are without authority to include for assessment purposes in the cost of a sewer system, the cost of sewage disposal plant. Op. Atty. Gen. (1920), p. 620.

Assessment for house connections up to the line of the street. See Toledo v. Andrews, 18 C. C. 861.

Cost of advertising and pay of superintendent may be included. Cincinnati v. Wewell, 16 B. 287.

Defense to assessment.—*Claiming no benefit.*—No defense to a sewer assessment that the lots were below the level of the sewer or that the sewer was too small and was therefore of no benefit. City v. McDermott, 2 B. 240; Hildebrand v. Toledo, 27 C. C. 427; 6 C. C. (N. S.) 450; Ford v. Toledo, 64 O. S. 92.

No defense to assessment that the sewer was no benefit to property owner's lot, Conner v. Cincinnati, 11 C. C. 336. Nor that owner's lot was six feet below the sewer. Toledo v. Kohn, 2 N. P. 47; nor that the owner's cellars were deeper than the sewer, Cincinnati v. Bickett, 26 O. S. 49; nor that the owner's lot is a wharf on the river bank and is the lowest ground of all, Boeres v. Strader, 1 C. S. C. R. 57, 60.

Postponed benefit.—Where a sewer is constructed for both drainage and sanitary purposes, but its use as a sanitary sewer must be postponed, an action lies by an abutting owner for injunction against collection of so much of the assessment as represents the increased cost in adapting the sewer to sanitary purposes until such time as it is open for use for that purpose, if such use is not delayed for an unreasonable period—in the instant case two years. Wilson v. Newark, 27 O. C. A. 476; 7 Oh. App. 452.

An assessment for the construction of a sewer will not be set aside on the ground that the state board of health has determined, after the sewer is built, to require the city to submit plans for abatement of the pollution of the stream into which the sewer empties; nor would the fact that the stream into which the sewer empties proves, ultimately, to be so polluted as to constitute a violation of the statutes prohibiting the pollution of streams by sewage justify the setting aside of such assessment. Thatcher v. Toledo, 22 C. C. (N. S.), 193; 2 Oh. App. 357.

Defect in proceedings.—Omission of some of the abutting feet from the assessment is no defense where plaintiff's assessment was not thereby increased. Wilson v. Cincinnati, 5 N. P. 68.

See also as to omissions and defects which are not a defense to assessment. Wewell v. Cincinnati, 45 O. S. 407, (omission to construct sewer in street embraced in plan); Toledo v. Railway Co., 4 C. C. 113, (failure to provide plans and specifications and estimate of expense); Cincinnati v. Honnigfort, 32 B. 32 (omission of a street in advertising plan); Davis v. Cincinnati, 1 B. 104,

(omitting to name one of the streets in the ordinance).

Uniformity.—Owner has no defense to assessment because of failure to assess all the abutting lots unless his assessment was thereby increased. His remedy is to enjoin the levy of increased taxes due to failure to make assessment. Wilson v. Cincinnati, 5 N. P. 68.

It is no defense to a sewer assessment that other property benefited has not been assessed where it appears that such other property is exempt because already supplied with local drainage. Toledo v. Potter, 19 C. C. 661.

In a sewer assessment district consisting wholely of farm lands, an assessment which levies the same amount per acre upon the remote lands as upon those in close proximity to the sewer, is not levied in proportion to the benefits, and its collection will be enjoined. Munz v. Myers, 23 C. C. (N. S.) 190 (aff'd without report, Myers v. Munz, 90 O. S. 383). But see Krauss v. Cleveland, 24 C. C. (N. S.) 483.

Set-off.—There can be no set-off against sewer assessment because of material furnished by property owner to contractor. Wilson v. Cincinnati, 5 N. P. 68.

Defense of local drainage.—See notes to § 3819.

Form of assessing ordinance for sewer improvement may be adapted from form of assessing ordinance under § 3825. And see requirements in § 3879 above.

Payment of special assessment after thirty day period without interest, when. Op. Atty. Gen. (1918), p. 1466.

Sec. 3882. [Construction of sewers without adopting plan or dividing city into districts.][1] If in its opinion expedient, the council may provide for the construction of main drains and branch drains connecting therewith without previously adopting any plan of sewerage or division of the territory of the municipal corporation or any part thereof, into districts, and may assess the cost and expense thereof upon such lots or lands as shall be designated in the ordinance to improve, or they may be paid from the sewer fund, or by the municipal corporation at large, as council determines, and such proceedings shall be had in respect to such improvements and assessments as are provided for herein for the construction of main or branch sewers according to a previously adopted plan. [96 v. 49, § 88.]

(1) **Old section 2371 R S., repealed.**

Sec. 3883. [Two or more municipalities authorized to construct joint sewers.][1] The respective councils of two or more municipal corporations may provide for the construction of a main sewer and branches jointly by such corporations for the

purpose of sewering and draining such corporations or any part thereof, and to agree upon the plan and location of such main sewer, and the terms and conditions on which it shall be constructed and maintained for common use, and the portion of the cost and expense thereof to be paid by each corporation. For this purpose such corporations may jointly appropriate land either within or without their respective corporations. [96 v. 49, § 89.]

(1) **Old section** (2406-120) R. S., repealed.

Further as to joint construction and use of sewers and sewage disposal works, see § 6602-10, *et seq.*, Part II.

Sec. 3884. [Payment of cost of joint sewers.][1] The council of each such corporation shall provide for assessing such portion of the cost and expenses of constructing any such main sewer or drain as it shall determine to be a proper charge upon the lots and lands within the respective corporations benefited thereby, and the excess over the assessment herein authorized shall be paid from the sewer funds of the corporations respectively, or if the corporations or either of them are divided into sewer districts, from the sewer fund of the district or districts directly or indirectly sewered in whole or in part thereby. If more than one district is so sewered thereby, the council shall apportion the amount to be paid by each district or assessed against the property therein, or such councils, or either, may determine to place the whole cost, or any part thereof, upon the general duplicate. [96 v. 49, § 89.]

(1) **Old section** (2406-120) R. S., repealed.

Sec. 3885. [Bonds may be issued.][1] Bonds may be issued by either or both corporations to provide for the payment of the cost and expense thereof as is provided herein, and the proceedings for the construction of such main sewer or drain, shall, so far as applicable, be conducted according to the provisions of this subdivision. [96 v. 49, § 89.]

(1) **Old section** (2406-120) R. S., repealed.

Serial bonds required.—For provisions relating to all bonds, see §§ 2295-6 et seq., under "Miscellaneous Statutes" in Part II, supra.

Sec. 3886. [Advertisement for bids.][1] The advertisement for bids for the construction thereof shall be joint, and shall be filed with the clerk of council, and reported to the council of each corporation. Any contract made for the construction of such sewer shall be in the names of such corporations jointly, but each corporation shall be liable only for such portion of the cost and expense as shall be specified in the ordinances providing therefor. [96 v. 49, § 89.]

(1) **Old section** (2406-120) R. S., repealed.

Sec. 3887. [Joint management of such system.][1] On completion, such main sewer or drain, branches and appurtenances, shall be the property of such corporations jointly, and they may take all necessary steps to keep them in proper repair and condition and to protect them from damage and improper use. Such corporations may by ordinance jointly passed, prescribe the terms and conditions, including the price to be paid therefor, upon which other municipal corporations, public institutions or individuals, may connect with and use such main sewer or drain, and the disposition of the fund arising therefrom.[2] [96 v. 50, § 90.]

(1) **Old sections.** Compare §§ (2406-146) and (2406-147) R. S.. repealed.

(2) **Tapping sewers.** See note to § 3871, *ante.*

Sec. 3888. [Council may borrow money for construction of sewers.][1] The council of a municipal corporation may borrow money, at a rate of interest not exceeding six per cent per annum, to pay the cost and expense of constructing such main sewers, main drains, branches and ditches. [96 v. 50, § 91.]

(1) **Old section.**—Compare § 2380 R. S., repealed.

Sec. 3889. [Repairs of sewers and ditches.] When it is deemed necessary, council may provide for the repair or reconstruction of any sewer, ditch or drain and the proceedings for that purpose shall be the same, so far as applicable, as are herein required for the original construction thereof. [R. S. Sec. 2404; 66 v. 256.]

Sec. 3890. [Construction and maintenance of sewer pumping stations.][1] The councils of municipal corporations, in accordance with the provisions of this title, may provide for the construction and maintenance of such sewer pumping stations, and equip them with necessary machinery and apparatus and provide the necessary buildings therefor, as the council deems necessary. [96 v. 50, § 92.]

(1) **Old section.**—Compare § (2406-121) R. S., repealed.

Sec. 3891. [Sewage farm.][1] A municipal corporation may purchase and hold land outside of the corporate limits, to be used as a sewerage farm,[2] to construct and maintain thereon all the necessary appliances for the proper dispositions of the sewage of such corporation, under such rules and regulations as shall be prescribed by council and approved by the state board of health. [96 v. 51, § 93.]

(1) **Old section.**—Compare § (2406-105) R. S., repealed.

(2) **Sewage plants and farms.** —See §§ 3647 and 3649, *ante.*

Sec. 3891-1. [Council may by ordinance establish rate or charges of rent to be paid city or village.] The council of any city or village which has installed or is installing sewerage, a system of sewerage, sewage pumping works or sewage treatment or disposal works for public use, may by ordinance establish just and equitable rates or charges of rents to be paid to such city or village for the use of such sewerage, a system of sewerage, sewage pumping works or sewage treatment or disposal works by every person, firm or corporation whose premises are served by a connection to such sewerage, system of sewerage, sewage pumping works or sewage treatment or disposal works. Such charges shall constitute a lien upon the property served by such connection and if not paid when due shall be collected in the same manner as other city and village taxes. The council may change such rates or charges from time to time as may be deemed advisable. Provided, however, that in a municipality operating under a municipal charter the council or other legislative body may establish the schedule of rates herein authorized and provide for its administration by designating

the department or officer of the municipality to be charged with the enforcement of the provisions of this act. [110 v. 370.]

Sec. 3891-2. [Director of public service; general duties.] In a city the director of public service shall manage, conduct and control the sewerage system and sewage pumping, treatment and disposal works and when the council has established a schedule of rates or charges of rents for their use shall collect sewer rentals, and he shall appoint the necessary officers and agents for such purposes. [110 v. 370, 371.]

Sec. 3891-3. [Board of trustees of public affairs shall manage and control sewerage system, etc.] When the council of a village has established a schedule of rates or charges of rents for the use of the sewerage system and sewage pumping, treatment and disposal works, the board of trustees of public affairs shall manage, conduct and control such sewerage system and sewage pumping, treatment and disposal works and shall collect sewer rentals and shall appoint necessary officers and agents for such purposes; and shall assume all duties, in relation to sewers, imposed upon the street commissioner by section 4364 of the General Code, whereupon the street commissioner shall be relieved of such duties. [110 v. 370, 371.]

Sec. 3891-4. [By-laws and regulations.] The director of public service and the board of trustees of public affairs may make such by-laws and regulations as may be deemed necessary for the safe, economical and efficient management and protection of the sewerage system and sewage pumping, treatment and disposal works; and for the construction and use of house sewers and connections to the sewerage system. Such by-laws and regulations shall have the same force and effect as ordinances when not repugnant thereto or to the constitution or laws of the state. [110 v. 370, 371.]

Sec. 3891-5. [Reception and distribution of funds derived from sewer rentals.] The funds received from the collection of sewer rentals shall be deposited weekly with the treasurer of the corporation. Money so deposited shall be kept as a

separate and distinct fund and shall be known as the sewer fund. When appropriated by council, it shall be subject to the order of the director of public service of a city or board of trustees of public affairs of a village. Such director or board shall sign all orders drawn on the treasurer of the corporation against such fund. This fund shall be used for the payment of the cost of the management, maintenance, operation and repair of the sewerage system and sewage pumping, treatment and disposal works and any surplus in such fund may be used for the enlargement or replacement of the same and for the payment of the interest on any debt incurred for the construction of such sewerage system and sewage pumping, treatment and disposal works, and for the creation of a sinking fund for the payment of such debt, but shall not be used for the extension of a sewerage system to serve unsewered areas or for any other purpose whatsoever. [110 v. 370, 371.]

COLLECTION OF ASSESSMENTS.

Sec. 3892. [When special assessments to be certified to county auditor; how collected.][1] When any special assessment is made, has been confirmed by council, and bonds, notes or certificates of indebtedness of the corporation are issued in anticipation of the collection thereof, the clerk of the council,[2] on or before the second Monday in September, each year, shall certify such assessment to the county auditor, stating the amounts and the time of payment. The county auditor shall place the assessment upon the tax list[3] in accordance therewith and the county treasurer shall collect it in the same manner as other taxes are collected, and when collected pay such assessment to the treasurer of the corporation, to be by him applied to the payment of such bonds, notes or certificates of indebtedness and interest thereon, and for no other purpose. For the purpose of enforcing such collection, the county treasurer shall have the same power and authority as allowed by law for the collection of state and county taxes. [96 v. 51, § 94.]

(1) **Old section** 2296 R. S., repealed.

(2) **In cities,** where assessment books may be conveniently kept by

the auditor, such installments may be by him reported to the clerk of council and certified by the latter.

Provision is directory only.—Section 3892, General Code, providing that such certification shall be made on or before the second Monday in September each year is directory merely. Savings & Trust Co. v. Cleveland, 28 O. C. A. 265.

The validity of an assessment ordinance for a street improvement of a municipality is not affected by its certification or lack of certification to the county auditor. *Ib.*

Compensation of clerk of council. See Op. Atty. Gen. (1918), p. 775.

(3) **Prima facie valid.**—An assessment on the tax duplicate is presumptively valid and the burden is on the property owner to show invalidity. Murphy v. Sims, 13 Dec. 62. See also Bolton v. Cleveland, 35 O. S. 319.

Placing on duplicate.—Where tract of land is cut in two by improvement, whole assessment must not be put on whole tract on the duplicate, but on separate parcels. Spangler v. Cleveland, 35 O. S. 469.

Nor should whole assessment be put on one of the lots. Younglove v. Hackman, 43 O. S. 69.

FORM OF CERTIFICATE TO AUDITOR OF ASSESSMENTS.

Office of the Clerk of Council of the City [*or* Village] of.....
To the Auditor of.....County, Ohio:

I hereby certify that the special assessments hereinafter set forth have been duly levied by the council of the city [*or* village] of.....upon the lots and lands described below, and are herewith certified to you, as provided by law to be placed upon the tax list and collected as other taxes are collected:

Owner	No. and sub-division or other description of lot.	Amount Assessed.

Witness my hand and official seal this.....day of....., 19....

.....

(Seal) Clerk of the Council of the City [*or* Village] of.....

Sec. 3893. [When assessment to be collected by municipal treasurer.] In all other cases, such assessment shall be paid to and collected by the treasurer of the municipality,[1] and in any event the clerk of the council, when the receipt is presented to him by the owner, showing the payment of an assessment on his property, shall enter such receipt on the margin of the record of the assessment. [96 v. 51, § 94.]

(1) **Paid to treasurer.**—The above provision would seem to forbid assignments of assessments to contractors. But see § 3897, *post*.

Sec. 3894. [Assessment on owner of life estate.] When a special assessment is made on real estate subject to a life estate, the assessment shall be payable by the tenant for life, but upon application by the life tenant to the court of competent jurisdiction, by action against the owner of the estate in fee, such court, may apportion the cost of the assessment between the life tenant and the owner in fee, in proportion to the relative value of the improvement to their estates, respectively, to be ascertained and determined by the court on principles of equity.[1] [R. S. Sec. 2268; 67 v. 80.]

(1) **In partition case,** the provision of this section will be applied and payments already made properly charged. Ward v. Ward, 9 C. C. 454.

Apportionment is according to proportionate benefit, not actual benefit. Crawford v. Crawford, 4 Dec. (Re.) 138.

See further Cook v. Gilpin, 2 B. 82.

Sec. 3895. [Notice of assessment to be published.] Before adopting an assessment made as provided in this chapter, the council shall publish notice for three weeks consecutively, in a newspaper of general circulation in the corporation, that such assessment has been made, and that it is on file in the office of the clerk for the inspection and examination of persons interested therein.[1] [R. S. Sec. 2278; 66 v. 248, § 585 (S. & S. 833).]

(1) **Application of section.**—This section applies to all assessments made under this chapter and is not limited to assessments by benefits. A study of the history of former Sec. 2278 R. S., shows that it was originally Sec. 585 of the Municipal Code of 1869 and related then only to assessments by the foot front. As carried into the Revised Stat. Sec. 2278 read: "Before adopting the assessments *so made*," etc., and followed 2277 which provided for an assessing board in case of assessment by benefits. But since Sec. 585 of the Municipal Code of 1869 has never been repealed, and the present section of the G. C. by its terms refers to all assessments made "as provided *in this chapter*," it seems that the notice is required in the case of assessments made by other methods as well as in assessments by benefits. See Maple Heights v. Holtz, 100 O. S. 264, where Sec. 3895 was held to apply to an additional pro rata assessment levied under § 3909. The purpose of the notice

is obviously to advise the property owner in order that he may determine whether the proposed assessment will be in excess of the constitutional or statutory limitations. The law is silent as to the mode of procedure in making up the tentative assessment where not levied according to benefits, but council may direct the clerk or some other officer to make it and place it on file pending the notice.

Necessity of notice.—Under former sections it was held that the publication of notice was not a condition precedent to the levying of assessments, where no damages caused by the improvement were included in the assessment. Finnell v. Kates, 19 O. S. 405.

Effect of notice.—After notice of the assessment is given, all persons interested are bound to take notice of the subsequent proceedings. Chamberlain v. Cleveland, 34 O. S. 551.

Sec. 3896. [What cost of improvement shall include.] The cost of any improvement contemplated in this chapter shall include the purchase money of real estate, or any interest therein, when acquired by purchase, or the value thereof as found by the jury, when appropriated, the costs and expenses of the proceeding, the damages assessed in favor of any owner of adjoining lands and interest thereon,[1] the costs and expenses of the assessment, the expense of the preliminary and other surveys, and of printing, publishing the notices and ordinances required, including notice of assessment, and serving notices on property owners, the cost of construction, interest on bonds, where bonds have been issued in anticipation of the collection of assessments, and any other necessary expenditure.[2] [R. S. Sec. 2284; 83 v. 171; 66 v. 241.]

(1) **Costs of appropriation.**—By the provision of Art. XVIII, Sec. 11, of the constitution as amended in 1912, not more than fifty percent of the expense of appropriating property, may be assessed upon benefited property. Prior to this amendment, such assessments were held unconstitutional. See Dayton v. Bauman, 66 O. S. 379; C. L. & N. Ry. v. Cincinnati, 62 O S. 465; Youngstown v. Bonnell, 65 O. S. 575; Dodsworth v. Cincinnati, 18 C C. 288.

For former cases *contra*, see Cleveland v. Wick, 18 O. S. 303; Norwood v. Ogden, 18 C. C. 869; Krumberg v. Cincinnati, 29 O. S. 69; Meissner v. Toledo, 31 O. S. 387; Otis v. Cleveland, 1 Clev. 91.

Damages to abutting property for change of grade cannot be included in the assessment. McGlynn v. Toledo, 22 C. C. 34 (affirmed, 47 B. 712); Freeman v. Hunter, 7 C. C. 117; Fridman v. Norwood, 1 C. C. (N. S.) 97; 25 C. C. 258; Bartley v. Cincinnati, 8 C. C. 226. Cases

contra, McMakin v. Cincinnati, 7 N. P. 203; Corry v. Cincinnati, 22 B. 194

Or the cost of grading or lowering the street to the new grade. Carlisle v. Cincinnati, 8 C. C. (N. S.) 46; Thale v. Cincinnati, 10 Cin. Court Index, No. 103.

(2) **What costs and expenses included.**—Expense of a retaining wall along street, Longworth v. Cincinnati, 34 O. S. 101; cost of lateral and cross drain pipes. *Ib.;* compensation of superintendent of work, but not compensation for services of salaried officers. *Ib.;* expense of removing water boxes on the street, Acklin v. Parker. 29 C. C. 625; 10 C. C. (N. S.) 243; (aff'd, 78 O. S., 413); small expense of placing a French drain in street, or increasing width of improvement, though not provided for in the ordinance to improve, etc., Hastings v. Columbus, 42 O. S. 585; Taylor v. Wapakoneta, 26 C. C. 285; amount retained as guaranty of good work, but not if retained for repairs, Fridman v. Norwood, 1 C. C. (N. S.) 97; 25 C. C. 258, (aff'd, 49 B. 99); necessary sheeting in a trench, not before provided for, Cincinnati v. Anchor White Lead Co., 44 O. S. 243; cost of broken stone beyond that called for in contract, Cincinnati v. Goodman, 5 Rec. 153; expense of curbing, included in street assessment, Ehni v. Columbus, 3 C. C. 494; fees of equalizing board, Chamberlain v. Cleveland, 34 O. S. 551, 569; expense of grading approaches on intersecting streets. Butler v. Toledo, 5 O. S. 225; Creighton v. Scott, 14 O. S. 438; expense of advertisement in more than one newspaper, although statute provides for "advertisement in some newspaper," Cincinnati v. Davis, 58 O. S. 225, 237; Fridman v. Norwood, 1 C. C. (N. S.) 97; 25 C. C. 258 (aff'd, 49 B. 99); additional cost of retaining wall, McMakin v. Cincinnati, 7 N. P. 203; interest on installments, Steese v. Oviatt, 24 O. S. 248; interest from time fixed for payment, when assessment defective, but amount properly chargeable equals assessments, Gest v. Cincinnati, 26 O. S. 275; interest on amount justly due from the time the court found it, but not earlier, in the ordinary case, Burkhardt v. Cincinnati, 7 C. C. 260; Fricke v. Cincinnati, 1 N. P. 98.

The fact that preliminary expenses such as cost of advertising, serving notices, etc., have been paid out of the general funds of the municipality, does not prevent such expenses from being lawfully included in the assessment, to reimburse the general fund. Adkins v. Toledo, 27 C. C. 417; 6 C. C. (N. S.) 433.

Municipality does not have to deduct from assessment the difference between interest which it has to pay on its bonds and interest which property owner pays the city. Borger v. Columbus, 3 N. P. (N. S.) 261; 15 Dec. 476; 27 C. C. 812; 6 C. C. (N. S.) 401. See § 3932. As to deduction under former statutes, see Fridman v. Norwood, 25 C. C. 258; 1 C. C. (N. S.) 97; Mudge v. Evanston, 7 C. C. (N. S.) 197.

Items which cannot be included.—Compensation for services of salaried officers, Cincinnati v. Longworth, 34 O. S. 101; cost of repair of bad work, Spangler v. Cleveland, 35 O. S. 469; Watterson v. Bradley, 43 O. S. 456; percentage to pay collector's fees, Jonas v. Cincinnati, 18 O. 318; Spangler v. Cleveland, 35 O. S. 469; expenses

for advertising, etc., where void assessment is enforced on ground of estoppel, Corry v. Gaynor, 22 O. S. 584, 597; interest on bonds which make the assessment exceed the percentage of value of property allowed by law, Salem v. Mulford, 22 C. C. 397 (affirmed, 62 O. S. 632); fees for service of notice in excess of lawful amount, McGlynn v. Toledo, 22 C. C. 34 (affirmed, 47 B. 712); item of expense not in estimate, whether to be included, see Knorr v. Cincinnati, 21 B. 297 (affirmed without report, 24 B. 371).

Determination of council that an item of expense is properly to be included is not conclusive. Reynolds v. Clearwater, 4 Gaz. 129.

Additional advertising, etc., is not necessary to allow items properly included in necessary expenditures to be included in assessment. Hastings v. Columbus, 42 O. S. 585.

Sec. 3897. [When payable; lien of; release of lien.][1] Special assessments shall be payable by the owners[2] of the property assessed personally, by the time stipulated in the ordinance providing therefor, and shall be a lien from the date of the assessment upon the respective lots or parcels of land assessed.[3] When presented with a receipt from the contractor,[4] in whose favor an assessment is confirmed, or his assigns, showing such assessment on any property for any improvement to have been paid, the auditor or clerk shall at once record the fact upon the margin of the record of the assessment, with the date of such presentation, from which time such property shall be released from the lien. [R. S. Sec. 2285; 90 v. 50; 66 v. 242.]

(1) **Object of section** is not to define property liable to assessment, but to prescribe the time when the assessment becomes a lien on the property and charge against the owner. Douglass v. Cincinnati, 29 O. S. 165; Cincinnati v. Oliver, 31 O. S. 371.

Validity of statutes creating personal liability for assessments sustained. Hill v. Higdon, 5 O. S. 243; Gest v. Cincinnati, 26 O. S. 275.

(2) **Owners.**—Lessee for ten years is not an owner within meaning of this section. Davis v. Cincinnati, 36 O. S. 24.

Those who were owners at the time of the assessment are liable to personal judgment. Toledo v. Barnes, 8 C. C. 684, 687.

Holder of perpetual lease with privilege of purchase is an "owner." Clements v. Norwood, 32 B. 201.

(3) **Lien.**—The assessment on property is a lien prior to a mortgage or judgment. Moerlein Brew. Co. v. Westmeier, 4 C. C. 296. But see Donohue v. Brotherton, 7 N. P. 367.

It is superior to a purchase money mortgage. Clifton v. Cincinnati, 3 B. 272.

Lien is for the present value of whole amount, although the assessment is payable in installments.

Moerlein Brew. Co. v. Westmeier, 4 C. C. 296.

A covenant against all claims whatsoever, would include a lien for assessments. Craig v. Heis, 30 O. S. 550.

Assessment becomes a lien from the date of the passage of the assessing ordinance. Whipple v. Toledo, 7 C. C. (N. S.) 520.

The lien of municipality on real estate for assessments remains on such real estate unaffected by sales and transfers and can be collected as other taxes. Where the property is sold under judicial process, the city need not and should not be made a party. Installments payable at the time and upon the annual duplicate, must be paid out of the proceeds of the sale, and other installments will continue a lien to be paid by the purchaser. Makley v. Whitmore, 61 O. S. 587, 595; Hagerty v. Columbus, 14 Dec. 1.

Property owners, whose property has been appropriated by the municipality, are liable for remaining installments of street assessment levied on the property. Cincinnati v. Burnet, 3 O. L. R. 572.

Where land on which there is an assessment lien is divided into parcels and sold, the separate parcels are liable for the liens in the inverse order for sale. Cincinnati v. Wynne, 19 C. C. 747 (aff'd, 65 O. S. 611).

(4) **Payment to contractor.**—See § 3893, and note.

Sec. 3898. [Assessment and penalty recovered by suit.] If payment is not made by the time stipulated, the amount assessed, together with interest, and a penalty of five per cent thereon,[1] may be recovered by suit[2] before a justice of the peace, or other court of competent jurisdiction, in the name of the corporation, against the owner or owners,[3] but the owner shall not be liable, under any circumstances, beyond his interest in the property assessed, at the time of the passage of the ordinance or resolution to improve.[4] [R. S. Sec. 2286; 66 v. 242, § 546.]

(1) **Interest.**—See note (2) to § 3896, *ante.*

Penalty.—No penalty can be collected where the assessment is not conclusive, because of irregularities. Upington v. Oviatt, 24 O. S. 232. See also Pike v. Cummings, 36 O. S. 213.

If judgment was entered without including penalty, and without objection, no penalty will afterwards be awarded. Evans v. Cincinnati, 3 B. 856.

Where judgment is reversed and larger amount assessed, court can not remit penalty. Finnell v. Howall, 2 C. S. C. R. 150, 155.

Where court reduces assessment because beyond statutory limit, no penalty can be recovered. Cincinnati v. Fugman, 5 N. P. 14.

Penalty is due and payable although no suit is brought. Toledo v. Platt, 2 N. P. 304; and a tender must include interest and penalty. *Ib.* County treasurer cannot accept delinquent installment without penalty when so certified; can-

not remit penalty. See Op. Atty. Gen. (1919), p. 316.

Penalties on assessments under this section to be added, when. Op. Atty. Gen. (1915), p. 1291.

No authority for placing penalties on delinquent assessments such as are placed on delinquent taxes. State *ex rel.* v. Sanzenbacher, 32 C. C. 16; 13 C. C. (N. S.) 356.

(2) **Action to collect.**—*When assessment certified* to auditor and put on the tax duplicate the action to collect by city does not lie. Fremont v. Hayes, 4 N. P. 379. Such action can be brought only by the county treasurer. Ry. Co. v. Bellaire, 67 O. S. 297.

Personal judgment.—Statute making lot owners personally liable is constitutional. Gest v. Cincinnati, 26 O. S. 275. But no personal liability exists unless the statute expressly imposes it. Dreake v. Beasley, 26 O. S. 315.

Personal liability exists only in case of one owning the lot at the date of the assessment and petition must aver ownership at that time. Corry v. Gaynor, 21 O. S. 277.

Personal judgment can not be had against one in possession who is not an owner. Davis v. Cincinnati, 36 O. S. 24.

See further Lowden v. Cincinnati, 2 Disney, 203.

Limitation on suit.—Statute of limitations runs not from date of assessing ordinance but from time fixed for payment. Reynolds v. Green, 27 O. S. 416; the limitation is six years. *Ib.* As to whether statute of limitations applies to right to collect assessment, see Brenchweh v. Drake, 31 O. S. 652; Hartman v. Hunter, 56 O. S. 175; Linn St. Bldg. Ass'n v. Morgan, 47 B. 889; Wasteney v. Schott, 58 O. S. 410.

The act of certifying the assessment to the county auditor, saves the assessment from the two year limitation on suits for collection. Fox v. Cincinnati, 31 C. C. 613; 13 C. C. (N. S.) 144; aff'd 85 O. S. 445.

An action for recovery of unpaid street assessments is an action upon a liability created by statute, and is therefore, controlled by the six years' statute of limitations. Cincinnati v. Fogarty, 13 N. P. (N. S.) 631.

Defenses.—No defense to suit to collect assessment, that city has not yet paid the money. Bliss v. Kraus, 16 O. S. 54; nor that proper plan for improvement was not adopted. Toledo v. Grasser, 7 N. P. 396.

No set-off to the assessment can be allowed because of damages to property claimed by defendant, Ulm v. Cincinnati, 7 N. P. 278; nor because of injury to defendant by slipping on improperly made street. Shroder v. Overmann, 5 N. P. 392; and see Straus v. Cincinnati, 23 B. 359; nor for claim for materials furnished to contractor, Wilson v. Cincinnati, 5 N. P. 68; nor for claim against contractor for digging more material from lot owner's property than licensed to take, Hastings v. Columbus, 42 O. S. 585.

Reduction for repairs made necessary by bad work should be made from the assessment. Hastings v. Columbus, 42 O. S. 585.

Money received by municipality for rent of tools need not be deducted from assessment. McGlynn v. Toledo, 22 C. C. 34 (affirmed, 47 B. 712.)

Pleading, practice and evi-

dence.—Averment of "due passage" of resolution is sufficient on demurrer, though two-thirds vote for passage be required. Jessing v. Columbus, 1 C. C. 90. See also Burns v. Patterson, 2 H. 270.

Answer denying that requisite number petitioned for improvements needs no reply. Corry v. Campbell, 25 O. S. 134, 140.

Where claim has already been adjudged a lien on the property, no question on demurrer can arise as to validity of improvement or statute of limitations. Columbus v. Schneider, 12 C. D. 781.

Jury trial, whether necessary. Norris v. Casper, 8 N. P., 475, 476.

Where assessments have exceeded benefits the trial court, in action to collect, may, upon proper pleadings determine what amount should be assessed; and court may also set aside the assessment and remit the question of amount to city authorities. Walsh v. Sims, 65 O. S. 211.

Burden of proof is on plaintiff to show assessment exceeded benefits, when this is the defense. Yost v. Railway Co., 24 C. C. 169; 2 C. C. (N. S.) 519. As to costs, see *Ib.*

Recovery back.—*Voluntary payment*, what is, see Marietta v. Slocomb, 6 O. S. 471; Whitbeck v. Minch, 48 O. S. 210; Stephan v. Daniels, 27 O. S. 527; Groesbeck v. Cincinnati, 51 O. S. 365; Cincinnati v. James, 55 O. S. 180.

Limit of time for recovery back, is one year, by § 12075 G. C. See Groesbeck v. Cincinnati, 51 O. S. 365.

Injunction against assessments.—See notes to § 3812.

(3) See note to § 3897, *ante.*

(4) **Limit of liability** applies even where owner is one of three-fourths of property owners who petitioned for improvement and asked all costs to be placed on them. Personal judgment can not exceed the value of the property. Laird v. Cincinnati, 5 B. 903; 9 Rec. 479.

Sec. 3899. [Lien may be enforced against all or part of owners.] Proceedings for the recovery of the assessment may be instituted by the corporation against all the owners, or each or any number of them, or to enforce the lien, against all the lots or lands, or each lot or parcel, or any number of them embraced in any one assessment, but the judgment or decree shall be rendered severally or separately for the amount assessed.[1] Any proceeding may be severed, in the discretion of the court, for the purpose of trial, review or appeal where an appeal is allowed. [R. S. Sec. 2287; 66 v. 242.]

(1) **Enforcement of lien.**—Lands of cemetery association exempt from taxation can not be sold to pay assessment, but assessment may be enforced by such remedy as courts of equity afford. Lima v. Cemetery Ass'n, 42 O. S. 128.

Municipality can not enforce lien after assessment has been certified to county auditor. Fremont v. Hayes, 4 N. P. 379.

Municipality may buy in property on which it has a lien. Columbus v. Schneider, 7 N. P. 619.

Sec. 3900. [Lien as to nonresident owner.] In proceedings to enforce the lien, when the owner of any lot or land assessed is a nonresident of the state, or is unknown, notice shall be given by publication in the manner prescribed by law in similar cases.[1] [R. S. Sec. 2288; 66 v. 242.]

(1) **Manner of publication.**—See §§ 11293-11298 G. C.

Sec. 3901. [Costs, in case of error or defect in proceedings.][1] If in any such action it appears that by reason of any technical irregularity or defect, whether in the proceedings of the council, or of any other officer of the corporation, or in the plans or estimates, the assessment has not been properly made against any defendant or upon any lot or parcel of land sought to be charged,[2] the court may nevertheless on satisfactory proof that expense has been incurred which is a proper charge against such defendant, or lot or parcel of land in question, render judgment for the amount properly chargeable against such defendant or on such lot or land,[3] but in such cases the court shall make such order for the payment of the costs as may be deemed equitable and proper.[4] [R. S. Sec. 2289; 80 v. 52; 66 v. 242.]

(1) **Validity.**—Section 2289 R. S. providing for judgment where assessment is invalid because of irregularities was held not a violation of the United States Constitution. Railway v. Columbus, 23 B. 3.

(2) **What irregularities cured.**—Irregularity in notice of resolution and ordinance to improve, Green v. Cincinnati, 7 C. C. 233; irregularity in estimate of cost of improvement, Wewell v. Cincinnati, 45 O. S. 407; as to what defects in advertisement are cured, see Wilder v. Cincinnati, 26 O. S. 284, 285; Cincinnati v. Goodman, 5 Rec. 153; publication of notice on Sunday, Hasting v. Columbus, 42 O. S. 585; defective advertisement for bids, see Cincinnati v. Bickett, 26 O. S. 49; ordinance to improve passed before time has expired for filing claim, Toledo v. Railway, 4 C. C. 113; failure to advertise for bids for full time required, Upington v. Oviatt, 24 O. S. 232; see also where rate of assessment not uniform on all property assessed, Jaeger v. Burr, 36 O. S. 164; part of street where sidewalks laid not being brought up to grade, McGlynn v. Toledo, 22 C. C. 34. aff'd, 47 B., 712; unlawful combination among bidders (in such case property owners may obtain a reduction to the extent of actual injury), Hubbard v. Norton, 28 O. S. 116; lowest bidder released at his own request, Cincinnati v. Goodman, 5 Rec. 153.

Lowest bid not taken from mistake in judgment, assessment collectible up to fair value of work,

Cincinnati v. Hopple, 1 B. 104; no plans and specifications on file when contract made, Becher v. McCloud, 4 C. C. 305; advertisement for bid not as required, *Ib.;* in such case the reasonable cost is recoverable. *Ib.*

Where proper proceedings were followed and contract let and new territory then added to one division, the work being continued under the terms of the contract as for the original division, the work actually done and paid for, the irregularity as to the proceedings touching the new territory was cured. Osborne v. Huffman, 14 C. C. (N. S.) 239 (aff'd 58 O. S. 697).

Assessment ordinance requiring payment at date earlier than its passage is an error that can be cured. Bolton v. Cleveland, 35 O. S. 319.

Defects not cured.—Failure to pass improvement ordinance as required by law, Sullivan v. Pausch, 5 C. C. 196; omission to publish preliminary resolution, Welker v. Potter, 18 O. S. 85; but see Upington v. Oviatt, 24 O. S. 232; failure to pass assessment ordinance, Brewer v. Bowling Green, 7 C. C. 489; failure to serve land owners with notice of ordinance to improve, Joyce v. Barron, 67 O. S. 264, 268; but see Toledo v. McMahon, 9 C. C. 194; Kirby v. Winton Place, 7 N. P. 169; omission of notice of resolution declaring necessity to improve, Schmidt v. Elmwood Place, 15 C. C. 351; Welker v. Potter, 18 O. S. 85; Stephan v. Daniels, 27 O. S. 527; Knecht v. Cincinnati, 18 C. C. 875; see also Kelly v. Cleveland, 34 O. S. 468. (Property assessed which was not included in ordinance); collusion between city officers and contractor, Cincinnati v. Kemper, 17 B. 116; work done before any determination to assess, Folz v. Cincinnati, 2 H. 261.

(3) **Amount properly chargeable.**—As to ascertainment of such amount, see Wilder v. Cincinnati, 26 O. S. 284; Cincinnati v. Bicket, 26 O. S. 49; Central O. R. R. Co. v. Columbus, 23 B. 3.

Court may allow interest from time assessment due on amount properly chargeable. Gest v. Cincinnati, 26 O. S. 275. See further McCloud v. Columbus, 54 O. S. 439, where this section was applied.

Where assessment covers more feet than defendant owns, court may reduce amount proportionately. Ridenour v. Saffin, 1 H. 464, 478.

When illegal items are included in the assessment, city need not re-assess, but court may correct assessment. Dodson v. Cincinnati, 4 Rec. 312.

Amount chargeable is not amount of benefits but that part of the assessment that should have been charged, if assessment had been legally made. Cincinnati v. Bickett, 26 O. S. 49. It is based on the fair average cost and not the cost in front of each lot. Wilder v. Cincinnati, 26 O. S. 284.

But, though court can correct assessment, it can not make an entirely new assessment, as council is authorized to do by § 3902. Mocker v. Cincinnati, 7 N. P. 279.

As to right of court to fix amount properly chargeable, where assessment improperly made, not because of technical error, but because in excess of benefits, etc., see note 2 under § 3819, *ante.*

Jury trial.—Under § 3901 giving the court power to determine the

amount properly chargeable and award judgment therefor, the issue is not one triable by a jury but by the court. R. R. Co. v. Bellaire, 60 O. S. 301.

Applies to injunctions.—Where property owner sues to enjoin collection of assessment, § 3901 applies and court may fix amount properly chargeable.

Where plaintiff in such case admits that part is due he must tender such part before he can have injunction. Griswold v. Pelton, 34 O. S. 482.

(4) **Costs** of a suit to reduce assessment should fall on municipality. Burkhardt v. Cincinnati, 7 C. C. 260, 262.

Sec. 3902. [When reassessment may be ordered.] When it appears to the council that a special assessment is invalid, by reason of informality or irregularity in the proceedings, or when an assessment is adjudged to be illegal, by a court of competent jurisdiction, the council may order a re-assessment, whether the improvement has been made or not.[1] [R. S. Sec. 2290; 66 v. 242, § 551.]

(1) **Right to re-assess.**—If property which ought to have been assessed is omitted, the assessment will be enjoined, but the right to make re-assessment will not be prejudiced. Upington v. Oviatt, 24 O. S. 232.

A re-assessment may also be made where the action of the equalization board is unauthorized. Chamberlain v. Cleveland, 34 O. S. 551.

Where an assessment was held void because the city put an assessment at one rate on abutting property and another assessment at a different rate upon lots declared to be specially benefited, the right to re-assess was held not to be prejudiced. Akron v. Allen, 22 B. 260.

Where a contractor was unable to recover an assessment because part of the work was enjoined, but recovered the amount from the city, the city could, on the removal of the injunction and completion of the work, reimburse itself by a re-assessment. Cincinnati v. Wilder, 9 Rec. 727.

The right to make a proper re-assessment is not prejudiced where an asssessment is held illegal because the ordinance to improve a street provides for assessment by the front foot, while the assessment of damages to the abutters was by benefits. Dick v. Toledo, 5 C. D. 157; 11 C. C. 349.

The curative sections apply and a re-assessment may be had, if an assessment is void because made on a wrong basis. Frey v. Findlay, 7 C. C. 311, 327.

A re-assessment is valid, even though a portion of the money thereby derived is used for the extension of the improvement beyond the limits designated. Butler v. Toledo, 5 O. S. 225, 230.

When re-assessment is precluded: See Kelly v. Cleveland, 34 O. S. 468.

Uniformity.—An assessment hav-

ing been set aside after settlement has been made as to part of the lots affected, a re-assessment of the lots with respect to which no settlement has been made is not invalid because the lots covered by the settlement are omitted from the re-assessment. Ridenour v. Biddle, 30 C. C. 237; 10 C. C. (N. S.) 438.

Who may re-assess.—The right to re-assess lies with council, and a court has no power to order a re-assessment. Mocker *et al.* v. Cincinnati, 4 Dec. 161; 5 N. P. 242.

It is not error for the court to refuse to set aside an assessment and submit the question to the city authorities for re-assessment, where the assessment made by the city exceeds in a substantial amount the special benefits conferred, and the trial court may, upon proper pleadings, determine the amount to be assessed. Walsh v. Sims, Treasurer, 65 O. S. 211.

Sec. 3903. [Proceedings upon reassessment.] Proceedings upon a re-assessment, and for the collection thereof, shall be conducted in the same manner as is provided for the original assessment. [R. S. Sec. 2291; 66 v. 242, § 552.]

Sec. 3904. [Special duty of courts.] The court of common pleas and superior courts shall have the jurisdiction authorized by this chapter for the collection of any charge or debt, or the enforcement of any lien, notwithstanding the amount involved shall be less than that to which the jurisdiction is limited in other cases, and those courts may make such special rules concerning the class of cases authorized to be brought under this chapter, as will tend to expedite their disposition, and prevent unnecessary costs. [R. S. Sec. 2294; 66 v. 242, § 553.]

Sec. 3905. [Unpaid assessments to be certified to auditor.] The council may order the clerk or other proper officer of the corporation to certify any unpaid assessment or tax to the auditor of the county in which the corporation is situated, and the amount of such assessment or tax so certified, shall be placed upon the tax list by the county auditor,[1] and shall, with ten per cent penalty[2] to cover interest and cost of collection, be collected with and in the same manner as state and county taxes, and credited to the corporation. Such ten per cent penalty shall in no case be added unless at least thirty days intervene between the date of the publication of the ordinance making the levy and the time of certifying it

to the county auditor for collection.[3] [R. S. Sec. 2295; 80 v. 52; 66 v. 243, § 554.]

(1) **Section construed.**—See R. R. Co. v. Sullivan, 32 O. S. 152.

Placing on duplicate.—Where assessment had been assigned to contractor it could not be placed on tax duplicate. Horn v. Columbus, 1 C. C. 337.

Where assessment has been certified to auditor, municipality can not then collect by suit. Fremont v. Hayes, 4 N. P. 379.

Only county treasurer can sue. Ry. Co. v. Bellaire, 67 O. S. 297.

County auditor not entitled to compensation for preparing a special delinquent assessment duplicate. Marshall v. Wooster, 38 B. 170.

(2) **Penalty** can not be collected if assessment not paid in time because defective. Upington v. Oviatt, 24 O. S. 232.

See further, Hartman v. Hunter, 8 C. C. 623; 56 O. S. 175.

Penalties on assessments under this section to be exacted, when. Op. Atty. Gen. (1915), p. 1291. See also *Ib.* (1920), p. 314.

(3) **Other provisions.**—See § 3892, which provides that *whenever bonds are issued* in anticipation of the collection of assessments, *all* such assessments (except, of course, those paid in cash) shall be certified to the county auditor and collected as other taxes. In all other cases assessments are collected by the treasurer of the municipality, and these, if unpaid, may be certified as provided in § 3905, above.

Sec. 3906. [Duration of lien.] The lien of an assessment,[1] shall continue two years from the time it is payable, and no longer,[2] unless the corporation, before the expiration of the time, causes it to be certified to the auditor of the proper county, for entry upon the tax list for collection, or causes the proper action to be commenced in a court having jurisdiction thereof, to enforce such lien against such lots or lands, in which case the lien shall continue in force so long as the assessment remains on the tax list uncollected or so long as the action is pending, and any judgment obtained, under and by virtue thereof, remains in force and unsatisfied.[3] [R. S. Sec. 2297; 66 v. 243, § 556 (S. & S. 837).]

(1) **Lien distinguished** from that given by § 2667 G. C. Hartman v. Hunter, 56 O. S. 175.

Municipality is not proper party to suit to foreclose mortgage and decree does not discharge lien of assessment. Glaeser v. Cincinnati, 13 C. C. (N. S.) 558.

(2) **Suit by municipality** to collect must be brought within the two years and where petition shows on its face that the two years have

elapsed it is demurrable. Bonte v. Taylor, 24 O. S. 628.

Period injunction is in force is to be deducted. Bell v. Cincinnati, 7 N. P. (N. S.) 393.

(3) **Limitation of actions** to collect assessments. See note to § 3898, *ante*.

Laches in prosecuting the action does not affect the lien, if action still pending. Glaeser v. Cincinnati, 13 C. C. (N. S.) 558.

Sec. 3907. [When new action may be commenced.] If an action is commenced within due time, and a judgment therein for the plaintiff is reversed, or if the plaintiff fails in such action otherwise than upon the merits, and the time limited for the action has expired, a new action may be commenced within one year after such reversal or failure. [R. S. Sec. 2298; 66 v. 243, § 557.]

Sec. 3908. [Collection of assessment in advance.] The council may, if it deems expedient, cause the assessments to be collected before the work is done or contracted for. [R. S. Sec. 2299; 66 v. 243, § 558.]

Sec. 3909. [Deficiency or excess of assessments.][1] If an assessment proves insufficient to pay for the improvement and expenses incident thereto, the council may, under the limitation prescribed for such assessment, make an additional pro rata assessment to supply the deficiency. In case a larger amount is collected than is necessary, it shall be returned to the persons from whom it was collected, in proportion to the amounts collected from such persons respectively. This section shall be subject to the limitations contained in other sections of this chapter. [R. S. Sec. 2300; 66 v. 243, § 559.]

(1) **Additional assessment.**—An additional assessment to complete an improvement for which the original assessment proved insufficient, is an incident of the original assessment and governed by the law in force when the improvement proceedings were begun. Stuart v. Lakewood, 23 C. C. (N. S.) 269.

Where an additional pro rata assessment is levied under this section, it is the duty of council to cause assessment to be filed and published for three weeks in accordance with provisions of § 3895. Maple Hts. v. Holtz, 100 O. S. 264.

Sec. 3910. [Added territory.] The provisions of this chapter shall embrace territory added to the corporation by annexation or otherwise. [R. S. Sec. 2302; 66 v. 244, § 561.]

Sec. 3911. [Construction of proceedings with respect to improvements.] Proceedings with respect to improvements shall be liberally construed by the councils and courts, to secure a speedy completion of the work, at reasonable cost, and the speedy collection of the assessment after the time has elapsed for its payment, and merely formal objections shall be disregarded, but the proceedings shall be strictly construed in favor of the owner of the property assessed or injured, as to the limitations on assessment of private property, and compensation for damages sustained.[1] With respect to any assessment heretofore levied, or which may hereafter be levied by the council of any municipal corporation, upon the abutting, adjacent and contiguous, or other specially benefited lots or lands in the corporation, for any part of the entire cost and expense connected with an improvement authorized by law, the passage by the council of such municipal corporation of an ordinance levying such assessment shall be construed a declaration by such council that the improvement for which such assessment is levied is conducive to the public health, convenience and welfare; and no such assessment heretofore levied, or which may hereafter be levied, shall be held invalid by any court because of the omission of council to expressly declare in the proceedings and legislation for such improvement and assessment that such improvement is conducive to the public health, convenience or welfare. [108 v. 1227; R. S. Sec. 2327.]

(1) **Applied.—Cincinnati v. Sherike,** 47 O. S. 217, 222; **Connor v.** Cincinnati, 11 C. C. 336, (affirmed, 55 O. S. 82); **Ridenour v. Biddle,** 30 C. C. 237; 10 C. C. (N. S.) 438; Gray v. Toledo, 80 O. S. 448; Savings & Trust Co. v. Cleveland, 28 O. C. A. 265. See note 6 under § 3812, *ante.*

CHAPTER 6.

BORROWING MONEY.

Sec. 3912. [Special power, how exercised.] Municipal corporations shall have special power to borrow money[1] and to maintain and protect a sinking fund. The power to borrow money shall be exercised in the manner provided in this chapter. [96 v. 26, § 9.]

(1) **Power to borrow.**—In the absence of restrictions a municipality has implied power to borrow money to carry into effect other powers granted. Bank v. Chillicothe, 7 O. (2nd pt.) 31. But see Dunham v. Opes, 3 C. C. 274, 282, where it is said that this doctrine does not apply where there are restrictions, as now exist in Ohio. Where a municipality is defending against paying a debt on the ground of its want of power to borrow, a strict construction of powers in its favor will not be adopted. Bank v. Chillicothe, 7 O. (2nd pt.) 31.

The only legal borrowing power to meet deficiencies in the revenues of a municipality is that provided in Section 3931 G. C. Op. Atty. Gen. (1913), p. 1712.

General provisions as to bonds.—The "Griswold Act" (109 O. L. p. 336) as amended (110 O. L. 456) made sweeping changes in the procedure relative to bonds. These acts should both be carefully observed.

Griswold Act, when not applicable.—This act by its terms became effective Jan. 1, 1922, and applied to all ordinances, resolutions, measures and proceedings pending on that date. Held that this referred only to legislative proceedings and where bonds had been authorized prior to Jan. 1, 1922, but not sold and delivered until after that date, the provisions of § 2295-9 limiting maturity of bonds do not apply. State ex rel. v. Chandler, 105 O. S. 499. See also Op. Atty. Gen. (1922), p. 671.

Sec. 3913. [Corporations may borrow money in anticipation of current revenues and issue certificates of indebtedness.][1] In anticipation of the collection of current revenues in and for any fiscal year (excepting taxes and assessments to be received for the payment of interest or principal of bonds, notes or other indebtedness), such corporations may borrow money and issue certificates of indebtedness therefor, signed as municipal bonds are signed, but no loans shall

be made to exceed the amount estimated to be actually received from such taxes and other current revenues for such fiscal year, after deducting all advances. Such corporation may borrow money and issue certificates of indebtedness in anticipation of the collection of taxes and assessments to be received during the fiscal year for the payment of interest or principal of bonds issued previous to January 1, 1922. The proceeds of any such certificates shall be used only for the purpose for which the anticipated revenues, taxes or assessments were raised, collected or appropriated. The sums so anticipated shall be deemed appropriated for the payment of such certificates at maturity. The certificates shall not run for a longer period than six months, nor bear a greater rate of interest than six per cent and shall not be sold for less than par with accrued interest. [110 v. 456, 458; 109 v. 336, 337; 96 v. 51, § 95.]

(1) **Old section** 2700 R. S., repealed.

Council may not legally issue certificates of indebtedness against tax collection, when. See Op. Atty. Gen. (1918), pp. 546 and 1456. As to interest on such certificates, see Op. Atty. Gen. (1915), p. 1867.

Municipalities cannot pay interest in advance on loans under this section. See Op. Atty. Gen. (1920), p. 856.

As to borrowing money in anticipation of current sinking fund revenues. See Op. Atty. Gen. (1922), p. 587.

Sec. 3914. [Bonds or notes in anticipation of special assessments.][1] Municipal corporations may issue bonds in anticipation of the collection of special assessments.[2] Such bonds may be in sufficient amount to pay that portion of the estimated cost of the improvement or service for which the assessments are levied. In the issuance and sale of such bonds the municipality shall be governed by all restrictions and limitations with respect to the issuance and sale of other bonds,[3] and the assessments as paid shall be applied to the liquidation of such bonds. Municipal corporations may borrow money and issue notes, due and payable not later than two years from the date of issue, in anticipation of the levy of special assessments or of the issuance of bonds as provided in this section. The notes shall not exceed in amount that portion of the estimated cost of the improvement or service

for which the assessment is levied. The proceeds of bonds issued in anticipation of the collection of assessments and all of the assessments collected for the improvement shall be applied to the payment of the notes and interest thereon until both are fully paid; and thereafter said assessments shall be applied to the payment of said bonds and interest thereon. Council ordinances and proceedings relating to the issuance of such bonds or notes shall not require publication. [110 v. 456, 458; 109 v. 336, 340; 96 v. 51, § 95.]

(1) **Old sections** 2704 R. S. and 2705 R. S., repealed.

(2) **Bonds in anticipation of assessment.**—Prior to the latest amendment this section authorized the issuance of bonds in anticipation of the levy of special assessments, but the section as it now stands seems to pre-suppose the passage of the assessing ordinance.

As to injunction against payment of such bonds, because of irregularity in issuing, see Ampt v. Cincinnati, 3 N. P. 184.

Validity of bonds. Although the statute authorizing the assessment is invalid, and assessment can not, therefore, be collected, the bonds authorized by same statute issued in anticipation of the assessment may be valid and enforceable. Loeb v. Columbia Twp., 179 U. S. 472.

(3) **Form of bonds.**—It was held, under the former statutes that all bonds issued under the authority of former §§ 2700 *et seq.* R. S. must comply with § 2703 R. S. (now 3918), and express upon their face the purpose of issue and the ordinance under which issued. Keehn v. Wooster, 13 C. C. 270. See bond form under § 3939.

Maturities. — See §§ 2295-6 *et seq.* under "Miscellaneous Statutes" in Part II, as to requirements that all bonds be serial bonds, and as to other general provisions governing their issue.

Sec. 3914-1. [Bonds, notes, etc., issued by municipal corporations in anticipation of special assessments.] Bonds, notes or certificate of indebtedness issued in anticipation of the levy of special assessments or the collection thereof shall be full, general obligations of the issuing municipal corporation, and for the payment of the principal and interest of the same, the full faith, credit and revenues of such municipal corporation shall be pledged. [110 v. 456, 459; 109 v. 336, 340; 106 v. 492, 495.]

Sec. 3915. [Notes in anticipation of special assesments.] Repealed, 109 v. 336.

Sec. 3916. [Authority to issue bonds extending indebtedness

incurred prior to January 1, 1924, by municipality.] For the purpose of extending the time of payment of any indebtedness created or incurred before the first day of January, 1924, which from its limits of taxation the corporation is unable to pay at maturity, the council thereof may issue bonds[1] of the corporation or borrow money so as to change but not to increase the indebtedness,[2] in such amounts, for such length of time and at such rate of interest as the council deems proper, not to exceed six per cent. per annum, payable annually or semi-annually. [109 v. 336, 339; R. S. Sec. 2701; 92 v. 368, 170; 89 v. 417; 70 v. 5, § 662.]

(1) **Purpose.**—Under former corresponding statutes, it was held that such a section as this does not give power to issue bonds of a municipality to meet deficiencies in the various departments. It is intended to give the right to issue bonds where a funded indebtedness of the municipality exists. Herrmann v. Cincinnati, 9 C. C. 357, 359 (affirmed, 52 O. S. 676).

Temporary provisions of this section construed in connection with § 2295-7. See Op. Atty. Gen. (1921), p. 1166.

Form and requisites.—See notes to §3939, and see generally, "Griswold Act", 109 O. L. 336, as amended 110 O. L. 456.

Funding bonds.—It is bad policy to issue funding bonds under this section to replace notes issued in anticipation of collection of special assessments under Section 3915 G. C.; a better plan in such case. Op. Atty. Gen. (1914), p. 897.

Under this section council may when there are outstanding bonds and before the maturity of such bonds, issue refunding bonds to an amount equal to the original bond issue, at a lower rate of interest and at longer time. But where the original bonds were sold at a premium, council can not issue additional bonds in excess of original bond issue, to be used to pay holders of original bonds for premiums so paid. Altaffer v. Nelson, Mayor, 18 C. C. 145. As to refunding interest see Cincinnati v. Guckenberger, 60 O. S. 353.

The indebtedness for which the municipality may issue bonds under § 3916 must be such as the municipality has power to levy a tax to pay, or already evidenced by bonds, or such that bonds could have been issued at the time. The mere existence of claims for which in some manner the municipality is or may be made liable is not sufficient. Newton v. Toledo, 18 C. C. 756, 762 (affirmed, 52 O. S. 649).

Under §§ 3916 and 3917 G. C., municipal corporations are authorized to fund or refund existing valid and binding obligations, but this power cannot extend to notes issued under Sections 3913 and 3915 G. C. Op. Atty. Gen. (1913), p. 1617.

Refunding bonds.—Power of council to issue for the purpose of paying compromise claim. Op. Atty. Gen. (1913), p. 1485.

An unsatisfied judgment against a city is an indebtedness for which bonds may be issued under Sec. 3916. Op. Atty. Gen. (1919), p. 1032.

Held Sections 3931 and 3916 G. C. not inconsistent; Section 5649-3d G. C. not inconsistent with either 3916 or 3931. See Op. Atty. Gen. (1919), p. 885.

Authority to issue bonds in pursuance of the provisions of Sections 3916 and 3917 for payment of salaries of policemen and firemen and a health officer, when such salaries have become binding obligations against the city, is not restricted by the provisions of Section 5649-3d G. C.; the provisions of the Smith one per cent. law, as an entirety, are applicable to the authority for issuance of such bonds only with respect to the levy for their retirement and for interest thereon, which must be made within the 10 mill limitation. Op. Atty. Gen. (1919), p. 909.

Deficiencies in sinking fund; when refunding bonds may not legally be issued. See Op. Atty. Gen. (1920), p. 440.

Bonds to refund indebtedness. See Op. Atty. Gen. (1922), p. 588.

Municipalities not authorized to borrow money to meet anticipated deficiency in current operating revenues. See Op. Atty. Gen. (1922), p. 205.

Bonds for payment of salaries of municipal officers under this section. See Op. Atty. Gen. (1922), p. 250.

Issuance of bonds for cost of appraising water works purchased by municipality. See Op. Atty. Gen. (1922), p. 1090.

Validity in general.—Bonds made out in the name of the "town of Perrysburg" when the correct name was the "incorporated village of Perrysburg" were held valid. Fosdick v. Perrysburg, 14 O. S. 472.

Bonds to refund will not be valid if the original bond issue was unconstitutional. Keehn v. Wooster, 13 C. C. 270.

Bonds issued on faith of Supreme Court decision, will not be invalidated by a subsequent decision denying the right to issue such bonds. Gelpke v. Dubuque, 68 U. S. 175, followed, State v. Gibson, 8 N. P. 367; Reese v. Olmstead, 14 O. F. D. 737.

Bonds issued under authority of the legislature to pay the moral obligation of a county though the claimants thereon had no cause of action cognizable in a court of law, will be upheld and their payment enforced against the county. N. Y. Life Ins. Co. v. Cuyahoga Co., 106 Fed. 123.

Where a municipality has issued its bonds impressed with the seal of the city clerk, not having a seal of the corporation, but the bonds reciting that the seal attached is the "corporate seal," the municipality is estopped to deny the validity of such seal. Defiance v. Schmidt, 14 O. F. D. 408.

Certain bonds of the city of Defiance recited on their face that they were "issued under and pursuant to the laws of the State of Ohio, and an act of the General Assembly passed Feb. 3, 1887, entitled, etc." *Held* that such bonds were valid, even though the particular act referred to was unconstitutional and furnished no authority for their issue, since authority was elsewhere

to be found in the statutes. Defiance v. Schmidt, 14 O. F. D. 408.

Purchase for value without notice.— Where power is given to issue bonds on certain conditions, and the bonds purport to be issued under such law, they will be good in the hands of *bona fide* purchasers, notwithstanding irregularity in the acts of the authorities issuing them. State *ex rel.* v. Board of Ed., 27 O. S. 96. See further State v. Commissioners, 37 O. S. 526.

Where a municipality has power, as under this section, to borrow for certain purposes, a *bona fide* lender will be protected, although the money was desired for an illegal purpose. Ohio Farmers' Ins. Co. v. New Philadelphia, 17 B. 250.

And the mere failure to comply with the statutory provisions relating to the issue of bonds will not relieve the municipality from the obligation to repay the money borrowed on the faith of such bonds. Ampt v. Cincinnati, 3 N. P. 184.

But bonds issued where no power to issue has been given by the legislature are invalid even in the hands of *bona fide* purchasers. Ampt v. Cincinnati, 3 N. P. 184, and cases cited.

Where an injunction was allowed restraining the issuing of certain municipal bonds, the decree being entered before the date of the bonds or the time when they purported to be signed and before the ordinance authorizing them could go into operation under the statute, the fact that the bonds were in fact signed before the injunction was allowed, and sold will not protect the purchasers thereof as innocent purchasers for value. Altaffer v. Nelson, Mayor, 18 C. C. 145. But the rights of a *bona fide* holder are not affected by the fact that bonds bear a date prior to that of ordinance authorizing them. Kent v. Dana, 100 Fed. 56; 40 C. C. A. 281.

A bond under § 3916 above, must show on its face the purpose for which issued, and the ordinance or resolution authorizing it, in order that a purchaser may claim to be a purchaser for value without notice. Keehn v. Wooster, 13 C. C. 270.

Where the bond does not recite any ordinance or resolution authorizing its issue, it is not negotiable paper. Sullivan v. Urbana, 3 Dec. (Re.) 554. If such bond was in fact fraudulently issued, *bona fide* purchasers will not be protected. *Ib.*

The presumption is that the holder of bonds acquired them in good faith and for value. Ampt v. Cincinnati, 3 N. P. 184, and cases cited.

A purchaser can not be charged with negligence in not anticipating that the law under which the bonds were issued would be held unconstitutional. Life Ins. Co. v. Cuyahoga Co., 106 Fed. 123.

The *bona fide* purchaser of county bonds issued by officers having no authority to issue them was held not to be protected. In such case the bonds are void. State v. Gibson, 8 N. P. 367; Hubbard v. Fitzsimmons, 57 O. S. 436.

Limitations that purchaser is bound to take notice of. See Miller v. Hixson, 64 O. S. 39.

The recital in a bond that it is issued in pursuance of an act of the legislature and ordinances of the city council passed in pursuance thereof, does not put a purchaser upon inquiry as to the terms of the ordinances under which the bonds

were issued. Evansville v. Dennett. 161 U. S. 434; Schmidt v. Defiance, 13 O. F. D. 229.

Estoppel by recitals.—"It is now firmly established by decisions that if a municipality has power to and does issue bonds containing recitals of fact and such bonds come into the hands of innocent purchasers, such city is estopped from denying the truthfulness of such recitals." Defiance v. Schmidt, 14 O. F. D. 408; Northern Bank v. Porter Township, 5 O. F. D. 256; Bradford v. Cameron, 15 O. F. D. 310.

Where payable.—Bonds can be made payable outside the state. Meyer v. Muscatine, 1 Wall. (U. S.) 384, 391; Lynde v. Wennebago Co., 16 Wall. (U. S.) 6.

(2) **Not to increase indebtedness.**—Where a municipality is issuing bonds to refund its bonded indebtedness, it can not, even by a separate resolution, issue additional bonds (besides those equalling the amount of the original bonds) to pay compensation for premiums paid by holders of original bonds. Altaffer v. Nelson, Mayor, 18 C. C. 145.

And see § 3925 providing that when new bonds are issued to renew or refund an indebtedness not yet matured, such new bonds shall not exceed the amount renewed or refunded.

As to adding interest to principal and refunding both, see Cincinnati v. Guckenberger, 60 O. S. 353.

Mode of procedure. Op. Atty. Gen. (1917), p. 2429.

FORM OF RESOLUTION TO ISSUE BONDS UNDER SEC. 3916 G. C.

Resolution.

To provide for the issue of bonds of the city [*or* village] of..... in the sum of $....., for the purpose of extending the time of payment of certain indebtedness which from its limits of taxation the said city [*or* village] is unable to pay at maturity.

Be it resolved by the council of the city [*or* village] of..... State of Ohio:

Sec. 1. That certain indebtedness heretofore incurred by the city [*or* village] of....., to-wit, that incurred in (here state the manner in which and time when the indebtedness was incurred) to the amount of $..... is hereby determined and declared to be an existing, valid and binding obligation of said city [*or* village].

Sec. 2. To provide means to extend the time of payment of said indebtedness which from its limits of taxation the city [*or* village] of .....is unable to pay at maturity there shall be issued the bonds of city [*or* village] of.....to an aggregate amount of $.....

Sec. 3. (From this point the general form of bond ordinance given under § 3939 may be adapted beginning with Sec. 2.)

NOTE.—In the form above given the action of council is called a "resolution," in accordance with the provisions of § 3917. § 3918, *post*, requires that bonds shall express upon their face the "ordinance" under which they are issued. It would seem, however, that bonds issued under § 3916 need not

be authorized by both a resolution and an ordinance, and that one would include the other. See note to § 3918. *post.*

The form above given provides only for cases in which bonds are to be sold to take up and thus postpone the final extinguishment of, an existing indebtedness. If it is desired to exchange new bonds for old and reduce the rate of interest on obligations not matured, this may be done under § 3925, *post*, and an adaptation of the form given under § 3939 may be used.

Sec. 3917. [Indebtedness shall be determined before being refunded.] No indebtedness of such municipal corporation shall be funded, refunded, or extended, unless it shall first be determined to be an existing valid and binding obligation of the corporation by a formal resolution of the council thereof.[1] Such resolution shall also state the amount of the existing indebtedness to be funded, refunded or extended, the aggregate amount of bonds to be issued therefor, their number and denomination, the date of maturity, the rate of interest they shall bear, and the place of payment of principal and interest. [R. S. Sec. 2701; 92 v. 368, 170; 89 v. 417; 70 v. 5, § 662.]

(1) **Indebtedness first declared.**—In a petition in mandamus to compel the mayor to sign certain refunding bonds, the absence of averment that the council first declared the debt to be valid and described the bonds, will be fatal, on demurrer. State v. Staley, 18 C. C. 406 (affirmed, 60 O. S. 632).

Sec. 3918. [Bonds shall recite authority for issue.] Bonds issued under authority of this chapter shall express upon their face the purpose for which they were issued,[1] and under what ordinance.[2] [R. S. Sec. 2703; 66 v. 262.]

(1) **When recital required.**—All municipal bonds issued under authority of former chapter beginning with § 2700 R. S., were held to be subject to requirement of § 2703 R. S. Keehn v. Wooster, 13 C. C. 270.

So, bonds to extend the time of payment of certain indebtedness, must comply with this section. *Ib.*

But notes given for a municipal loan need not express upon their face the purpose for which given. Section 3918 applies only to bonds issued to be sold to the highest bidder. Ohio Farmers' Ins. Co. v. New Philadelphia, 17 B. 250.

Sufficiency of recital.—Bonds given to refund void bonds, reciting merely that they were given to take up other bonds, "as provided in an ordinance" of the municipality, are not valid, where there was no ordinance for their issue. U. S. Trust Co. v. Mineral Ridge, 104 Fed. 851.

See also, as to sufficiency of state-

ment of purpose, Hensly v. Hamilton, 3 C. C. 201; Keehn v. Wooster, 13 C. C. 270; Kent v. Dana, 100 Fed. 56, 40 C. C. A. 281; Clapp v. Marice City, 111 Fed. 103.

Effect of non recital.—A bond not containing a reference to the ordinance or resolution authorizing it was held not to be negotiable paper. Sullivan v. Urbana, 3 Dec. (Re.) 554.

Municipality will not be estopped to deny legality. Keehn v. Wooster, 13 C. C. 270; and no one can claim to be innocent purchaser of such bond. *Ib.*

Estoppel by recitals.—See notes to § 3916, *ante.*

(2) **Ordinance** referred to in § 3918 above, doubtless covers the "formal resolution" required in § 3917, *ante.* "Ordinance" and "resolution" mean the same thing when the procedure respectively required is complied with. Kerlin Bros. v. Toledo, 20 C. C. 603.

Sec. 3919. [Form and requisite of municipal bonds.] Bonds, notes or certificates of indebtedness issued by a municipal corporation shall be signed by the mayor and by the auditor, or the clerk thereof, and be sealed with the seal of the corporation.[1] When issued for street improvements, they shall have the name of the street or portion thereof so improved, and for which they were issued, legibly written or printed upon them.[2] [R. S. Sec. 2706; 80 v. 66; 66 v. 86, § 666.]

(1) **Duty of officers.**—It would be a breach of duty for the mayor to sign bonds containing false recitals as to matters and things required to be done to make the bonds valid. Defiance v. Schmidt, 14 O. F. D. 408.

Seal.—Where bonds are sealed with the seal of the city clerk, but contain a recital that the seal is the corporate seal, the city will be estopped to deny validity of seal. *Ib.*

(2) **Bonds to pay municipality's part of street improvement.**—This provision not applicable to, and such bonds need not have name of street upon them. Heffner v. Toledo, 75 O. S. 413.

Sec. 3920. [Bonds may have coupons attached.] Bonds issued as provided in this chapter may, in the discretion of the council, have interest coupons attached.[1] [R. S. Sec. 2707; 66 v. 262, § 667.]

(1) **Interest coupons.** — The power to issue interest bearing bonds was held to include, of itself, the authority to attach interest coupons. State *ex rel.* v. Comm'rs, 6 O. S. 280, 286.

Possession of interest warrants is *prima facie* evidence of ownership of bonds and their nonpayment. *Ib.*

Sec. 3921. [Character of bonds in certain cases.] Where the corporation is divided into districts for sewerage pur-

poses, bonds issued for money to pay the expense of constructing or repairing sewers in any such district, shall have the name and number of the district for which they are issued legibly written or printed upon them.[1] [R. S. Sec. 2708; 66 v. 262, § 668.]

(1) **Application.**—This section would apply to bonds issued in anticipation of the collection of special assessments, but not to bonds for municipality's part of cost of sewers. Heffner v. Toledo, 75 O. S. 413.

Sec. 3922. [Officers to whom bonds shall be first offered.][1] When a municipal corporation issues its bonds, it shall first offer them at par and accrued interest to the trustees of the sinking fund, in their official capacity, or, in case there are no such trustees, to the officer or officers of such corporation having charge of its debts, in their official capacity. If such trustees or other officers of the sinking fund decline to take any or all of such bonds at par and accrued interest, the corporation shall offer to the board of commissioners of the sinking fund of the city school district such bonds or so many of them, at par and accrued interest and without competitive bidding as have not been taken by the trustees of the sinking fund, and the board of commissioners of the sinking fund of the city school district may take such bonds, or any part thereof. [99 v. 254, § 97; 96 v. 52, § 97.]

(1) **Old section** 2709 R. S., repealed.

Offer to Industrial Commission. —§ 1465-58 requires all such bonds, before being offered for sale, to be offered to the Industrial Commission of Ohio. And see § 1465-58a (109 O. L., p. 47).

To whom tender must be made. —Where there has been no appointment of a board of commissioners of the district as provided by Section 7614, the tender of an issue of municipal electric light bonds should be made to the trustees of the sinking fund of the municipality, and not to the board of education. Railway Co. v. Norwalk, 22 C. C. (N. S.) 590.

Effect of non-payment.—A purchase of bonds from the municipality by the sinking fund trustees without paying for them does not pass title and their surrender may be ordered. Burns v. Kain, et al., 17 N. P. (N. S.) 465 (aff'd by court of appeals without report).

Sec. 3923. [When bonds may be sold at public sale.][1] Only after the refusal of all such officers to take all or any of such bonds at par and interest, bona fide for and to be held

for the benefit of such corporation, sinking fund or debt, shall the bonds, or as many of them as remain, be advertised for public sale. In no case shall the bonds of the corporation be sold for less than their par value,[2] nor shall such bonds when so held for the benefit of such sinking fund or debts, be sold, except when necessary to meet the requirements of such fund or debt. [99 v. 254, § 97; 96 v. 52, § 97.]

(1) **Old section** 2709 R. S., repealed.

This section does not limit the power of trustees of sinking fund under Sec. 4517. Cleveland v. Baker, 25 C. C. (N. S.) 369; 4 Oh. App. 68.

(2) **Sale for less than par.**—Bonds sold for less than par, though void in the hands of one who illegally bought them are not void as against an innocent purchaser into whose hands they subsequently came. State *ex rel.* v. Board of Education, 27 O. S. 96.

Sec. 3924. [Notice of sale; publication.][1] Sales of bonds, other than to the trustees of the sinking fund of the city or to the board of commissioners of the sinking fund of the city school district as herein authorized, by any municipal corporation, shall be to the highest and best bidder,[2] after publishing notice thereof for four consecutive weeks in two newspapers printed and of general circulation in the county where such municipal corporation is situated, setting forth the nature, amount, rate of interest, and length of time the bonds have to run, with the time and place of sale.[3] Additional notice may be published outside of such county by order of the council, but when such bonds have been once so advertised and offered for public sale, and they, or any part thereof, remain unsold, those unsold may be sold at private sale[4] at not less than their par value, under the directions of the mayor and the officers and agents of the corporation by whom such bonds have been, or may be, prepared, advertised and offered at public sale. [106 v. 492; 99 v. 254; 96 v. 52, § 97.]

(1) **Old section.**—Section 2709 R. S., repealed.

(2) **Highest bidder.**—City council's discretion in determining which is the highest and best bid if bids were uncertain, will not be interfered with. Irwin v. Greenville, 1 Dayton 140.

See further as to discretion, Guckenberger v. Dexter, 5 N. P. 429; 60 O. S. 353.

As to tender to Industrial Com., see note to § 3922.

Where the terms of the highest bid are clearly understood by buyer and seller and the bid is accepted there can be no complaint, as to ambiguity in the terms, by other bidders. Atlas Bank v. Cincinnati, 11 Dec. 436.

Compliance with advertisement.—A bid of 103 5-10 with interest is not ambiguous and sufficiently complies with an advertisement requiring the gross amount of the bid to be stated. Atlas Bank v. Cincinnati, 11 Dec. 436.

A bid offering par and accrued interest to date complies with advertisement stating that no bid will be received for less than par and accrued interest "to date of delivery" for the bid will be construed as meaning payment of interest from date of issue to date of delivery. Hayes v. Board of Education, 22 C. C. 32 (aff'd, 68 O. S. 685).

Construction of bids for bonds; terms and conditions found in offer of purchaser. See Bell v. Plant City, 22 N. P. (N. S.) 145.

Right to reject all bids.—See upon general subject of right to reject all bids whether or not expressly conferred by statute, State *ex rel.* v. Cincinnati, 3 C. C. 542; State *ex rel.* v. Comm'rs, 36 O. S. 326; State v. Comm'rs, 39 O. S. 188; State *ex rel.* v. Comm'rs, 1 C. C. 194; State *ex rel.* v. Directors, 5 O. S. 234.

(3) **Sufficiency of advertisement.**—An advertisement stating that the bonds are to be delivered on a certain day is sufficient and the sale is valid, although on the day set for delivery, but before the bidding, it is announced that the bonds will be delivered in installments covering a period of four months, giving the purchaser the benefit of the interest accruing upon the later installments. Franklin v. Baird, 7 N. P. 571.

A bidder can not complain of a variance, as to the time of redemption, between the advertisement and the resolution authorizing the bonds, where the bonds were made payable according to the advertisement. State *ex rel. v.* Allison, 8 N. P. 170.

Whether objection can be raised as to sufficiency of advertisement after bonds have been issued and the money is in the treasury, see State *ex rel.* v. Amlin, 13 Dec. 334.

Charter cities may, by charter provisions, regulate the publication of notices of bond sales, and such provisions will take precedence of the requirements of this section. See Op. Atty. Gen. (1920), p. 655.

Bonds sold before date will not be good in the hands of a bona fide purchaser when injunction against their issue was allowed before the date of the bonds. Altaffer v. Nelson, Mayor, 18 C. C. 145.

Sinking fund bonds, issued to refund or extend existing obligations, as authorized by § 4520, are subject to the provisions of § 3924 above, and can be sold only to the highest and best bidder after advertisement. Cincinnati v. Guckenberger, 60 O. S. 353; Roberts & Co. v. Taft, 109 Fed. 825; 48 C. C. A. 681. See also § 4522, *post.*

But this section does not limit the power of the trustees of the

sinking fund, under § 4517, to protect the credit of the municipality. Cleveland v. Baker, 25 C. C. (N. S.) 369; 4 Oh. App. 68.

(4) **Private sale.**—When bonds were duly offered and bids received by proper municipal officers, but before time for awarding, municipality was enjoined from awarding the bonds and thereupon all bids were withdrawn (as they could be, any time before acceptance), the officers might lawfully sell such bonds at private sale. Vadakin v. Crilly, 7 C. C. (N. S.) 341 (aff'd, 73 O. S. 380).

FORM OF NOTICE OF SALE OF BONDS.

Legal Notice.

Sealed proposals will be received at the office of the auditor [*or* clerk] of the city [*or* village] of....., State of Ohio, until 12 o'clock noon of....., 19...., for the purchase of bonds of the said city [*or* village], in the aggregate sum of $..... dated the .....day of....., 19..... Said bonds will be .....in number and numbered from one to....., both inclusive. Each of said bonds will be of the denomination of $..... (if any of the bonds is for a fractional amount, so state) and will draw interest at the rate of.....per centum per annum, payable annually [*or* semi-annually] on the first days of .....(and .....) of each year upon presentation and surrender of the interest coupons to be attached to said bonds. Said bonds will be due and payable as follows:

Nos. 1 to.....inclusive on the .....day of....., 19.....

Nos.....to.....inclusive on the.....day of....., 19...., etc.

Said bonds are issued for the purpose of (here state purpose of issue) and under authority of the laws of Ohio and of § ..... of the General Code of Ohio [*or* of an act of the General Assembly of the State of Ohio passed on the.....day of....., ..., entitled an act etc.], and under and in accordance with a certain ordinance [*or* resolution] of the said city [*or* village] entitled (here state title) passed on the ..... day of....., 19.....

Said bonds will be sold to the highest and best bidder for not less than par and accrued interest.

All bids must state the number of bonds bid for and the gross amount of bid and accrued interest to date of delivery (and if desired, add, "All bids to be accompanied with a certified check, payable to the treasurer of the city [*or* village] for ..... per centum of the amount of bonds bid for, upon condition that if the bid is accepted the bidder will receive and pay for such bonds as may be issued as above set forth, within ten days from the time of award, said check to be retained by the city [*or* village] if said condition is not fulfilled.")

The city [*or* village] of.....reserves the right to reject any and all bids.

Bids should be sealed and endorsed "bids for.....bonds."

.....

....., 19..... Auditor [*or* clerk].

Sec. 3925. [Refunding bonded indebtedness.][1] When a municipality has issued bonds subject to call or redemption previous to maturity thereof, and it appears to the council thereof to be for the best interest thereof to exercise such privilege of call or redemption by means of refunding of such indebtedness at a lower rate of interest than is provided in said bonds, then such council may issue for that purpose new bonds[2] with semi-annual interest coupons attached which shall not in any case exceed in amount the outstanding bonded indebtedness subject, as aforesaid, to call or redemption and proposed to be called, redeemed and refunded. The maturity of the bonds so issued shall not extend beyond the time of the maturity of the called, redeemed and refunded bonds. [109 v. 336, 339; 99 v. 254, § 97; 96 v. 52, § 97.]

(1) **Old section** 2709 R. S.

(2) **Forms** of ordinance or resolution effecting such exchange and of the new bonds to be exchanged for the old may be adapted from forms given under § 3939, post.

Sec. 3926. [Sale by popular subscription; notice.] Municipal corporations may issue bonds and other obligations in such denominations as the council may determine and sell them at popular subscription at a price of not less than par. Such bonds may be issued as registered or coupon bonds, or payable to bearer only, and provision may be made for the redemption, retirement or reissue of them. All such bonds shall be first offered the sinking fund trustees as is provided in the preceding sections, and shall be advertised and sold as provided in such sections, setting forth the amount of bonds to be sold and the denomination in which they will be issued, with an invitation for tenders for all or part of such issue. Such advertisement shall state the time and place when tenders will be opened and the award made. All tenders shall be in sealed envelope and shall not be opened until the day

and hour specified in the advertisement. At the time so specified the tenders shall be opened. [99 v. 255, § 97a.]

Sec. 3927. [Distribution of bonds.] When sold such bonds shall be distributed to bidders according to the following rules:

First, those offering the highest premium for all or part of such bonds shall receive the amount requested by them.

Second, those offering the next highest premium shall receive the amount requested by them. This process shall be continued until all of the bonds have been disposed of. In alloting such bonds, bidders for small quantities shall be given the preference, but the council may reject any and all bids.

When such bonds have been advertised and offered for sale in accordance with law, and no bids have been received therefor, or bids insufficient in amount to purchase the entire issue or issues of bonds so offered have been received, then and in that event the municipal corporation, in a manner to be provided by ordinance, may sell such issue or issues of bonds, or any part thereof, or such balances thereof as have not been sold, either in the denominations originally authorized, or in any other denomination not less in any case than one hundred dollars, at not less than par and the accrued interest thereupon. The proceeds of such bonds so sold shall be subject to the same uses and restrictions as the proceeds of bonds sold in any other manner provided by law. [104 v. 242; 99 v. 255, § 97a.]

Sec. 3928. [Registration of bonds.][1] On demand of the owner or holder of any of its coupon bonds, a municipal corporation may issue instead thereof a registered bond, or bonds, of the corporation not exceeding in amount the coupon bonds offered in exchange. The registered bond or bonds shall be signed and sealed as other municipal bonds are signed and sealed, and bear the same rate of interest, be payable both principal and interest at the same time and place, as the coupon bonds for which the exchange is made, and shall be of such denomination as the holder of the coupon bonds may elect. [97 v. 516, § 98; 96 v. 53, § 98.]

(1) **Old section** 2711 R. S., repealed.

Sec. 3929. [Payment of interest, exchange and registration.][1] When due, the interest and principal of such registered bonds shall be paid only to the person, corporation or firm, appearing by the records of the municipal corporation to be the owner thereof, or order. Such registered bonds may be transferred on such record by the owner in person or by a person authorized so to do by power of attorney duly executed. The exchange and registration here required shall be transacted by the trustees of the sinking fund at their business office where a registry shall be kept for that purpose which shall show the date, series, denomination and owner of such registered bonds, and the number and series of the coupon bonds for which they were exchanged. [97 v. 516, § 98; 96 v. 53, § 98.]

(1) **Old section** 2711 R. S., repealed.

Sec. 3930. [When registered bonds may be issued.][1] No registered bonds shall be issued by a municipal corporation until the bonds and coupons offered in exchange shall have been cancelled or destroyed.[2] The trustees of the sinking fund may demand of the holder of the coupon bonds a reasonable fee as compensation for the expense of making such exchange. [97 v. 516, § 98; 96 v. 53, § 98.]

(1) **Old section** 2711 R. S., repealed.

Lost bonds.—Municipality cannot be compelled to reissue a bond, negotiable by delivery or a non-negotiable bond, in place of its negotiable bond lost by the owner. Citizens Bank v. Cincinnati, 13 C. C. (N. S.) 14.

Sec. 3931. [Deficiency bonds; limitation.][1] Repealed, 109 v. 336.

(1) **Deficiencies for year 1921.**—For act authorizing municipalities to fund deficiencies for 1921, issue bonds and levy taxes therefor, see 109 v. 17. Deficiencies for year 1919, see 108 v. 709. Deficiencies for year 1920, see 108 v. 1142.

Sec. 3932. [Premiums and accrued interest.] Premiums and accrued interest received by the corporation from a sale of its bonds shall be transferred to the trustees of the sinking fund to be by them applied on the bonded debt and interest

account of the corporation, but the premiums and accrued interest upon bonds issued for special assessments shall be applied by the trustees of the sinking fund to the payment of the principal and interest of those bonds and no others. [96 v. 53, § 100.]

Sec. 3933. [Bonds for improving natural gas works.] The council of a municipal corporation may issue and sell bonds in the manner provided by law, at a rate of interest not to exceed six per cent when such council by an affirmative vote of not less than two-thirds of the members elected or appointed thereto by resolution or ordinance, deems it necessary for the purpose of extending, enlarging, improving, repairing or securing a more complete enjoyment of any natural gas works owned by such corporation. [95 v. 478, § 1.]

Sec. 3934. [Question of issue to be submitted to vote.] Before such bonds are issued, the question of issuing them shall be submitted to the voters of the municipal corporation at a general or special election, when the council thereof, by resolution or ordinance, passed by an affirmative vote of not less than two-thirds of all the members elected or appointed thereto, declares it necessary to issue and sell bonds for any of such purposes. It shall fix by such resolution or ordinance the date upon which the question shall be so submitted and shall cause a copy of such resolution or ordinance to be certified to the deputy state supervisors of the county in which such municipal corporation is situated. [97 v. 237, § 2; 95 v. 479.]

Sec. 3935. [Conduct of the election.] Thereupon the deputy state supervisors shall prepare the ballots and make other necessary arrangements for the submission of the question to the electors of the municipal corporation at the time fixed in such resolution or ordinance. The election shall be held at the regular place or places of voting in the municipal corporation, and shall be conducted, canvassed and certified in the same manner, except as otherwise provided by law, as for the election of municipal officers. [97 v. 237, § 2; 95 v. 479.]

Sec. 3936. [Voting precinct; transfers.] When a special election for such purpose is held in a municipal corporation

divided into wards, there may be but one voting place in each ward, which shall be designated by the deputy state supervisors of elections, and the notice hereinafter provided for shall designate the voting places in each ward. In cities in which registration is required, if but one voting place is designated in each ward, certificates of removal shall not be necessary, except where transfers are required from one ward to another, and the board of deputy state supervisors of the county shall issue such removal certificates. [97 v. 237, § 2; 95 v. 479.]

Sec. 3937. [Notices of the election.] Fifteen days' notice of the submission shall be given in one or more newspapers printed in the municipal corporation once a week for two consecutive weeks, stating the amount of bonds to be issued, the purpose for which they are to be issued, and the time and place of holding the election. If no newspaper is printed therein, the notice shall be posted in a conspicuous place and published once a week for two consecutive weeks in a newspaper of general circulation therein. [97 v. 237, § 2; 95 v. 479.]

Sec. 3938. [Result of election; form of ballot.] If two-thirds of the voters voting at such election upon the question of issuing the bonds, vote in favor thereof, then, and not otherwise, the bonds shall be issued, and a tax may be levied for the purpose of paying the interest and principal upon such bonds. Those who vote in favor of the proposition shall have written or printed on their ballots, "For the issue of bonds;" those who vote against it shall have written or printed on their ballots the words, "Against the issue of bonds." [97 v. 237, § 2; 95 v. 479.]

BONDS FOR SPECIFIC PURPOSES.[1]

Sec. 3939. [When, how and for what specific purposes municipalities may sell bonds.] When it deems it necessary, the council of a municipal corporation, by an affirmative vote of not less than two-thirds of the members elected or appointed thereto, by ordinance,[2] may issue and sell bonds in such amounts and denominations, for such period of time,

and at such rate of interest, not exceeding six per cent per annum, as said council may determine and in the manner provided by law, for any of the following specific purposes:[3]

1. For procuring the real estate and right of way for an improvement authorized by this section, or for purchasing real estate with a building or buildings thereon, to be used for public purposes, or to be donated to the state of Ohio by deed in fee simple as a site for the erection of an armory.

2. For extending, enlarging, improving, repairing or securing a more complete enjoyment of a building or improvement authorized by this section, and for equipping and furnishing it.

3. For sanitary purposes and for erecting a crematory or providing other means for disposing of garbage and refuse matters, and for erecting public toilet and public comfort stations.

4. For improving highways leading into the corporation, or for building or improving turnpikes, or for purchasing one or more turnpike roads and making them free.

5. For constructing wharves and landings on navigable waters.

6. For erecting infirmaries.

7. For erecting workhouses, prisons and police stations.

8. For erecting houses of refuge and correction.

9. For erecting market houses and providing market places.

10. For erecting municipal garages, repair shops, storage houses and warehouses.

11. For erecting public halls and public offices.

12. For erecting or purchasing waterworks for supplying water to the corporation and the inhabitants thereof.

13. For erecting or purchasing gas works or works for the generation and transmission of electricity, for the supplying of gas or electricity to the corporation and the inhabitants thereof.

14. For providing grounds for cemeteries or crematories, for enclosing and embellishing them, and for erecting vaults.

15. For constructing sewers, sewage disposal works, flushing tunnels, drains and ditches.

16. For establishing free public libraries and reading rooms, and free recreation centers.

17. For the establishment of free public baths and municipal lodging.

18. For erecting monuments to commemorate the services of soldiers, sailors and marines of the state and nation.

19. For improving any water course or water front.

20. For the payment of obligations arising from emergencies resulting from epidemics or floods,[4] or other forces of nature.

21. For purchasing and condemning the necessary land for parks, boulevards and public playgrounds, and for improving it as well as for improving or completing the improvement of any existing boulevard, park or parks, or public playgrounds.[5]

22. For erecting hospitals and pest houses and for rebuilding or improving existing hospitals and pest houses.

23. For resurfacing, repairing or improving any existing street or streets as well as other public highways.

24. For opening, widening and extending any street or public highway.

25. For purchasing or condemning any land necessary for street or highway purposes, and for improving it or paying any portion of the cost of such improvement.

26. For constructing levees and embankments or paving or improving them, and for improving any water course passing through the corporation.

27. For constructing or repairing viaducts, bridges and culverts, and for purchasing or condemning the necessary land therefor.

28. For erecting any building necessary for a fire department, purchasing fire engines, fire boats, constructing water towers, and fire cisterns, and paying the cost of placing under ground the wires or other signal apparatus of any fire department, or installing and operating any municipal ice plant for the purpose of manufacturing ice for the citizens of any municipality. [110 v. 373; 107 v. 553; 106 v. 536; 102 v. 262; 102 v. 153; R. S. Sec. 2835; 98 v. 63; 97 v. 291; 95 v. 318; 90 v. 229; 76 v. 158.]

(1) **Act of May 15, 1911.**—The sections under the above title (§§ 3939-3953 as re-numbered by the Attorney General), constitute sections 1 to 15 of the Act of May 15th, 1911, (102 O. L. 262), to provide for the issue of bonds by municipal corporations and repeal §§ 3939 to 3954 G. C.

Validity.—The act, amending old §§ 2835, 2836 and 2837 R. S., and known as the "Longworth Bond Act," was held constitutional in Guckenberger v. Henderson, 66 O. S. 692.

Not repealed by Smith Law.—This section is not repealed by implication by Sections 5649-2, et seq., fixing limitations with reference to taxation. Rabe v. Board of Education, 88 O. S. 403, distinguished. Schieber v. Edon, 23 C. C. (N. S.) 378.

Nor is the debt creating power conferred upon municipalities affected by the tax limitations which have been imposed, and an issue of bonds to meet the costs of street improvements will not be enjoined because not authorized by a vote of the people, where payment thereof can be made without violation of the tax limitation fixed by the Smith one percent law. *Ib.* (Reversing Schieber v. Edon, 18 N. P. (N. S.) 94.)

Construction of old sections, before amendment, see Dunham v. Opes, 3 C. C. 274 (holding that the former sections outlined the exclusive method by which bonds could be issued, where the power was not given to council to act of its own motion, unless § 2687 R. S. conferred the power, which was not decided.) Hensly v. Hamilton, 3 C. C. 201 (holding gas works to be a local improvement within the meaning of former sections); Cleveland v. Cleveland, 16 C. C. (N. S.) 471 (holding bonds to abolish street crossings under 95 O. L. 356 and bonds to pay for street and sewer improvements are both subject to the provisions of this section).

Bonds for cleaning streets not authorized.—A municipality cannot raise money by the sale of bonds to pay for the cleaning of catch basins or streets, under this section. Morgan v. Akron, 19 C. C. (N. S.) 119; aff'd 84 O. S. 499.

Partial invalidity.—When in one ordinance a municipality provides for the issue and sale of bonds to pay for several separate improvements, for some of which it has authority to issue bonds and for others it has not, an injunction will not be granted against the entire issue proposed, but only against that part which is for the payment of unauthorized improvements. Morgan v. Akron, 19 C. C. (N. S.) 109; (aff'd 84 O. S. 499).

This section is unconstitutional in so far as it authorizes municipal corporations to issue bonds for purchasing an armory site. Op. Atty. Gen. (1915), p. 919.

Power of municipality to sell bonds for purpose of erecting poles, wires and other fixtures for transmitting and distributing electric current purchased by such municipality from others. Op. Atty. Gen. (1914), p. 989.

Council may not under this section issue bonds to create a fund to be paid to school district li-

brary. Op. Atty. Gen. (1918), p. 1545.

Municipal corporation has no authority hereunder to issue bonds to construct a bridge in cooperation with county commissioners. Op. Atty. Gen. (1918), p. 1051.

When a village makes a joint road improvement with county or township the village issues bonds under Section 6905-3 G. C. Op. Atty. Gen. (1915), p. 373.

Inter-county highway through village—bond issue to pay its share. Op. Atty. Gen. (1918), p. 817.

May not issue bonds to provide a fund for street improvements to be thereafter determined. Op. Atty. Gen. (1918), p. 1082.

When public building has been condemned under § 5629-1, bonds for its repair may be issued under § 3939, *et seq.*, and subject to their limitations. Op. Atty. Gen. (1916), p. 1709.

Interpretation as to what purposes are included in said section. See Op. Atty. Gen. (1919), p. 830.

Bond issue for reconstruction and extending aerial fire and police alarm system. See Op. Atty. Gen., July 2, 1921.

Purchase of waterworks.—Noncharter city may buy waterworks from private company by issuing bonds for first payment under section 3939 G. C., and contracting to pay rest of purchase price from earnings of water works and may legally issue mortgage bonds secured only upon utility and its revenues. See Op. Atty. Gen. (1919), p. 1480.

Bonds cannot be issued under this section for extension of water works beyond the corporate limits. Op. Atty. Gen. (1920), p. 40.

Validity of bonds in general, see notes to § 3916, *ante*.

General provisions.—For general provisions as to bonds, see 109 O. L. 336, known as the "Griswold Act"; and see particularly provisions as to bonds under "Miscellaneous Statutes" in Part II.

(2) **Ordinance declaring necessity.**—*Condition precedent.*—The proper adoption of the ordinance declaring it necessary to issue and sell the bonds of the corporation for a specified purpose as authorized by the above section, and providing therein for submission of the question to popular vote, is essential to the validity of all subsequent proceedings and to the bond issue. Gas and Water Co. v. Elyria, 57 O. S. 374.

Character of ordinance.—Such ordinance is of general and permanent nature and must be read on three different days, unless the rule is duly dispensed with. Gas and Water Co. v. Elyria, 57 O. S. 374.

Such ordinance must provide for but one improvement and can not combine two distinct measures and if it does so, it will not be effectual for either purpose. *Ib.*

Municipality is not authorized to issue bonds to provide a fund from which to pay its part of the cost of improvements that may from time to time be made, but only to pay its part of the cost of specific improvements. Heffner v. Toledo, 75 O. S. 413.

Municipality may, under this section, provide for issuing bonds to pay its part of the cost of a specific improvement before the passage of

a resolution declaring the necessity for the improvement. Heffner v. Toledo, 75 O. S. 413.

Manner of bond issue, it was held under former section, must be determined by council and this power could not be delegated to mayor. Gas and Water Co. v. Elyria, 57 O. S. 374.

Resolution declaring necessity; when not required.—Where bonds are proposed to be issued under the authority of this section and within the limitations named in Sections 3940 and 3941, General Code, the council of a municipal corporation is required to pass but one ordinance authorizing the issue of such bonds in order to complete the legislation necessary to make and pay for such public improvement. Heffner v. Krinn, et al., 98 O. S. 1; distinguishing Gas & Water Co. v. Elyria, *supra*.

(3) **Several improvements under one submission.**—The question of increasing size of waterworks system and erecting electric plant in connection therewith, could be submitted as one question, if both were substantially one improvement. Ryan v. Orbison, 7 C. C. 30.

But the purchase of waterworks and the erection of new ones, are distinct measures and require different proceedings. Gas and Water Co. v. Elyria, 57 O. S. 374.

The statutory provision for the selling of bonds by a municipality "for erecting or purchasing water works and supplying water to the corporation" is to be read literally, and cannot be construed to authorize a sale of bonds to pay rental under a lease of water works not yet constructed. Moore v. Village of Elmore, 13 N. P. (N. S.) 651.

Maturities of bonds.—For provisions of law limiting maturities of different classes of bonds, and requiring all bonds to be serial, see §§ 2295-9 to 2295-12, under "Miscellaneous Statutes", in Part II; and see generally, all of the provisions of the "Griswold Act", 109 O. L. 336, as amended 110 O. L. 456.

(4) **Floods of 1913.**—For act of legislature authorizing local authorities to make extraordinary expenditures rendered necessary by the floods of 1913 and to issue bonds therefor, see 103 O. L. 141, and amendment, 103 O. L. 760. This act held constitutional. Assur v. Cincinnati, 14 N. P. (N. S.) 433 (aff'd 88 O. S. 181).

Conservancy law.—Organization of conservancy districts, powers, procedure, etc., see Secs. 6828-1 to 6828-79 G. C. (104 O. L. 13).

(5) **No authority to issue bonds for sidewalk or retaining wall.**—A municipality cannot raise money by the sale of bonds to pay for the construction of a sidewalk and retaining wall in a street, though the improvement of the street is adjacent to a park. Morgan v. Akron, 19 C. C. (N. S.) 109; aff'd 84 O. S. 499.

FORM OF CERTIFICATE OF FISCAL OFFICER.

. . . . . Ohio. . . . . 19. . .

To the Council of the City [*or* Village] of. . . . . .

Pursuant to Sec. 2295-7 general code of Ohio, I hereby certify that the estimated life of the property and improvement contemplated by the proposed ordinance hereto annexed is. . . . . years, and I further

certify pursuant to Secs. 2295-9 and 2295-10 that the maximum maturity permitted by law of the bonds authorized in said ordinance is..... years from a date twelve months prior to the date of the earliest maturity of said bonds, and that the same has been calculated in accordance with Sec. 2295-9 of the general code of Ohio.

.....

City Auditor [*or*] Village Clerk.

Note that the above certificate must be made prior to the passage of the ordinance.

GENERAL FORM OF BOND ORDINANCE.

Ordinance No.....

(Sec. 3939.)

To issue bonds for the purpose of .....

Whereas the City Auditor [*or* Village Clerk] has certified to this council the estimated life of the property, asset or improvement proposed to be acquired or constructed from the proceeds of the bonds hereinafter provided, as.....years, and has further certified the maximum maturity of such bonds as.....years, and

Whereas this council estimates that a tax for said bonds will first appear on the duplicate for the tax year 19... and that the final tax stetlement with the County Treasurer next following the inclusion of a tax for this issue in the Annual Budget by the County Auditor as provided by law will be obtained not ealier than the first day of September, 19___, and will require $.....for interest until such taxes are collected and available.

Now, therefore, BE IT ORDAINED, By the Council of the City [*or* Village] of....., State of Ohio, two-thirds of the members elected thereto, concurring:

Sec. 1. That for the purpose of raising money for (here state any of the purposes for which bonds may be issued), it is hereby declared to be necessary to issue and sell, and there shall be issued and sold, bonds of said city [*or* village] in the sum of ..... Dollars.

Sec. 2. Said bonds shall be of the denomination of $..... each; shall be dated not later than ....., 19....; shall draw interest at the rate of ..... per centum per annum, payable on the first days of ..... and ..... in each year, upon presentation and surrender of interest coupons to be attached to said bonds, bearing the *facsimile* signature of the Auditor [*or* Clerk], and shall be due and payable as follows: (here state the dates of maturity, and aggregate amount maturing at each date. Note that all bonds must mature serially, and in substantially equal installments. § 2295-12. Note also the provisions of § 2295-12 as to the earliest maturity, and § 2295-9 as to the last maturity. These sections will be found in Part II under "Miscellaneous Statutes".)

Sec. 3. Said bonds shall be prepared by the City [*or* Village] Solicitor, be signed by the Mayor and City Auditor [*or* Village Clerk], sealed with the city [*or* village] seal, and (in case of *city* bonds only) recorded in the

office of the Sinking Fund Trustees; shall express upon their face the purpose for which they are issued, and the fact that they are issued pursuant to law and this ordinance; shall be payable, both principal and interest, at the office of the Treasurer of the City [*or* Village] of ....., or at the office of the ..... Bank, in the City [*or* Village] of .....; shall be issued and sold under the direction of the Finance Committee of Council, and shall bear such consecutive numbers as said Committee or the proper officers of the city [*or* village] may determine.

Sec. 4. That the proceeds of the sale of said bonds, except the premiums and accrued interest thereon, shall be placed in the city [*or* village] treasury to the credit of ..... fund, and shall be disbursed on proper vouchers for the purpose of (here state purpose of bond issue), and for no other purpose, for which purpose said money is hereby appropriated; and the premiums and accrued interest received from said sale shall be transferred to the Trustees of the Sinking Fund.

Sec. 5. That the faith, revenue and credit of the City [*or* Village] of ..... are hereby pledged for the prompt payment of both principal and interest of the bonds hereinbefore described, in accordance with the laws and constitution of the State of Ohio.

Sec. 6. That for the purpose of providing the necessary funds to pay the interest on the foregoing issue of bonds promptly when and as the same falls due, and also to create and maintain a fund sufficient to discharge the said bonds at maturity, there shall be, and is hereby levied on all the taxable property of the City [*or* Village] of ....., in addition to all other taxes, a direct tax annually during the period for which said bonds are to run, in an amount sufficient to provide funds to pay interest upon said bonds as and when the same falls due, and also to provide a fund for the discharge of the principal of said serial bonds at maturity.

That said tax shall be and is hereby ordered computed, certified, levied and extended upon the tax duplicate and collected by the same officers, in the same manner and at the same time that the taxes for general purposes for each of said years are certified, extended and collected. Said tax shall be placed before and in preference to all other items and for the full amount thereof. All funds derived from said tax levies hereby required, shall be placed in a separate and distinct fund, which, together with all interest collected on the same, shall be irrevocably pledged for the payment of the interest and principal of said bonds when and as the same fall due.

Sec. 7. This ordinance shall take effect and be in force from and after the earliest period allowed by law.

.....
President of Council.

Attest:.....
Clerk.

Passed.....

NOTE.—The above form of ordinance may, with slight modifications, be adapted for the issue of all classes of bonds, excepting bonds in anticipation of special assessments, for which see form under Sec. 3825.

GENERAL FORM OF MUNICIPAL BOND.

United States of America,

State of Ohio,

County of .....,

City [*or* Village] of .....,

..... Bond,

No. ....., $.....

KNOW ALL MEN BY THESE PRESENTS: That the City [*or* Village] of ....., County of ....., State of Ohio, acknowledges itself to owe, and for value received, promises to pay to bearer the sum of ..... Dollars, on the ..... day of ....., 19.., with interest thereon from the ..... day of ..... 19.., at the rate of ..... per centum per annum, payable semi-annually, on the first days of ..... and ..... of each year, as evidenced by the coupons hereto attached, until the principal sum is paid. The principal sum and interest thereon are payable in lawful money of the United States of America, at the office of the Treasurer of said city [*or* village], or at the office of the ..... Bank, in the City [*or* Village] of ....., upon presentation and surrender of this bond, and the coupons hereto attached, as they respectively mature.

This bond is one of a series of ..... bonds of like tenure and effect (except as to maturity), and dated the ..... day of ....., 19...., numbered from ..... to ....., both inclusive, all of said bonds being of the denomination of $..... each (except bond No....., which is of the denomination of $.....), aggregating in amount $....., and issued (in case of general bonds, or bonds to extend indebtedness), for the purpose of (here state purpose), (*or* in anticipation of the collection of assessments heretofore levied for improving ..... in said city [*or* village]) and issued under authority of the general laws of the State of Ohio, and particularly Section ..... of the General Code, and pursuant to Ordinance No. ....., duly passed by the council of said city [*or* village] on the ..... day of ....., 19....

AND IT IS HEREBY CERTIFIED AND RECITED, that all acts, conditions and things necessary to be done precedent to and in the issuing of these bonds, in order to make them legal, valid and binding obligations of said City [*or* Village] of ....., have been done and performed in regular and due form as required by law; that the faith, credit and revenue of said City [*or* Village] of ..... are hereby irrevocably pledged for the prompt payment of the principal and interest thereof at maturity; that no limitation of indebtedness or taxation, either statutory or constitutional, has been exceeded in issuing these bonds; and that due provision has been made for levying and collecting annually, by taxation, an amount sufficient to pay the interest on

these bonds as it falls due and to provide a fund for the final redemption of said bonds at maturity.

IN WITNESS WHEREOF, the Council of the City [*or* Village] of ....., County and State aforesaid, has caused this bond to be signed by the Mayor and Auditor [*or* Clerk] of said city [*or* village], and the corporate seal of said city [*or* village] to be hereto affixed at ....., as of the ..... day of ....., 19....

.....
Mayor.

.....
Auditor (of City).
Clerk (of Village).

(On back of bond, in case of city bonds only:)
Recorded in the office of the Sinking Fund Trustees.

.....
Secretary.

FORM OF COUPON.

$.....

On ....., 19...., the City [*or* Village] of ....., in the County of ....., State of Ohio, will pay to bearer ..... DOLLARS, at the office of the Treasurer of said city [*or* village] or at the office of the ..... Bank, in the City [*or* Village] of ....., being interest then due on its ..... bond, dated ....., 19....

Bond No. .....

.....
Auditor [*or* Clerk].

(NOTE.—Where bonds are issued pursuant to a vote of the electors, insert after the reference to the General Code, the following: "and of a two-thirds vote of the electors of said city [*or* village] cast at an election regularly and legally called and held therein on the ..... day of ....., 19....")

Sec. 3939-1. [May issue bonds to construct subway.] When it deems necessary, the council of a municipal corporation, by affirmative vote of not less than two-thirds of the members elected or appointed thereto, by resolution or ordinance, may issue and sell bonds in such amounts and denominations, for such period of time, at such rate of interest, not exceeding six per cent, and in the manner, as provided by law, to provide for the construction of subways under any street or boulevard or elsewhere. [102 v. 443.]

Sec. 3939-2. [Protection of state property by extension of waterworks system.] When a municipal corporation has within or bordering on its boundaries property belonging to the state of Ohio, the council of said municipal corporation, by an affirmative vote of not less than two-thirds of the members elected or appointed thereto, by resolution or ordinance, may issue and sell bonds in such amounts and denominations, for such period of time, at such rate of interest, not exceeding six per cent, and in the manner authorized by law, to provide for the protection of said property belonging to the state or any buildings erected thereon by the extension of the waterworks system of said municipal corporation to, into or through said property belonging to the state. [109 v. 542.]

Sec. 3940. [Yearly bonded indebtedness permitted.] (§ 2.) Such bonds may be issued for any or all of such purposes, but the total indebtedness created in any one fiscal year, by the council of a municipal corporation, under the authority conferred in the preceding section,[1] shall not exceed one-half of one per cent of the total value of the property in such municipal corporation as listed and assessed for taxation.[2] [107 v. 578; 102 v. 263; R. S. Sec. 2835; 100 v. 53; 98 v. 63; 97 v. 291; 95 v. 318.]

(1) **Section referred to.**—In the act of May 15, 1911, the above provision constituted § 2, and the preceding section referred to in the act was § 1 or § 3939 as numbered by the Attorney General.

(2) **What bonds included.**—See § 3949, *post*, and notes.

Bonds not included.—The municipal corporation issuing bonds under orders of state board of health pursuant to § 1249 *et seq.*, shall not be bound by the limitation of § 3940, nor by the limitation imposed by § 3952, but may, if necessary to provide funds to comply with such order, issue its bonds to the extent of five percent of such property so listed and assessed for taxation, although the limitations provided for by §§ 3940 and 3952 G. C., have been reached. The full issue of five per cent. may, if necessary, be issued in any one fiscal year, without submission to a vote of the electors. State ex rel. v. Dean, Auditor, 95 O. S. 108.

Bonds issued by a municipal corporation to pay its share of street improvement are subject to the limitation of this section. Op. Atty. Gen. (1915), p. 2185.

Limitation herein does not apply to § 1259 G. C., when. Op. Atty. Gen. (1915), p. 506.

Limitation of this section ap-

plies to bonds issued under § 6953 G. C. Op. Atty. Gen. (1916), p. 1258.

The limitations of this and following sections known as the Longworth Act, apply to bonds issued against the general credit of the municipality for the purchase or construction of a public utility under Sec. 12, Article XVIII of the constitution. State, ex rel., v. Weiler (Ohio Sup. Ct., decided March 16, 1920).

Bonds not in excess of one-half of one per cent of tax duplicate. See Op. Atty. Gen. (1922), p. 1030.

Authority to issue bonds after expiration of fiscal year. See Op. Atty. Gen. (1922), p. 102.

Sec. 3941. [Net indebtedness limited to 2½%.] The net indebtedness created or incurred by a municipal corporation under the authority granted to it in section 3939 of the General Code and all other provisions of law or of the constitution authorizing the creation or incurring of indebtedness without a vote of the electors shall never exceed two and one-half per cent of the total value of all property in such municipal corporation as listed and assessed for taxation.[1] [109 v. 336, 340; 102 v. 264; 102 v. 11; 101 v. 432; G. C. 3942; R. S. Sec. 2835; 98 v. 63; 97 v. 291; 95 v. 318; 90 v. 229; 76 v. 158.]

(1) **What bonds included.**—See § 3949, *post*, and notes.

Sec. 3942. [Vote for additional bonds.][1] § 4. In addition to the authority granted in section one (1) of this act[1] and supplementary thereto, the council of a municipal corporation, whenever it deems it necessary, may issue and sell bonds in such amounts, or denomination, and for such period of time and rate of interest not exceeding six per cent per annum, as it may determine upon for any of the purposes set forth in said section one, upon obtaining the approval of the electors of the corporation at a general or special election in the following manner. [102 v. 264; R. S. Sec. 2837; 98 v. 66; 97 v. 190; 95 v. 321; 91 v. 106; 90 v. 226; 76 v. 158.]

(1) The power to re-submit at special election questions of issuing bonds is discretionary. Op. Atty. Gen. (1913), p. 1621.

(2) **Section referred to.**—Reference is to § 3939, *ante*. See note to § 3940.

Sec. 3943. [Action of council necessary.] § 5. The council, by resolution passed by an affirmative vote of not less than two-thirds of all the members elected or appointed thereto, shall declare it necessary to issue and sell bonds of the corporation.[1] Such resolution shall state the purpose and amount of said issue, and shall fix a date upon which the question of issuing and selling such bonds shall be submitted to the electors of the corporation. Council shall then cause a copy of such resolution to be certified to the deputy state supervisors of the county in which the corporation is situated. [102 v. 264; G. C. 3949; R. S. Sec. 2837; 98 v. 66; 97 v. 190; 95 v. 321; 91 v. 106; 90 v. 226; 76 v. 158.]

(1) **Publication of the resolution** of council declaring the necessity therefor, not required. Railway Co. v. Norwalk, 22 C. C. (N. S.) 590.

Referendum on resolution.—See Heffner v. Krinn, 98 O. S. 1.

FORM OF RESOLUTION DECLARING NECESSITY OF BOND ISSUE.

Resolution.

Declaring it necessary to issue bonds for the purpose of.....

Be it resolved by the council of the city [*or* village] of ....., State of Ohio, two-thirds of all the members elected thereto concurring, that it is necessary to issue and sell bonds in the fiscal year beginning January first, 19....., for the purpose of .....(here state purpose of bond issue) in an amount greater than one-half of one per cent. of the total value of all property in said city [*or* village] as listed and assessed for taxation, to-wit: in the sum of $....., and that the question of issuing and selling the bonds of said city [*or* village] in excess of said one-half of one percent, that is, in the sum aforesaid, be submitted to a vote of the qualified electors of said city [*or* village] at the general election to be held in said city [*or* village] on the ..... day of November, 19...., at the regular place or places of voting in said city [*or* village] and said election shall be conducted, canvassed and certified in the same manner as other general municipal elections.

(If the question is to be submitted at a special election, the form should read: at a special election to be held in said city for that purpose on the ..... day of ....., 19....)

That the mayor be and he is hereby directed to give public notice of the time and place of holding said election in the manner provided by law.

That the clerk be and he is hereby directed to certify a copy of this resolution to the deputy state supervisors of .....County, Ohio.

Passed ....., 19.....

.....,
President of Council.

Attest, ...,
Clerk.

Sec. 3944. [Duty of deputy state supervisors.] § 6. The deputy state supervisors shall prepare the ballots and make the necessary arrangements for the submission of such question to the electors of such municipal corporation at the time fixed in the resolution. [102 v. 264; G. C. 3950; R. S. Sec. 2837; 98 v. 66; 97 v. 190; 95 v. 111, 321; 91 v. 98, 106; 90 v. 226; 76 v. 158.]

Sec. 3945. [Election.] § 7. The election shall be held at the regular place or places of voting in the municipality, and be conducted, canvassed and certified in like manner, except as otherwise provided by law, as regular elections in the municipal corporation for the election of officers thereof. [102 v. 264; G. C. 3951; R. S. Sec. 2837; 98 v. 66; 97 v. 190; 95 v. 111, 321; 91 v. 98, 106; 90 v. 226; 76 v. 158.]

Sec. 3946. [Notice.] § 8. Thirty days' notice[1] of the election shall be given in one or more newspapers printed in the municipality once a week for four consecutive weeks prior thereto, stating the amount of bonds to be issued, and the purpose for which they are to be issued, and the time and place of holding the election. If no newspaper is printed therein, the notice shall be posted in a conspicuous place and published once a week for four consecutive weeks in a newspaper of general circulation in the township or municipal corporation. [102 v. 264; G. C. 3952; R. S. Sec. 2837; 98 v. 66; 97 v. 190; 95 v. 111, 321; 91 v. 98, 106; 90 v. 226; 76 v. 158.]

(1) **Substantial compliance.**— Publication of notice for four successive weeks but covering a period of only 26 days, held to be a substantial compliance with the requirements of this law in absence of any allegations that any one was denied the right to vote by the failure of the publications to cover the full statutory period of 30 days. Cincinnati v. Puchta, Mayor, 94 O. S.

431; affirming s. c. 25 C. C. (N. S.) 458.

Slight irregularities will not invalidate.—The statutory provision that polls shall be kept open until 6 p. m. is directory only, and the fact that at an election for the purpose of authorizing an issue of municipal bonds the polls were closed at 5:30 p. m., is not sufficient to warrant the granting of an injunction restraining the putting forth of such issue, in the absence of fraud or a positive showing that the result would have been materially changed had the opportunity to vote been extended to 6 p. m. Link v. Karb, 14 N. P. (N. S.) 244 (aff'd 89 O. S. 326).

FORM OF NOTICE OF ELECTION.

Legal Notice.

Notice is hereby given that in pursuance of a resolution of the council of the city [*or* village] of ....., passed on the ..... day of ....., 19...., there will be submitted to the qualified electors of said city [*or* village] at the general election in the city [*or* village] of ....., on the ..... day of November, 19...., [*or* at a special election to be held in the city [*or* village] or ..... on the ..... day of ....., etc.] the question of issuing bonds of said city [*or* village] in an amount in excess of one-half of one percent of the total value of all the property in such city [*or* village] as listed and assessed for taxation, that is to say, in the sum of $..... for the purpose of ..... (here state purpose of bond issue). If the question is to be submitted at a special election the notice must further, where applicable, contain a designation of the voting place in each ward as fixed by the deputy state supervisors of election.)

Those who vote in favor of the proposition of issuing the bonds as aforesaid shall have written or printed on their ballots the words "For the issue of bonds" and those who vote against the same shall have written or printed on their ballots the words "Against the issue of bonds."

....., 19.....

.....,
Mayor.

Sec. 3947. [Two-thirds vote required.] § 9. If two-thirds of the voters voting at such election upon the question[1] of issuing the bonds vote in favor thereof, the bonds shall be issued. Those who vote in favor of the proposition shall have written or printed on their ballots, "For the issue of bonds;" and those who vote against it shall have written or printed on their ballots, "Against the issue of bonds." [102

v. 264; G. C. 3953; R. S. Sec. 2837; 98 v. 66; 97 v. 190; 95 v. 111, 321; 91 v. 98, 106; 90 v. 226; 76 v. 158.]

(1) **Blank ballots** or unintelligible ballots cast in an election under this section are not to be considered in determining the number voting "upon the question." Wellsville v. Connor, 91 O. S. 28.

Effect of majority vote.—Where a bond issue is authorized by a majority but not by a two-thirds vote, former § 3952, limiting the issue to 2½ percent of the total value of the city property as listed for taxation is applicable, and the authorization is valid only within the limits of the 2½ percent restriction. Cincinnati v. Puchta, Mayor, 25 C. C. (N. S.) 458; aff'd 94 O. S. 431.

Mode of determining whether two-thirds of votes cast were favorable. Op. Atty. Gen. (1917), p. 701.

After favorable vote by electors, council may be compelled by mandamus to issue bonds. See Op. Atty. Gen. (1920), p. 292.

FORM OF ORDINANCE TO ISSUE BONDS AFTER AFFIRMATIVE POPULAR VOTE.

Ordinance No. .....

To issue bonds for the purpose of .....

Whereas, at a general election held in the city [*or* village] of ....., on the ..... day of November, 19...., [*or* at a special election held for that purpose on the ..... day of ....., 19....], the question of issuing the bonds of said city [*or* village] in an amount in excess of one-half of one percent of the total value of all the property in such city [*or* village] as listed or assessed for taxation, that is, in the sum of $..... for the purpose of ..... (here state purpose of bond issue) was submitted to a vote of the qualified electors of said city [*or* village] and,

Whereas, two-thirds of the voters voting at such election upon the question of issuing said bonds voted in favor thereof, now therefore,

Be it ordained by the council of the city [*or* village] of ....., State of Ohio.

Sec. 1, etc. (Follow form of ordinance under § 3939.)

Note: Form of bond may be adapted from that given under § 3939, *ante;* and form of notice of sale of bonds from that given under § 3924, *ante.*

Sec. 3948. [Maximum net indebtedness 5%.] The net indebtedness created or incurred by a municipal corporation under the authority of sections 3939 and 3942 of the General Code of Ohio and all other provisions of law authorizing the

creation or incurring of indebtedness shall never exceed five per cent of the total value of all property in such municipal corporation as listed and assessed for taxation. [109 v. 336, 341; 102 v. 265; 102 v. 11, § 3954; 101 v. 432, § 3954; G. C. 3954; R. S. Sec. 2837; 98 v. 66; 97 v. 190; 95 v. 111, 321; 91 v. 98, 106; 90 v. 226; 76 v. 158.]

Sec. 3948-1. [Maximum indebtedness in charter municipality 2½%.] Exclusive of bonds approved by the electors of the corporation at a general or special election held in the manner provided in sections 3943 to 3947, inclusive, of the General Code of Ohio, the net indebtedness created or incurred by any charter municipality shall never exceed two and one-half per cent of the total value of all property in such municipal corporations as listed and assessed for taxation. Upon resolutions of its council or chief legislative body, passed by an affirmative vote or not less than two-thirds of all the members elected or appointed thereto, the electors of any such municipality are hereby authorized to vote upon a proposed issue of bonds and the deputy state supervisors of elections of the county are hereby authorized and directed to conduct, canvass and certify any such election in the manner provided in said sections 3943 to 3947. Inclusive of bonds heretofore or hereafter approved by the electors as aforesaid, the net indebtedness of any such municipal corporation shall never exceed five per cent of the total value of all property in such municipal corporation as listed and assessed for taxation. [109 v. 336, 341.]

Sec. 3949. ["Net indebtedness" defined; what bonds not considered in ascertaining limitation.] The net indebtedness prescribed in sections 3940, 3941, 3948 and 3948-1 of the General Code of Ohio, shall be the difference between the par value of the outstanding and unpaid bonds and the amount held in the sinking fund, judgment fund, bond fund, and other indebtedness retirement funds for their redemption. In ascertaining the limitations of one-half per cent, two and one-half per cent and five per cent, prescribed in sections 3940, 3941, 3948 and 3948-1, the following bonds shall not be considered:[1]

(a) Bonds issued prior to April 29, 1902;

(b) Bonds heretofore issued to refund, extend the time of payment of, or in exchange for bonds, representing an indebtedness created or incurred prior to April 29, 1902;

(c) Bonds and notes issued in anticipation of the levy or collection of special assessments, either in original or refunded form, and certificates of indebtedness issued in anticipation of the collection of current revenues;

(d) Bonds heretofore issued for the payment of obligations arising through emergencies caused by epidemics, floods or other forces of nature, and bonds hereafter issued for the replacement or restoration of property destroyed or injured by sudden casualty which could not have reasonably been foreseen, or for defraying the expenses of an extraordinary epidemic of disease; but the aggregate amount of such emergency bonds hereafter issued which may be so excluded from consideration of net indebtedness shall not exceed one-half of one per cent of the total value of all property in the municipal corporation as listed and assessed for taxation;

(e) Bonds heretofore issued to meet deficiencies in the revenue, as provided for in section 3931 of the General Code;

(f) Bonds issued for the purpose of purchasing, constructing, improving and extending water-works to the extent that the income from such water-works is sufficient to cover the cost of all operating expenses, interest charges and to pass a sufficient amount to a sinking fund to retire such bonds as they become due or to provide for the payment of the interest and principal installments of serial bonds as they become due or bonds heretofore issued, or heretofore authorized by the General Assembly, for municipally owned steam railways, and bonds heretofore issued, or heretofore authorized by a vote of the people, under the authority of sections 4000-16 to 4000-28 inclusive of the General Code, provided that all other bonds issued under the provisions of sections 4000-16 and 4000-28 shall be counted in the limitation unless prior to their issues, the Public Utilities Commission of Ohio on application made to it by the municipality concerned shall certify that in its opinion the interest and sinking fund charges thereon will be paid the third year of operation from the receipts of the rapid transit system to be constructed. Provided, further, that after

the end of the third fiscal year of operation of any rapid transit system only such amount of the bonds heretofore or hereafter issued under the provisions of said section shall be excluded from consideration on which the interest, sinking fund and retirement have actually been paid from the receipts of the system during the preceding year, such payment to be certified by the fiscal officer of the municipality.

Bonds issued under authority of section 15093 of the General Code and subsequent sections thereto of an act relating to cities of the first class having a population exceeding 150,000 inhabitants, passed May 4, 1869, and acts supplemental thereto and amendatory thereof.

(g) Bonds issued under the authority of section 1259 of the General Code;

(h) Bonds issued for the payment of non-contractual final judgments under the authority of section 4 of this act;

(i) Excess condemnation and mortgage bonds issued under the authority of section 10 or section 12 of Article XVIII of the Constitution of Ohio and other bonds not secured by the general credit of the municipality.

(j) All bonds issued previous to January 1, 1922, and not included in any of the above classes (a) to (i) inclusive, which at the time of issuance were not required by law to fall within the percentage limitations as provided in sections 3941 and 3948 of the General Code. [110 v. 456, 461; 109 v. 336, 341; 102 v. 265; 102 v. 33, § 3946; G. C. 3946; R. S. § 2835b; 98 v. 66; 97 v. 520.]

(1) **What bonds included.**—*Voted bonds.*—In Cleveland v. Cleveland, 32 C. C. 257, 15 C. C. (N. S.) 129 (aff'd 83 O. S. 482), it was held, in construing the provisions of § 3939, *et seq.*, before the amendments of 1911, that the Longworth act, of which the General Code sections were a revision, divided municipal bonds issued thereunder into two distinct classes, voted bonds and unvoted bonds, and the one per cent. and four per cent. limitations applied only to the unvoted bonds; and it was further held that former § 3945 G. C. providing that limitations of one per cent. and four per cent. should not affect voted bonds, meant that in calculating the amount of bonds that might be issued under the limitations of one and four per cent., bonds previously authorized by vote of the people were not to be counted.

Bonds issued and not bonds payable.—Under former provisions, it was held that the limitation of one per cent. referred to amount of bonds issued for any calendar year and not amount payable within any

calendar year. Smith v. Rockford, 29 C. C. 478, 9 C. C. (N. S.) 465; Heffner v. Toledo, 75 O. S. 413.

Bonds to pay municipality's portion of street and sewer improvements were held subject to the one per cent. limitation of former provisions. *Ib.*

For other cases determining whether bonds were included within those provided for by the Longworth act, see Cleveland v. Cleveland, 18 Dec. 619, 7 N. P. (N. S.) 249 (bonds for paving, sewer construction and abolishing of grade crossings); Cincinnati v. Von Bargen, 18 Dec. 547, 6 N. P. (N. S.) 258, aff'd, 78 O. S. 396, (bonds for completion of Cincinnati Waterworks); Platt v. Toledo, 54 B. 63, (bonds for completion of parts of bridge over navigable river).

Limitation exceeded. — Where bonds issued in excess of amount allowed, as to right of persons contracting with municipality for construction of improvements to rely on clerk's certificate of money in treasury. See Smith v. Rockford, 29 C. C. 478; 9 C. C. (N. S.) 465.

Where total amount of bonds authorized exceeds the limitation, but contracts entered into and partly executed will not require an amount in excess of limitation, the issue, to extent required to meet such contracts will be upheld as binding on the municipality. Smith v. Rockford, 29 C. C. 478; 9 C. C. (N. S.) 465.

Dividing cost of improvement. —Whether a municipality may make a partial appropriation of property for a waterworks system, which will not involve the issuance of bonds in a sum greater than one per cent. of the tax duplicate and thus evade the submission of the question to popular vote, *quere*. Knauss v. Columbus, 13 Dec. 200.

Sec. 3950. [When certain indebtedness deemed not to exist.] § 12. An indebtedness shall not be deemed to have been created or incurred, within the meaning of this act, until the bonds shall have been delivered under contract of sale. [102 v. 265; G. C. 3944; R. S. Sec. 2835.]

Sec. 3951. [Validity of bonds previously issued.] § 13. Bonds issued in the manner hereinbefore prescribed, which at the time of issue were within the limitations herein provided shall continue to be valid obligations of the municipal corporation which issued them. [102 v. 265; G. C. 3954; R. S. Sec. 2837.]

Sec. 3952. [Act takes effect, when.] Repealed, 109 v. 336.

Sec. 3953. [Levy.][1] § 15. For the payment of all bonds herein authorized, unless the interest thereon and redemption thereof is otherwise provided for, council shall levy each

year during the periods the bonds have to run, a tax in addition to all levies authorized by law, sufficient to pay the interest thereon as it matures, and provide a sinking fund for their redemption at maturity. [102 v. 266.]

(1) **Section 3954.**—Section 3954 was expressly repealed by the act of May 15th, 1911, (102 O. L. 262), and its provisions embodied in that act; but in the numbering of the sections of the act by the Attorney General there were included only the numbers 3939 to 3953, inclusive. There is therefore no § 3954.

DIVISION IV.

INSTITUTIONS AND UTILITIES.

CHAPTER 1.

WATER WORKS.[1]

Sec. 3955. [General powers of council.] The council of a municipality may take possession of any land obtained for the construction or extension of water works, reservoirs, or the laying down of pipe, and also any water rights or easements connected with the use of water. Any land, water right, or easement so taken possession of for water works purposes shall not be used for any other purpose, except by authority of the director of public service and consent of the council.[2] [R. S. Sec. 2407; 66 v. 205, § 334.]

(1) **Application of sections.**— Former §§ 2407 R. S., 2409-2423 R. S., 2425-2435 R. S. (of which the sections in this chapter are a revision), originally related to the powers and duties of *trustees of waterworks* to be provided by council. These sections were not repealed by the municipal code of 1902, but on the other hand they were not re-enacted in that part of the code relating to cities. They were, however, re-enacted in that part of the code (§ 205), relating to the duties of the trustees of public affairs in villages. It was held, nevertheless, in Hutchins v. Cleveland, 29 C. C. 697, 9 C. C. (N. S.) 226 (aff'd, 79 O. S. 478), that the sections, being left in force by the Code would apply to cities as well as to villages and would govern the department having charge of waterworks in cities as well as the trustees of public affairs in villages.

Other provisions. — General power to provide for waterworks is given in § 3619, *ante.*

Power to apply water rent to maintenance of works, etc., is found in § 3619, *ante.*

Power to contract with private company for furnishing water to municipality is given in §§ 3809 and 9324.

Works of private company.— Regulations of price charged, see § 3982, *post.* Powers of private companies, see § 9320, *et seq.*, under title "Gas, Water and Electricity," in Part II.

(2) **Municipality as a riparian proprietor,** has the right to take water from a stream for the use of

its waterworks, and other riparian owners cannot complain, if no more is taken than required for the works. Canton v. Shock, 66 O. S. 19. *Contra*, Warder v. Springfield, 17 B. 398. But the municipality cannot take more than a reasonable amount in supplying manufacturers with water power, and it cannot supply inhabitants outside the municipality. Canton v. Shock, 66 O. S. 19.

Sec. 3956. [Duties of director of public service.] The director of public service shall manage, conduct and control the water works,[1] furnish supplies of water, collect water rents, and appoint necessary officers and agents.[2] [R. S. Sec. 2409; 92 v. 192; 90 v. 118; 66 v. 206.]

(1) **Management.** — See also § 4326 giving the director of public service the management of municipal waterworks, and § 4328 giving the director of public service the power to make contracts, purchase supplies, or provide labor for any work under his supervision.

Payment of rent by water department for offices in municipal building. See Op. Atty. Gen. (1922), p. 1109.

Powers.—For cases construing the powers of the waterworks trustees under former sections of the Revised Statutes, see Fremont v. June, 8 C. C. 124; State v. Griffin, 4 C. C. 156; Cincinnati *ex rel.* v. Cincinnati, 11 C. C. 309.

In Fremont v. June it was held that the trustees might contract with a mill owner for part of his slack water for use in waterworks; in State v. Griffin it was held that the statutes gave the trustees full control of the waterworks, including contracting for enlargements and improvements and disbursements of the waterworks fund; in Cincinnati *ex rel.* v. Cincinnati, it was held that the trustees would have power to appoint experts to investigate as to the condition, sufficiency of the works, etc.

As to the respective powers of council and the director of public service over waterworks, see notes to § 4326.

Appointment of bank as agent to collect water rents and electric lighting charges; compensation. See Op. Atty. Gen. (1921), p. 540.

Salary of Director of Public Service payable partly from service and partly from water works funds; proportion within discretion of council. Op. Atty. Gen. (1916), p. 1910.

Under former sections of the Revised Statutes relating to trustees of waterworks it was held that the trustees had no power to purchase or lease real estate, such power being in council and the municipality would not be estopped by the acts of the trustees in so leasing. Dayton v. Cooper Company, 7 N. P. 495.

Municipal liability.—As to the liability of the municipality for injury caused by breakage of waterpipes, see notes under § 3714, *ante*.

A municipality is liable to a water consumer for negligently cutting off his supply of water, regardless of whether the consumer's contract called for a continuous supply. Cincinnati v.

George & Allan, 14 C. C. (N. S.) 447.

(2) **Removal of appointees.**—As to the removal of appointees, see § 4247, *post.* See also § 486-1 *et seq.*, under "Civil Service", Part II. As to the powers of the trustees under former statutes, see Lawrence v. Cincinnati, 3 Rec. 598.

Sec. 3957. [By-laws and regulations.] Such director may make such by-laws and regulations as he deems necessary for the safe, economical and efficient management and protection of the water works.[1] Such by-laws and regulations shall have the same validity as ordinances when not repugnant thereto or to the constitution or laws of the state. [R. S. Sec. 2410; 66 v. 206.]

(1) Director of Public Service may require patrons to install meters when he thinks it most economical, etc. Op. Atty. Gen. (1912), p. 1664.

Sec. 3958. [Assessment and collection of water rents.] For the purpose of paying the expenses of conducting and managing the water works, such director may assess and collect from time to time a water rent[1] of sufficient amount in such manner as he deems most equitable upon all tenements and premises supplied with water. When more than one tenant or water taker is supplied with one hydrant or off the same pipe, and when the assessments therefor are not paid when due, the director shall look directly to the owner of the property for so much of the water rent thereof as remains unpaid, which shall be collected in the same manner as other city taxes. [R. S. Sec. 2411; 94 v. 57; 90 v. 198; 86 v. 364; 84 v. 10; 71 v. 109.]

(1) **Nature of water rent.**—Water rent is an assessment rather than a tax. If not paid, the property may be sold to pay it. Gallipolis v. Trustees, 2 N. P. 161; Alter v. City, 56 O. S. 47.

Water rents not a preferred claim against property in hands of receiver. Cincinnati v. Schultz, 97 O. S. 317; affirming Schultz v. Cincinnati, 27 O. C. A. 362; 8 Oh. App. 140; 39 O. C. C. 228.

Power limited.—Power to assess and collect water rents is limited by the statute conferring it. See Ramsay v. Columbus, 12 Dec. 725.

The power to "assess and collect water rents" means power to fix general rates to be assessed equally upon all water takers of a given class; the director is not authorized by this section to bind the municipality for a period of years by special contracts with individual

users. Lake Shore, etc., Ry. Co. v. Elyria, 32 C. C. 449.

Service charges and deposits.—The director of public service of a city owning and operating a water works may require consumers of water who have installed meters to pay a service charge based upon the size of the meter, as part of the water rent necessary for the maintenance of the plant, and may also require of meter users a cash deposit in advance for a quarterly period. Rogers v. Cincinnati, 14 N. P. (N. S.) 193.

But regulations that require such cash deposit in advance of domestic consumers only, and not of commercial or mercantile consumers, are discriminatory, unreasonable, and an abuse of the discretion vested in the director of public service and therefore invalid. *Ib.*

As to discretion of director, see Rogers v. Cincinnati, 13 Oh. App. 472.

Director of Public Service may fix different rates according to amount consumed, etc. Op. Atty. Gen. (1912), p. 1664.

Bank may act as agent for collection. See Op. Atty. Gen. (1921), p. 540.

No authority for publishing rules and rates. Op. Atty. Gen. (1918), p. 1138.

No reduction can be made for leaks on premises of consumer. Op. Atty. Gen. (1918), p. 639.

Expense of publishing notice to consumers of water relative to the payment of water bills is a proper charge against water works. Op. Atty. Gen. (1920), No. 938.

Regulations as to water rents.—A regulation that if any party neglect to pay water rent when due the water will be turned off until back rent and damage is paid and a charge of $1.00 made for turning off and on the water, is a reasonable regulation and may be enforced. Mansfield v. Humphrey Mfg. Co., 82 O. S. 216.

Where regulations of department provide that property to which water is supplied shall be held liable for water rents, such rents become a lien on the property, notwithstanding application for water was made by tenant only. Young v. Hamilton, 10 N. P. (N. S.) 369.

Sec. 3959. [Disposition of surplus; how taxes applied.][1] After paying the expenses of conducting and managing the water works, any surplus[2] therefrom may be applied to the repairs, enlargement or extension of the works or of the reservoirs, the payment of the interest of any loan made for their construction or for the creation of a sinking fund for the liquidation of the debt. The amount authorized to be levied and assessed for water works purposes shall be applied by the council to the creation of the sinking fund for the payment of the indebtedness incurred for the construction

and extension of water works and for no other purpose whatever. [R. S. Sec. 2412; 87 v. 4; 86 v. 299; 66 v. 206.]

(1) **Validity.**—This section held constitutional. Cincinnati v. Roettinger, 105 O. S. 145.

(2) **Use of surplus exclusive.**—The uses set forth in this section are exclusive. Cincinnati v. Roettinger, 105 O. S. 145.

Charter cities.—This section applies also to cities under Home Rule charters. Ib.

Sec. 3960. [Proceeds from water works shall be separate fund.] Money collected for water works purposes[1] shall be deposited weekly with the treasurer of the corporation. Money so deposited shall be kept as a separate and distinct fund. When appropriated by council, it shall be subject to the order of the director of public service. Such director shall sign all orders drawn on the treasurer of the corporation against such fund.[2] [R. S. Secs. 2413, 2414; 66 v. 206, §§ 340, 341.]

(1) **Charge for reading meters.** — Consumers cannot be charged for monthly reading of meters, in addition to the charge for water used. Bancroft v. Wall, 29 B. 306.

(2) **Character of orders.**—Under former § 2414 R. S. it was held that the orders must show on their face that they were issued by order of the trustees or the treasurer would not be bound to honor them. Trustees v. Corzelius, 35 O. S. 69.

Money raised by bond issue, for improvement of waterworks already constructed, it was held, under former statutes, was to be paid by the treasurer upon order of the trustees. State v. Griffin, 4 C. C. 156.

Sec. 3961. [Director may make certain contracts.] Subject to the provisions of this title,[1] the director of public service may make contracts for the building of machinery, water works buildings, reservoirs and the enlargement and repair thereof, the manufacture and laying down of pipe, the furnishing and supplying with connections all necessary fire hydrants for fire department purposes, keeping them in repair, and for all other purposes necessary to the full and efficient management and construction of water works. [R. S. Sec. 2415; 70 v. 11.]

(1) **Contracts.**—As to the powers and duties of the director of public service in making contracts generally, see § 4328 *et seq*, *post*.

Sec. 3962. [Investigation by council.] The council of a municipality in which water works are situated or in progress of construction may appoint a committee for the investigation of all books and papers, and all matters pertaining to the management of the water works, at least once a year, and oftener, if necessary, by reason of neglect of duty or malfeasance on the part of any officer of the works. Any such officer found by such committee so offending shall be liable to removal from office by the council. [R. S. Sec. 2416; 66 v. 206.]

Sec. 3963. [Water supply free for certain purposes.][1] No charge shall be made by a city or village, or by the waterworks department thereof, for supplying water for extinguishing fire, cleaning fire apparatus, or for furnishing or supplying connections with fire hydrants, and keeping them in repair for fire department purposes, the cleaning of market houses, the use of any public building belonging to the corporation, or any hospital, asylum, or other charitable institutions, devoted to the relief of the poor, aged, infirm, or destitute persons, or orphan or delinquent children, or for the use of the public school buildings in such city or village.

But in any case where the school district, or districts, include territory not within the boundaries of the city or village, a proportionate charge for water service shall be made in the ratio which such tax valuation of the property outside the city or village bears to the tax valuation of all the property within such school district, subject to the rules and regulations of the waterworks department of the municipality governing, controlling, and regulating the use of water consumed. [108 v. 1160; 102 v. 94; R. S. Sec. 2417; 76 v. 84; 70 v. 11.]

(1) **Validity.**—This section as originally enacted was held constitutional in Gallipolis v. Trustees, 2 N. P. 161.

County Orphans' Home located within corporation is entitled to water from municipal plant free of charge. Op. Atty. Gen. (1916), p. 616.

Water rates for schools, hospitals, and libraries — classification of rates. Op. Atty. Gen. (1918), p. 800.

Free water, gas and electricity, when used for public purposes. See Op. Atty. Gen. (1923), No. 982.

Consumers outside municipality. See Op. Atty. Gen. (1923), No. 977.

For further construction of this section, see Op. Atty. Gen. (1920), pp. 71, 75, 290 and 325.

Payment of water rents by library trustees of school districts partly outside of municipal corporation. See Op. Atty. Gen. (1921), p. 96.

This section, in so far as it requires free water to be furnished to charitable institutions, held unconstitutional. Euclid v. Camp Wise, 102 O. S. 207.

Sec. 3964. [Protection to attachments.] Attachments of whatever nature made to the water pipes or other fixtures belonging to the water works and intended for public use shall be subject to the same supervision, rules and regulations as are made for the protection of water works against abuse, destruction and unnecessary use or waste of water or the director of public service may make general or special rules and regulations for such purpose. [R. S. Sec. 2418; 66 v. 207.]

Sec. 3965. [Bond of contractor, emergency.] Before entering into any contract for work to be done, the director of public service shall require bond to be given, with good and sufficient surety, for the faithful performance of the work.[1] In case of emergency, by a vote of two-thirds of all the members elected thereto, the council may authorize such director to enter into such contract without advertising. [R. S. Secs. 2419, 2420; 66 v. 207, §§ 346, 347 (S. & C. §§ 1529, 1530).]

(1) **Awarding contract.**—See, generally, notes to § 4328, *post.*

Discretion of officers, in determining bidder to whom contract should be awarded, under provisions of former § 2419 R. S., see Fergus v. Columbus, 6 N. P. 82; McClain v. McKisson, 15 C. C. 517, (aff'd, 54 O. S. 673).

Certificate of money in treasury held not necessary in case of such contracts under former laws. Fergus v. Columbus, 6 N. P. 82.

Sec. 3966. [Extension of public utility service beyond corporate limits.][1] On the written request of any number of citizens living outside of the limits of a municipal corporation, the corporation may extend, construct, lay down and maintain aqueduct and water pipes, and electric light and power lines outside the corporate limits, and for such purpose may make use of such of the public streets, roads, alleys and public grounds as may be necessary therefor, provided however aqueduct and water pipes shall not ex-

tend more than five miles beyond the corporate limits. [110 v. 38; 109 v. 37; R. S. Sec. 2421; 90 v. 35; 66 v. 207.]

(1) Water works extensions outside municipality. See Op. Atty. Gen. (1920), p. 40.

Issues of bonds for such purpose. See Op. Atty. Gen. (1920), p. 40.

Liability of municipality for conversion of water pipes laid by private owner. See Lakewood v. Newell, 28 C. D. 682.

Sec. 3967. [Expense of service beyond corporate limits.] When a person or persons at his or their expense have laid down and extended mains and water pipes or electric light and power lines beyond the limits of a municipal corporation, and the corporation by resolution of the council, has authorized the proper officer of the water works to superintend or supervise the laying and extension of such mains and water pipes or electric light and power lines the corporation shall furnish water or electricity to the residents and property holders on the line of such mains and water pipes or electric light and power lines subject to the same rules and regulations that it furnishes water or electricity to its own citizens, except that the rates charged therefor shall not exceed those within the corporation by more than one-tenth thereof. [109 v. 37; R. S. Sec. 2421; 90 v. 35; 66 v. 207.]

Sec. 3968. [Supervision of territory having water service outside municipality.] All ordinances, except those relative to taxation or assessment, resolutions, rules and regulations relative to the construction, maintenance and operation of water works, mains, hydrants, service pipes and connections, and the protection thereof, shall operate in like manner in the territory outside the municipality when such extensions have been made, and for the enforcement thereof the jurisdiction of the mayor and police shall extend into and over such territory. [R. S. Sec. 2421; 90 v. 35; 66 v. 207.]

Sec. 3969. [Disposition of mains and pipes in case of annexation.] The corporation shall take full charge and control of such mains and water pipes, keep them in repair at its own expense, and, in case of annexation to the corporation of such territory, the corporation shall pay to such person or persons a just compensation therefor and shall thereupon

become the owner of them. [R. S. Sec. 2421; 90 v. 35; 66 v. 207.]

Sec. 3970. [Regulation and protection thereof.] Such aqueducts and pipes shall be so constructed and laid as not to interfere unnecessarily with the use of such streets, roads, alleys and public highways and public grounds, and the corporation so extending and establishing any part of its water works outside of its limits shall have the same power and jurisdiction to prevent or punish pollution of or injury to the water so conveyed or injury to the works or any portion thereof as it has within the limits of such corporation. [R. S. Sec. 2422; 66 v. 208.]

Sec. 3971. [Water works in contiguous municipality.] A municipality owning water works whose territory is contiguous to that of another municipality with the assent of such other municipality, may establish and maintain such portion of its water works as it deems advisable within the limits of such other municipality and may make such use of the public streets, alleys and public grounds thereof as is necessary to construct, lay down and maintain all such aqueducts and water pipes as are required in connection with such water works for the conveyance of water along and across such streets, alleys and public grounds. [R. S. Sec. 2423; 66 v. 208.]

Sec. 3972. [Construction, regulation and protection thereof.] Such aqueducts and pipes shall be so constructed and laid as not to interfere unnecessarily with the use of such streets, alleys and public grounds as public highways and public grounds. A municipality so establishing a part of its water works within the limits of such other municipality shall have jurisdiction to prevent or punish the pollution of or injury to water so conveyed or of the stream or source from which it is obtained or any injury to any portion of the water works so located within the limits of such other municipality. [R. S. Sec. 2424; 66 v. 208.]

Sec. 3973. [Authority to supply other municipalities.] A municipality which has water works or electric works may

contract with any other municipality[1] for the supply of the latter or its inhabitants with water or electricity upon such terms as are agreed upon by their respective councils. A municipality which has water works may dispose of surplus water, for manufacturing or other purposes, by lease or otherwise, upon such terms as are agreed upon by the director of public service or trustees and approved by the council thereof. Moneys received for such surplus water in either case shall be applied to the payment of the principal and interest of the bonds issued for the construction of such water works, or other expenses incident to the maintenance of the water works, but no lease shall be made for a longer term than twenty years. [110 v. 38, 39; R. S. Sec. 2425; 99 v. 249; 69 v. 25.]

(1) **Former statute** limited the right to contiguous cities or villages. Wright v. Kennedy Heights, 25 C. C. 409; 1 C. C. (N. S.) 195.

Sec. 3973-1. [Construction by two or more municipalities for water supply.] Two or more municipalities may unite in the construction of a water works plant for the purpose of supplying water to such municipalities and the inhabitants thereof for domestic, manufacturing and other purposes. Such municipalities shall have power, through their duly authorized officers, to contract with each other for the construction and maintenance of such water works, and to agree as to a division of the cost and maintenance of such plant and a division of the water produced thereby. [107 v. 419.]

Sec. 3974. [Cost thereof, how paid.] The amount to be paid for such supply shall be raised by such municipality in the manner provided for the payment of the expense of conducting and managing water works constructed wholly by a municipality. The amount so received by the municipality furnishing such supply shall be applied to the payment of the interest on the sum borrowed for the construction of such water works, or to defray the expense of their management, as the director of public service or trustees shall direct. [R. S. Sec. 2426; 66 v. 208.]

Sec. 3975. [Ownership of works when municipalities are annexed.] Upon the annexation of one municipal corporation to another, the water works theretofore constructed by either shall thereby become the property of the united corporation, and shall thereafter be managed by the director of public service or the board of trustees of public affairs of the corporation to which such annexation is made. [R. S. Sec. 2427; 66 v. 208.]

Sec. 3976. [Termination of contract upon annexation.] A contract entered into by one municipal corporation for the supply of water to the other, as hereinbefore provided, shall be terminated by such annexation, and so much of the debt incurred by either, in the construction of water works, as remains unpaid, shall thereafter be a charge upon the united corporation, to the same extent that the separate debt of either, incurred as aforesaid, was, before the union, a charge upon the corporation which constructed it. [R. S. Sec. 2428; 66 v. 209.]

Sec. 3977. [Tax for payment of certain interest.] For the purpose of paying the interest on the money borrowed for the erection and completion of water works, during the erection and completion thereof, and before they are put in operation, a tax of sufficient amount shall be assessed and collected each year in the usual manner of levying and collecting taxes in the corporations upon all the taxable property thereof. [R. S. Sec. 2429; 66 v. 209.]

Sec. 3978. [Tax for the payment of interest on loans.] For the purpose of paying the interest on any loan which a municipality has made for the erection or extension of water works, and after they have been put in operation, and for the building of machinery, a tax of sufficient amount may be assessed and collected, in addition to the amount authorized by law, by the council each year upon all the taxable property, both real and personal, in such municipality. [R. S. Sec. 2430; 90 v. 326; 88 v. 153; 66 v. 209.]

Sec. 3979. [Tax a lien upon property.][1] The tax, when

levied and assessed, shall be a lien upon the property upon which it is levied, and a charge against the owners thereof, and shall be certified to the auditor of the county, placed upon the tax list in a separate column thereof, collected as other taxes and paid into and be under the same control as the water works funds. [R. S. Sec. 2431; 66 v. 209.]

(1) Assessment for water pipes. See Op. Atty. Gen. (1922) p. 1116.

Sec. 3980. [Laying pipes in highway.] The council may prescribe by ordinance for the laying down of water pipes in all highways about to be paved, macadamized or otherwise permanently improved, and for the assessment of the cost and expense thereof upon the lots or parcels of land adjoining or abutting upon the highways in which they are laid. In no case, except as a sanitary measure, shall the council require any house connections to be built further from the main pipe than the outer line of the curbstone. [R. S. Sec. 2432; 90 v. 198; 66 v. 209.]

Sec. 3981. [Municipalities may contract for a water supply; contract to be submitted to a vote.] A municipal corporation may contract with any individual or individuals or an incorporated company for supplying water for fire purposes, or for cisterns, reservoirs, streets, squares and other public places within the corporate limits, or for the purpose of supplying the citizens of such municipal corporation with water for such time, and upon such terms as may be agreed upon. But such contract shall not be executed or binding upon the municipal corporation until it has been ratified by a vote of the electors thereof, at a special or general election, and the municipal corporation shall have the same power to protect such water supply and prevent the pollution thereof as though the water works were owned by such municipal corporation.[1] [R. S. Sec. 2434; 82 v. 11; 80 v. 71; 78 v. 42; 71 v. 93.]

(1) **Certificate** of money in treasury, not necessary under former statutes, see Defiance v. Council, 23 C. C. 96 (reversed on other grounds, 68 O. S. 520).

Private water plant.—When contract with does not require a vote of people; subject to ten-year limitation of Section 3809 G. C. Op. Atty. Gen. (1915), p. 987.

CHAPTER 2.

GAS, WATER AND ELECTRICITY.[1]

Sec. 3982. [Council may regulate price of electric light, gas and water.] The council of a municipality in which electric lighting companies, natural or artificial gas companies, gas light or coke companies, or companies for supplying water for public or private consumption, are established, or into which their wires, mains or pipes are conducted, may regulate[2] from time to time the price which such companies may charge for electric light, or for gas for lighting or fuel purposes, or for water for public or private consumption, furnished by such companies to the citizens, public grounds, and buildings, streets, lanes, alleys, avenues, wharves, and landing places, or for fire protection. Such companies shall in no event charge more for electric light, natural or artificial gas, or water, furnished to such corporation or individuals, than the price specified by ordinance of council.[3] The council may regulate and fix the price which such companies shall charge for the rent of their meters, and such ordinance may provide that such price shall include the use of meters to be furnished by such companies, and in such case meters shall be furnished and kept in repair by such companies and no separate charge shall be made, either directly or indirectly, for the use or repair of them. [R. S. Sec. 2478; 98 v. 170; 97 v. 114; 86 v. 62; 84 v. 39; 66 v. 218.]

(1) **Power of municipality to establish** and maintain lighting, power and heating plants, see § 3618.

Power of municipality to contract for lighting the streets, etc., see § 3809.

Power of municipality to appropriate property for such purpose, see § 3677.

Powers of private companies, see further §§ 9320, *et seq.*, under title "Gas, Water and Electricity," in Part II.

(2) **Conditions in grant.**—The express power to regulate does not limit the power of the municipality to impose terms and conditions in granting a franchise to a natural gas company to lay pipes in the streets, etc., Columbus v. Federal

Gas & Fuel Co., 10 N. P. (N. S.) 305; 21 Dec. 179; aff'd Gas Co. v. Columbus, 96 O. S. 530.

Requirement of franchise, that natural gas company pay to municipality 10 per cent. of its receipts from gas sold above a certain figure is valid. *Ib.*

Provision in an ordinance embodying a grant to a natural gas company, to the effect that the gas furnished shall not be used for illuminating purposes, but only for heat and power, is void. Springfield v. Gas Co., 31 C. C. 446, 12 C. C. (N. S.) 392, (aff'd, 81 O. S. 537).

Provision requiring notice to gas company before consumer may turn natural gas into artificial gas pipes is reasonable, but consumer is entitled to immediate service. *Ib.*

Artificial gas company acquiring by purchase the rights and franchises of a natural gas company, and continuing to use the streets, its obligation to city and inhabitants are same as that of company whose property is acquired. *Ib.*

Character of contract.—Where a municipality by ordinance gives its consent that a natural gas company may enter the municipality, lay down its pipes therein and furnish gas to consumers upon terms imposed by the ordinance and accepted by the company, such action constitutes a contract. When the contract is silent as to the duration of the franchise, such franchise is not perpetual but the duration is simply indeterminate, existing only so long as the parties mutually agree thereto; the company may voluntarily forfeit its right to exercise its privileges within the municipality and wholly withdraw therefrom, and the municipality may not prevent the removal of the company's property; but so long as the company continues to exercise any of its franchises within the municipality it may be compelled to exercise them fairly and without discrimination. East Ohio Gas Co. v. Akron, 81 O. S. 33.

The right to use the streets for gas purposes is a franchise and must emanate directly or indirectly from the legislature. State v. Cin., G. L. & C. Co., 18 O. S. 262.

Power to regulate.—Where the right has been reserved to alter or amend charter, a general law may be passed authorizing cities to regulate the price of gas. State *ex rel.* v. Cincinnati, G. L. & C. Co., 18 O. S. 262.

A company chartered under the old constitution, unless empowered by charter to fix prices, comes within the provisions of this section. Zanesville v. Gas Light Co., 47 O. S. 1.

A company whose pipes extend into another city or village, is subject to the regulations of such city or village under the authority of this section. Cincinnati, G. L. & C. Co. v. Avondale, 43 O. S. 257.

Municipality is not deprived of its power to regulate, because it had passed an ordinance allowing a gas company to lay pipes in the street, the company agreeing not to charge more than a certain price for gas. State *ex rel.* v. Cleveland, etc., Co., 3 C. C. 251.

Where council has fixed a rate pursuant to this section, and the company has failed either to accept the rate or to appeal to the Public Utilities Commission, under Sections 614-44, the rates fixed

in such ordinance will be effective. Washington v. Public Util. Comm., 99 O. S. 70.

Where an ordinance is passed by a municipal corporation granting to a gas company the right for the term of twenty-five years to furnish natural gas for heating, lighting and power purposes through its mains and appliances in the streets and public places, on terms and conditions contained in the ordinance, which include a provision that the grant is subject to the right of the city to regulate the price of natural gas from time to time as provided by law, the fixing of a rate for the first ten years of such franchise does not change the franchise contract nor exhaust the power of the city thereunder to subsequently fix the rate, and the assent of the company to the rate so fixed is not necessary. Cincinnati v. Public Utilities Commission, 98 O. S. 320.

As to the power of the municipality to fix rates, see also Gas. Co. v. Pub. Util. Com., 103 O. S. 168.

The provisions of Sec. 614-44, G. C. relative to the powers of the public utilities commission do not apply to a contract made prior to the passage of that section. *Ib.*

The ordinance allowing pipes to be laid is not a contract. *Ib.* Where no contract has been made with a company, fixing the price of gas, the municipality may regulate the prices of gas and make changes at any time. State *ex rel.* v. Gas Co., 37 O. S., 45.

But if a contract has already been made and the company has accepted the terms of an ordinance fixing the price of gas, the contract cannot be changed. Toledo v. N. W. Ohio Nat. Gas Co., 5 C. C. 557; but see Phelps v. Gas and Fuel Co., 101 O. S. 144; Briggs v. Dayton, 104 O. S. 616.

Where municipality has fixed the price for lighting for ten years, under § 3983, its power to regulate after such period is not affected. State *ex rel.* v. Gas Co., 37 O. S. 45. See further, note (1) under § 3983, *post.*

The franchise under which a gas company furnished gas to a village and its inhabitants for a specified number of years, becomes, at the expiration of the term named, an indeterminate franchise under which the company is not bound to continue to supply gas, but if it elects to supply gas, the rate charged must be the same as during the period in which the franchise was in force. Newcomerstown v. Gas Co., 30 O. C. A. 283; affd. 100 O. S. 494.

Pending the term of a gas-rate ordinance passed by the council of a municipality and accepted by the gas company, it is competent for the parties to modify or abrogate by mutual agreement the contract thus entered into. Phelps v. Gas & Fuel Co., 101 O. S. 144; Briggs v. Dayton, 104 O. S. 616.

An ordinance regulating gas companies, and referring to "any gas companies" is broad enough to cover companies organized for furnishing natural gas. Cline v. Springfield, 7 N. P. 626.

As to effect of company chartered to furnish artificial gas, substituting natural gas therefor, see Find-

lay Gas Light Co. v. Findlay, 2 C. C. 237.

As to right of company substituting natural gas for artificial gas in certain parts of municipality to charge higher rate for artificial gas, under authority of council, see Feckter v. Union Gas & E. Co., 19 Dec. 658; 6 O. L. R. 658.

Mandatory injunction will lie to compel a gas company to furnish gas to a municipality with which it has contracted for such service. Akron v. East Ohio Gas Co., 19 Dec. 218; 7 N. P. (N. S.) 553.

Any additional charge, such as a certain amount per month for "readiness to serve," or any other device for increasing the total sum collected from the consumer above that fixed by council, cannot be maintained. Van Wert v. Van Wert Public Service Co., 11 N. P. (N. S.) 91.

Public utilities commission is without power to authorize such "readiness to serve" charge in addition to agreed rate. Lima v. Commission, 100 O. S. 416.

Scope of regulation.—Council has no power to compel a gas company, without its assent to the ordinance, to furnish gas in a manner and at a rate at the option of the consumer. Gas & Fuel Co. v. Chillicothe, 65 O. S. 186; Newark v. Gas & Fuel Co., 65 O. S. 210; Granville v. The Crawford Co., 14 C. C. (N. S.) 421.

Having fixed one standard for prices for ten years, which has been duly accepted by the company, council cannot within that period, fix another standard. Newark v. Gas & Fuel Co., 65 O. S. 210.

The power to regulate includes the power to demand reports, data, etc. Cline v. Springfield, 7 N. P. 626.

The fact that price fixed has afterwards become inadequate is not ground for relief. Manhattan Trust Co. v. Gas Co., 7 O. F. D. 578.

The power of a municipality to fix a maximum rate for electricity includes the power to fix a maximum rate for varying quantities used. Van Wert v. Van Wert Public Service Co., 11 N. P. (N. S.) 91.

Reasonableness of regulation.—A regulation without taking into consideration the amount of gas consumed is void. Toledo v. N. W. Ohio Nat. Gas Co., 5 C. C. 557.

The power to fix a maximum rate is not improperly exercised when it is so exercised as to permit of a reasonable profit to the lighting company. Van Wert v. Van Wert Public Service Co., 11 N. P. (N. S.) 91.

The power given to municipalities by the Ohio statute to regulate the price of natural gas, contemplates an impartial and thorough investigation into all the facts for the purpose of doing justice to both the corporation and the public by establishing reasonable rates on the one hand and on the other compensation which will be just to the company. The elements to be considered in fixing the rate for natural gas are the amount of net profit which may be earned under a fixed rate, and whether the rate as so fixed will yield a fair return on the investment, depreciation in the value of the plant and the risk attendant on the enterprise considered. Newark v. Gas Co., 20 C. C. (N. S.)

254; 3 Oh. App. 383; aff'd 92 O. S. 393.

Reasonableness presumed.— Price fixed is presumed reasonable until the contrary is proved. Gas Co. v. Newark, 92 O. S. 393; Bellaire Goblet Co. v. Findlay, 5 C. C. 418. See also State *ex rel.* v. Gas Co., 37 O. S. 45; Central O. Gas & Fuel Co. v. Columbus, 16 Dec. 359.

But no presumption arises when answer denies reasonableness of price fixed by ordinance and when a contract exists in which a reasonable price is to be fixed by agreement. Toledo v. N. W. Ohio Nat. Gas Co., 5 C. C. 557.

Presumption of validity of ordinance.— Ordinance regulating price is presumed valid until contrary is proved. State *ex rel.* v. Ironton Gas Co., 37 O. S. 45, 49.

And inadequacy of price in absence of fraud or bad faith will not be inquired into. *Ib.*

When council does not regulate.—Electric light company must furnish light to all inhabitants alike at reasonable price when council has not regulated the price. Railway v. Bowling Green, 57 O. S. 336.

Mere discrimination in charges for electric current, without proof of substantial injury to consumers, is not sufficient to show unlawful or unreasonable charges. State *ex rel.* v. Union Gas & Electric Co., 13 C. C. (N. S.) 12.

How regulation may be enforced.—Gas company must furnish gas at the rates fixed; failing to do so, mandatory injunction will lie. Gas Light Co. v. Zanesville, 47 O. S. 35. See also Toledo v. N. W. Ohio Nat. Gas Co., 5 C. C. 557; New Lexington v. Fuel Supply Co., 24 C. C. (N. S.) 537.

A citizen and resident of a city may have a writ of mandamus issued, upon his own relation, to a public service corporation, commanding it to furnish him with gas in accordance with the terms of a city ordinance when such corporation has accepted the benefits of such ordinance and is bound by its provisions. State, ex rel., v. Gas Co., 14 N. P. (N. S.) 97.

But where the franchise of a gas company is indefinite as to the time and the period during which the price has been fixed has expired council cannot prevent the gas company from discontinuing the furnishing of gas to the municipality and its inhabitants and taking away from the streets its mains, pipes, etc. See East Ohio Gas Co. v. Akron, 81 O. S. 33. Approved and followed, Gas Co. v. Cleveland, 106 O. S. 489.

Where a municipality seeks to enforce an unaccepted ordinance rate against a gas company occupying its streets, and such gas company by way of defense alleges facts as to valuation, operating expense and source of supply, which, if true, amount at the ordinance rate to a confiscation of the property of the utility, a case is stated of which a court of equity will have jurisdiction. State ex rel. v. Court of Appeals, 104 O. S. 96.

Rate fixing not a judicial function. —Courts are without power to fix rates as such between municipalities and public utilities commission. Case Co. v. Cleveland, 106 O. S. 489. Lima v. Pub.Util.Com. 106 O.S. 381.

Power of court pending injunction

proceedings as to rate.—A court of equity has jurisdiction pending the final determination of a case to make such interlocutory orders as may be necessary to preserve the rights of the parties in the subject-matter of the controversy, and to attach to its orders, as a condition precedent to their taking effect, terms and limitations designed to serve the ends of justice. State ex rel. v. Court of Appeals, 104 O. S. 96.

And court may fix a rate pending final judgment, Lima v. Pub. Util. Com. 106 O. S. 379.

For further provisions as to regulation of rates and powers of the public utilities commission, see §§ 614-44 *et seq.*, under "Gas, Water and Electricity", in Part II.

(3) **Referendum vote not necessary.**—An ordinance passed under this statute may be referred to a referendum vote under the provisions of § 4227-2 but where no such referendum is invoked and the contract is performed by the utility, the ordinance is binding. State, ex rel., v. Burris, 91 O. S. 70.

FORM OF ORDINANCE REGULATING PRICE OF GAS.

Ordinance No. .....

To regulate the price which the ..... Company may charge for gas for and during the ensuing ..... years.

Be it ordained by the council of the city [*or* village] of ....., State of Ohio:

Sec. 1. That during the period of ..... years from and after the passage of this ordinance and its acceptance by the ..... Company, said company may charge for gas of not less than ..... candle power furnished to the citizens or private consumers and to the public buildings, grounds, streets, lanes, alleys, avenues, market places [*etc.*] of the city [*or* village] of ....., for illuminating purposes, ... per thousand cubic feet. If paid within ..... days after the dates of monthly settlements, then a discount of ..... per thousand cubic feet shall be allowed. For all gas supplied and used exclusively for heating and fuel purposes, through a separate service and meter, said company may charge during said period ..... per thousand cubic feet. If paid within ..... days after the dates of monthly settlements, then a discount of ..... per thousand cubic feet shall be allowed.

The said The ..... Company shall in no event, during said term of ..... years, charge for gas furnished as above mentioned, more than the prices herein specified.

Sec. 2. This ordinance shall take effect and be in force from and after

its acceptance by said The ..... Company, and its publication as required by law.

Passed .....,19.....

.....,
President of Council.

Attest: .....,
Clerk.

[Accepted.....19....]

NOTE.—The charge for lighting streets, etc., and the method of computing bills therefor, as per lamp or otherwise, will be governed by any contract made between company and municipality.

Sec. 3982-1. [Council may provide free use.] The council of any municipality owning and operating municipal water, gas, or electric light plants, may provide by ordinance to furnish free of charge the products of such plants when used for municipal or public purposes. [110 v. 126.]

Sec. 3983. [Minimum price not to be reduced during term agreed upon.] If council fixes the price at which it shall require a company to furnish electricity or either natural or artificial gas to the citizens, or public buildings or for the purpose of lighting the streets, alleys, avenues, wharves, landing places, public grounds or other places or for other purposes, for a period not exceeding ten years,[1] and the company or person so to furnish such electricity or gas assents thereto, by written acceptance, filed in the office of the auditor or clerk of the corporation, the council shall not require such company to furnish electricity or either natural or artificial gas, as the case may be, at a less price during the period of time agreed on, not exceeding such ten years.[2] [R. S. Sec. 2479; 97 v. 263; 66 v. 218.]

(1) **Contract beyond legal period.**—Where the power is given to the municipality to contract for a period "not exceeding ten years," the conclusive implication is that the municipality is forbidden to contract for a longer period, and contract exceeding such legal period is *ultra vires* and void, and the contractual stipulations contained therein are equally void and neither party can enforce them. Wellston v. Morgan, 59 O. S. 147. See also Gas & Fuel Co. v. Chillicothe, 65 O. S. 186, 207; Davy v. Hyde Park, 16 C. C. 507 (aff'd, 61 O. S. 638); Cincinnati Gas Light & Coke Co., v. Avondale, 43 O. S. 257, 267;

Lima Gas Co. v. Lima, 4 C. C. 22. But see *contra*, Toledo v. N. W. Ohio Natural Gas Co., 5 C. C. 557.

Such a contract beyond the legal period will in no way affect the authority of the municipality to regulate the price of gas, even though the contract has been performed by both parties for the legal period. State *ex rel.* v. Ironton Gas Co., 37 O. S. 45.

But an ordinance fixing the price of gas to be charged for a period of ten years, the price fixed not to go into effect until six months after the passage and taking effect of the ordinance and continue ten years from and after such six months, is not a contract exceeding the legal period, but is valid and binding for ten years from the date when the price fixed goes into effect. Logan Natural Gas Co. v. Chillicothe, 65 O. S. 186.

An ordinance regulating the price of gas, would not be within the restrictions of § 4241 G. C., providing that council shall not enter into any contract which is not to go into full operation during the term for which all the members of such council are elected. *Ib.*

(2) **Change in price.**—When the council has fixed the price of gas according to one standard and the price has been duly accepted by the company, it cannot be altered without the consent of the company, by fixing another standard, which may affect the price previously fixed. Logan Natural Gas Co. v. Chillicothe, 65 O. S. 186; State *ex rel.* v. Gas Co., 37 O. S. 45.

Where the council of a municipality has determined by ordinance the rates to be charged consumers of gas for an ensuing period of ten years, and the gas company has accepted the provisions of such ordinance, an ordinance passed four years later and also accepted by said company, providing for an immediate increase in the rates to be charged, is a valid exercise of municipal power, and constitutes a binding contract between the municipality and the gas company, abrogating and superseding the prior gas-rate ordinance. Phelps v. Gas & Fuel Co., 101 O. S. 144.

But if no contract has been made with a company, council has power to regulate the price from time to time. State *ex rel.* v. Gas Co., 37 O. S. 45.

The fact that council has fixed the maximum price for one company, does not prevent council, within the ten years, from fixing a lower maximum price for another company. Central Ohio Gas & Fuel Co. v. Columbus, 16 Dec. 359.

Such an ordinance, fixing a lower price for another company, does not affect the price fixed for the first company. *Ib.*

When period expires.—Council having fixed price of the gas for ten years and this period having expired, council may again fix the price for a period not exceeding ten years and so on as long as the gas company continues to exercise its franchise within the city; the municipality cannot prevent the gas company from voluntarily forfeiting its right at the expiration of the ten years and removing its property. See Ohio Gas Co. v. Akron, 81 O. S. 33. See also Akron v. East Ohio Gas Co., 9 N. P. (N. S.) 526.

Acceptance by the gas company of the terms of an ordinance

granting the right to furnish natural gas through mains and appliances in streets and public places, which ordinance includes a provision that the grant is subject to the right of the city to regulate the price of natural gas from time to time as provided by law, constitutes a valid contract, and the rights of the parties are to be determined by the contract itself. Cincinnati v. Public Utilities Commission, 98 O. S. 320.

Council of a municipality has authority to fix the price that may be charged by utility for its product, and when accepted, such action constitutes a contract as to which the Public Utilities Commission is without power. Power Co. v. Steubenville, 99 O. S. 421. Lima v. Pub. Util. Com., 100 O. S. 416.

Natural gas companies.—This section was held to apply to natural gas companies, even before the amendment of 1904. Toledo v. N. W. Ohio Nat. Gas Co., 5 C. C. 557.

Sec. 3984. [When council may occupy streets for gas purposes.] If at any time any such company required by the council to lay pipes and light a street, alley, avenue, wharf, landing place, public ground or building, refuses or neglects for six months after being notified by authority of the council to comply with such requirement, the council may lay pipes and erect gas works for lighting such streets, alleys, or public grounds, and all other streets, alleys, and public grounds not already lighted, and such company shall thereafter be precluded from using or occuping any of the streets, alleys, public grounds or buildings not already furnished with gas pipes of such company, and council may open any street for the purpose of so conveying gas.[1] [R. S. Sec. 2480; 66 v. 218.]

(1) **Erection of plant by municipality, when.**—It is not necessary in order that municipalities may erect and operate gas works that the contingency provided for in § 3984 arise. State *ex rel.* v. Hamilton, 47 O. S. 52.

Vested rights.—No vested rights of a gas company are taken away by a municipality erecting its own plant. *Ib.*

Sec. 3985. [Gas companies may be permitted to occupy streets.] At any time after the default mentioned in the preceding section, the council may permit such companies to use and occupy the streets, alleys, and public grounds of such corporation for the purpose of lighting them and furnishing gas to the citizens and public buildings. [R. S. Sec. 2481; 66 v. 218.]

Sec. 3986. [Forfeiture of charter for neglect to furnish gas.] A neglect to furnish gas to the citizens and other consumers of gas[1] or to the corporation by any company in accordance with the prices fixed and established by the council from time to time shall forfeit all rights of such company under the charter by which it has been established, and the council may proceed to erect, or, by ordinance, empower any person to erect gas works, for the supply of gas to such corporation and its citizens.[2] [R. S. Sec. 2482; 66 v. 219.]

(1) **Consumer, who is.**—As to person using gas only occasionally, see Adams Exp. Co. v. Gas Co., 21 B. 18.

(2) **Power of municipality on default of company.**—Gas companies organized and operating under laws of 1874 could not substitute natural for artificial gas, and under this section the municipality could, after abandonment by company of its artificial plant, provide for light and heat for its inhabitants by supplying natural gas. Findlay Gas Light Co. v. Findlay, 2 C. C. 237.

Sec. 3987. [A temporary failure shall work no forfeiture.] A temporary failure to furnish gas shall not operate as a forfeiture, unless such failure is through the neglect or misconduct of such gas-light or gas-light and coke company. [R. S. Sec. 2483; 66 v. 219.]

Sec. 3988. [Council may provide for electric current and gas inspection.] In a municipality in which gas works are constructed, council may provide, by ordinance, for the appointment of an officer, to be known as inspector of gas, whose duty it shall be to inspect all gas and gas meters, and certify the correctness of all bills against consumers of gas, make photometric tests, and perform such other duties as may be prescribed by ordinance, and the council shall fix his compensation. Council may also provide for the inspection and testing of meters used for measuring electric current for electric light, power or other purposes, furnished by any individual or company within the corporation, and may prescribe a suitable charge for such inspection and testing, and the manner of collecting it.[1] [R. S. Sec. 2484; 91 v. 299; 66 v. 219.]

(1) **Validity.**—Legislature may provide for inspection of meters and assess the cost of inspection upon the companies in proportion to their valuation. Cin. Gas L. and C. Co., v. State, 18 O. S. 237.

Sec. 3989. [Exclusive monopoly shall not be allowed to gas companies.] Council shall not agree by ordinance, contract, or otherwise, with any person or persons[1] for the construction or extension of gas works for manufacturing or supplying the corporation or its inhabitants with gas, which gives or continues to such person or persons the exclusive privilege[2] of using the streets, lanes, commons, or alleys, for the purpose of conveying gas to the corporation, or the citizens thereof, or which deprives council of the right to designate, inspect or regulate the kind of meter to be used for the correct measurement of the gas furnished under such agreement, or which does not specify the exact quality of the gas to be furnished, and reserve to the council the right to enforce an exact compliance with such specification, under such rules as the council may prescribe, nor shall the council make any such agreement which does not secure to the council the right to purchase such works, and all the appurtenances belonging thereto, at any time within the existence of such contract or agreement.[3] [R. S. Sec. 2485; 66 v. 219.]

(1) **Meaning of "person or persons."**—The words "person or persons," include a gas company or other private corporation. Cin. Gas L. and C. Co. v. Avondale, 43 O. S. 257.

The former § 2485 R. S. was held not to apply to natural gas companies. Gas and Fuel Co. v. Chillicothe, 65 O. S. 186; Newark v. Gas and Fuel Co., 65 O. S. 210.

(2) **Certain contracts prohibited.**—Council could not, without clear legislative authority, grant to any person or corporation the exclusive use of the streets for certain purposes. State *ex rel.* v. Cin. Gas L. and C. Co., 18 O. S. 262; see also Cin. Gas L. and C. Co. v. Avondale, 43 O. S. 257, 267.

An ordinance granting to a gas company the exclusive right to lay pipes in the street for furnishing gas, is void. Hamilton v. Gas Co., 8 N. P. 319; Morrow, etc., Co. v. Mt. Gilead, 8 N. P. 669.

Council cannot agree to put beyond the control of a village the price and quality of gas, as well as the quantity the village would require in the future. Cin. Gas L. and C. Co. v. Avondale, 43 O. S. 257, 269.

Quality of gas.—A franchise ordinance granting to a gas company the right to furnish gas to the inhabitants of a municipality at a certain stipulated price, but which fails to specify or make any reference to the quality of gas to be furnished, is in contravention of this section, and invalid and its performance may be enjoined. Stuver v. Gas Co., 31 O. C. A. 554; 13 Oh. App. 276.

This section is not affected or rendered invalid by the statutes relating to the public utilities commission. Ib.

(3) **Scope of franchise.**—A contract with a city is not void for the reason it does not reserve the right to purchase the works. Lima Gas Co. v. Lima, 4 C. C. 22.

The city cannot barter away its power to contract for the purchase of gas works. *Ib.*

Pipes laid by a company in a street must be changed to conform to a new grade. Gas L. & C. Co. v. Columbus, 50 O. S. 65.

Sec. 3990. [Council may erect or purchase gas or electric works.][1] The council of a municipality may, when it is deemed expedient and for the public good, erect gas works or electric works at the expense of the corporation, or purchase any gas[2] or electric works already erected therein,[3] but in villages where gas works or electrical works have already been erected by any person, company or persons, or corporation, to whom a franchise[4] to erect and operate gas works or electric works has been granted, and such franchise has not yet expired, the council shall, with the consent of the owner or owners, purchase such gas works or electric works already erected therein.[5] If the council and owner or owners of such gas or electric works are unable to agree upon the compensation to be paid therefor, the council may file in the probate court of the county where such gas works or electric works are located, a petition to appropriate such gas works or electric works, and thereupon the same proceedings of appropriation shall be had as is provided for the appropriation of private property by a municipal corporation.[6] A municipal contract existing between any village and such person, company of persons or corporation for the public or street lighting shall be considered as an element of value in fixing the compensation to be paid for such gas works or electric works. [R. S. Sec. 2486; 95 v. 599; 93 v. 59; 66 v. 219.]

(1) **Power to erect and maintain lighting plants** is also given to municipalities in § 3618.

(2) **Natural gas included.**—This section includes natural as well as artificial gas works. Bellaire Goblet Co. v. Findlay *et al.*, 5 C. C. 418, 425.

(3) **Scope of power.**—Although company was organized and in operation at passage of this act, municipality may purchase or erect its own plant. State *ex rel.* v. Hamilton, 47 O. S. 52.

And company is not deprived of vested rights. *Ib.* See also Hamilton Gas L. and C. Co. v. Hamilton, 7 O. F. D. 358; 146 U. S. 258.

Having the power to erect gas works, municipality has the right to levy taxes to meet the cost of such works, and the property of a

gas company within its limits will be subject to such taxation. Hamilton Gas L. & C. Co. v. Hamilton, 6 O. F. D. 256; 37 Fed. 832.

The provisions of former § 2486 *et seq.* R. S., relating to the erection or purchase of gas works by municipalities and management by *trustees,* were held not to vest in such trustees authority to charge the municipality with general liability on account of machinery or appliances purchased by them for such works, but the trustees were limited to contracts with reference to the particular fund which they had authority to control independently of council. Kerr v. Bellefontaine, 59 O. S. 446.

See further as to construction of former sections, Dalzell v. Findlay, 5 C. C. 435, 440.

Management of gas works.—*In cities,* see § 4326. *In villages,* see § 4357.

See Kerr v. Bellefontaine, 59 O. S. 446.

(4) **Who can grant franchise.**—The rights to use streets for gas purposes is a franchise and must emanate, directly or indirectly, from the legislature. State v. Cin. Gas L. and C. Co., 18 O. S. 262.

(5) The proviso that plants already erected and in operation under franchises shall be purchased with the consent of the owners is unconstitutional and void as being a limitation on Sec. 4, Art. XVIII of the constitution. Dravo-Doyle Co. v. Orrville, 93 O. S. 236, and see *contra,* El. and Gas Co. v. Orville, 26 O. C. D. 43.

(6) See §§ 3677 to 3697, *ante.*

Sec. 3991. [Municipality may sell to village.] When a municipal corporation is the owner of a natural gas plant by which the citizens thereof are supplied with natural gas, and such natural gas is so supplied through pipes from a point beyond the limits of such corporation which pipes pass through the limits of an incorporated village, the municipality may sell natural gas to such village, or to a company, for the use of such village and the citizens thereof, such gas to be delivered at a reducing station to be located within one hundred feet of the main pipe line. [87 v. 249, § 1.]

Sec. 3992. [Delivery of gas outside of municipality, how allowed.] When a municipal corporation is the owner of a natural gas plant to supply the citizens thereof with natural gas for fuel, the council of such municipal corporation may provide for supplying natural gas at rates to be determined by it, to persons living outside of and in the vicinity of such municipal corporation, and to county infirmaries, children's homes and other public institutions within or without such municipal corporation. To encourage the location or estab-

lishment of manufacturing industries within such municipal corporation, council may reduce the price of gas to be used to operate such manufacturing, or donate it for a term of years for such purpose,[1] but this section shall be inoperative if the municipal corporation or the citizens thereof are thereby deprived of a full supply of such gas. [87 v. 249, § 2.]

(1) **Electricity.**—A municipality may not furnish electricity to a corporation free of charge. Op. Atty. Gen. (1913), p. 1484.

Sec. 3993. [Laying of gas pipes, and expense thereof.] Council may prescribe, by ordinance, for the laying down of gas pipes in highways about to be paved, macadamized, or otherwise permanently improved, and for the assessment of the cost and expense thereof upon the lots or parcels of land adjoining or abutting upon the highways in which they are laid. In no case, excepting as a sanitary measure, shall the council require house connections to be built further from the main pipe than the outer line of the curb-stone. [R. S. Sec. 2490; 66 v. 220.]

Sec. 3994. [Contracts to supply municipality with electric light or gas.] A municipal corporation may contract with any company for supplying, with electric light, natural or artificial gas, for the purpose of lighting or heating the streets, squares and other public places and buildings in the corporation limits.[1] [R. S. Sec. 2491; 98 v. 150; 86 v. 62; 84 v. 39.]

(1) **Company** organized for the manufacture of electrical supplies is not a company contemplated by this section. Brush Electric Light Co. v. Jones Bros. Elec. Co., 23 B. 329.

Power of municipality to make contract for lighting streets, etc., is also conferred in § 3809 and certificate of auditor of money in the treasury is not required. As to requirement under former law, see Ampt v. Cincinnati, 2 N. P. 332.

Time of contract limited.—Municipality cannot contract with a company for lighting or heating for a period exceeding ten years by provisions of § 3983. Gas Co. v. Lima, 4 C. C. 22.

Interest on payments overdue on a contract to supply public lights may be collected against municipality. Electric Co. v. Toledo, 13 Dec. 137.

Contract to "furnish light" construed to include agreement to furnish lamps. Newark v. Light & Power Co., 16 Dec. 669.

Restrictions in former law.—

§ 2491 R. S. was formerly made subject to the provisions of § 3551 R. S., which required that before any company with which such contract was made should go into operation where a company had already been formed, there should be a vote of the electors. This restriction was omitted from the amendment of 1906, and § 3551 was also amended omitting the restriction.

Section cited.—Section 2491 R. S. is cited in the following cases; Findlay Gaslight Co. v. Findlay, 2 C. C. 237; Toledo v. N. W. Ohio Nat. Gas. Co., 5 C. C. 557, 571; Bellaire Goblet Co. v. Findlay, 5 C. C. 418, 424; Circleville L. & P. Co. v. Buckeye Gas Co., 69 O. S. 259, 269.

Sec. 3995. [Right of eminent domain in municipalities for public service enterprises.] For the purpose of erecting or building dams across rivers or streams to raise and maintain a head of water, for constructing and maintaining canals, locks, and race ways to regulate and carry such head of water to a plant or power house where electricity is to be generated, or for erecting and maintaining poles whereon to attach or sink wires or cables to carry and transmit electricity, or for transporting natural gas, petroleum, water or electricity through tubing, pipes or conduits, or by means of wires, cables or conduits, or for storing, transporting or transmitting water, natural gas or petroleum or for generating and transmitting electricity, a municipal corporation may enter upon any private land to examine or survey a line or lines for such tubing, pipes, conduits, poles and wires, reservoirs, dams, canals, race ways, plant or power house and to ascertain the number of acres overflowed by reason of the construction of such dam or dams and may appropriate so much thereof as is deemed necessary for the laying down or building of such tubing, conduits, pipes, dams, poles, wires, reservoirs, plant and power house, as well as land overflowed and for the erection of tanks and reservoirs for the storage of water for transporting stations, along such line or lines and such buildings as are necessary for such purpose. [R. S. Sec. 3878; 69 v. 194, § 3; 72 v. 151, §§ 1, 2; 85 v. 115; 94 v. 382; 97 v. 300.]

Sec. 3996. [How appropriation shall be made, restrictions thereon.] Such appropriation shall be made in accordance with the provisions of law for compensation to owners of

private property appropriated to the use of corporations. As far as the rights of the public therein are concerned, the county commissioners as to county and state roads, township trustees as to township roads, and the council of municipal corporations as to streets and alleys in their respective jurisdictions may grant to such municipal corporation the right to lay such tubing, pipes, conduits, poles and wires therein, subject to such regulations and restrictions as they prescribe. The right to appropriate for any such purpose shall not extend to the erection of any tank, station, reservoir, or building or lands therefor, or to more than one continuous pipe, conduit or tubing or land therefor in or through a municipal corporation unless the council first consents thereto. [R. S. Sec. 3878; 69 v. 194, § 3; 72 v. 151, §§ 1, 2; 85 v. 115; 94 v. 382; 97 v. 300.]

Sec. 3997. [May not appropriate property in a municipality without its consent.] The provisions of the preceding two sections shall not confer power to appropriate any portion of a street, alley, highway or public way, or land, or confer any right therein, situated within a municipality, without its consent. [R. S. Sec. 3878; 69 v. 194, § 3; 72 v. 151, §§ 1, 2; 85 v. 115; 94 v. 382; 97 v. 300.]

Sec. 3998. [Certain restrictions in the exercise of such power.] No such reservoir for the storage or transportation of water shall be constructed within the corporate limits of the municipality or any public park. All excavations, except such reservoirs, shall be well filled and so kept by such appropriating corporation. [R. S. Sec. 3878; 69 v. 194, § 3; 72 v. 151, §§ 1, 2; 85 v. 115; 94 v. 382; 97 v. 300.]

Sec. 3999. [Further powers to such municipal corporation.] Such municipal corporation may transport, store, insure and ship natural gas, petroleum or water, and transport and store water for the purpose of furnishing it to engineers employed in developing for, or in the production and transportation of petroleum, and for that purpose lay down, construct and maintain the necessary pipes, tubing, tanks, machinery and

arrangements. [R. S. Sec. 3880; 94 v. 382; 85 v. 114, 115; 72 v. 151, § 2.]

Sec. 4000. [Power of municipalities outside corporate limits to provide natural gas.] A municipality authorized and empowered by law to purchase or lease lands, purchase, lease or sink natural gas wells, procure rights of way, purchase and lay down pipes for the purpose of supplying such municipality or the citizens thereof with natural gas may exercise outside of its corporate limits any or all such powers and in addition thereto shall have all the rights and powers conferred upon municipalities by the preceding five sections, subject to all the restrictions therein. [86 v. 203, § 1; R. S. Sec. 2489-3.]

PUBLIC UTILITIES.

Sec. 4000-1. ["Public utility", "indeterminate permit" defined.] Wherever in this act and for the purpose of this act, the term "public utility" shall be taken to mean and include any street railroad operated in whole or in part under the act passed April 22, 1896, commonly known as "The Rogers Law" and entitled "An act to amend and supplement sections 2505a and 2505b of the Revised Statutes of Ohio enacted May 1, 1891, and amended April 18, 1892" or any street railroad operated in connection with or upon the tracks of any such street railroad and any corporation which owns, operates or leases any such street railroads.

The term "indeterminate permit" as used in this act, shall mean and embrace any grant of a municipality to any person, association of persons, company or corporation, of power, right or privilege to own, operate, manage or control any plant or equipment or any part of a plant or equipment within this state of any public utility created under said acts as herein defined, which by the terms thereof is to continue in force until such time as the municipality shall exercise its right to purchase the property of such public utility, in accordance with the terms of this act or until it shall be otherwise terminated according to law. [103 v. 726.]

Sec. 4000-2. [Authority to surrender franchise and accept indeterminate permit; purchase by municipality of public utility; how amount of payment determined.] Any such public utility is hereby authorized to surrender any existing license, permit, grant or franchise, and to accept in lieu thereof any indeterminate permit, and the municipality in which all or the major part of the property of such public utility is situated may accept such surrender and grant an indeterminate permit, and at the time or times provided in the grant of such permit, or, if no time be provided in such grant, then at any time after such grant, the municipal corporation may purchase all the property of such public utility actually used and useful for the convenience of the public, upon paying therefor just compensation as determined or agreed upon in accordance with the terms of this act. Any such municipality is authorized to purchase and operate such property, and every such public utility is hereby required to sell such property for the compensation determined or agreed upon in accordance with the terms of this act. The amount to be paid for the property may be determined, first, by condemnation proceedings, or second, by proceedings as hereinafter described before the public utilities commission of Ohio, or third, by agreement between the municipality and the public utility as hereinafter described. In the ascertainment of the compensation to be paid by any municipality for the property of any public utility, either by condemnation proceedings before the public utilities commission, the compensation shall be made and awarded only for such property of the public utility as is used and useful for the convenience of the public, excluding therefrom the value of any franchise or right to own, operate or enjoy the same, in excess of the amount actually paid to such municipal corporation as the consideration for the grant of such indeterminate permit. [103 v. 726.]

Sec. 4000-3. [Authority to grant indeterminate permit.] Any municipality may grant an indeterminate permit to any such public utility upon such terms and conditions as may be considered conducive to the public interests, and as provided in this act. [103 v. 726.]

Sec. 4000-4. [How compensation determined.] When the municipality determines to acquire the property by condemnation, the compensation therefor shall be determined in the manner provided by law for the appropriation of private property by a municipal corporation. [103 v. 726.]

Sec. 4000-5. [Procedure when municipality desires to acquire public utility.] When the municipality so desires, as expressed in the ordinance determining to acquire the property of any such public utility, to have the compensation determined by the public utilities commission of Ohio, the municipality shall make a request in writing to such commission in accordance with the provisions of section 21 of an act passed April 28th, 1913, entitled "An act to create the public utilities commission of Ohio, to prescribe its organization, its powers and its duties, and to repeal sections 487 to 499 inclusive, sections 543 to 551 inclusive, sections 614-24, 614-25, 614-26, 614-69, 614-70, 614-80, 614-81, and 614-83 of the General Code." Thereupon the public utilities commission shall proceed to make an inventory and valuation of the property of such public utility in accordance with the provisions of said act. The proceedings for a review of such valuation shall be as prescribed in section 29 of said act. Such valuation shall not become binding upon the municipality, however, unless the council thereafter passes an ordinance accepting the same, which ordinance shall be subject to a referendum in accordance with the provisions of law relating to referenda upon municipal ordinances. If not accepted, the municipality shall reimburse the public utility for its expenses reasonably incurred in the valuation proceedings, the amount to be ascertained and fixed by the commission. In the absence of agreement as to compensation as provided in section 6 hereof, the acceptance of an indeterminate permit shall be construed as a consent on the part of the public utility to the procedure provided for in this section. [103 v. 726.]

Sec. 4000-6. [Agreement by municipality with public utility as to compensation and time of purchase; proceedings.] Any municipal corporation may contemporaneously with or

at any time after the grant of an indeterminate permit, as provided in sections 2 and 3 of this act, agree with the public utility upon the compensation to be paid for its property, and the time or times for the exercise of the privilege of purchase; provided, however, that no period between the times fixed for such purchase shall exceed five years. Upon the determination of the municipality to acquire the property of such public utility, the amount to be paid by the municipality and the terms and conditions of the acquisition shall be as thus agreed upon. The agreement of the municipality shall be by ordinance. In the same or other ordinances, the municipality and public utility may agree upon the amount of or basis of calculating the amount of annual payment, if any, to be made to the city to be treated as operating expenses of the utility or otherwise; also upon the basis of a division of earnings between the utility and the city; also the purposes for which and the amounts or the basis for calculating the amounts in which new stock, bonds or other securities may be issued; also the minimum net earnings or basis of or device for calculating the minimum net earnings which the utility may earn as a condition precedent to a reduction of fares or rates, and as a test of the reasonableness of extensions; also the initial rates, fares and charges, and the dates of revision of rates, fares or charges, but no period between dates fixed for revision shall exceed five years; also the obligations of the utility with reference to minimum maintenance, renewal and depreciation reserve funds; also for arbitration of differences, also any other terms and conditions relative to the construction, maintenance, financing, operation and control of service of the utility consistent with the terms and conditions of this act and an indeterminate permit. [103 v. 726.]

Sec. 4000-7. [Ordinance shall not take effect until submission of question to electors; notice of election.] No ordinance passed pursuant to the provisions of section 6 hereof, shall take effect until submitted to the electors of the municipality, at a special or general election held in the municipality at such time as council may determine, and approved by a majority of the electors voting thereon. The or-

dinance shall be duly passed by an affirmative vote of not less than a majority of the members elected or appointed to the council, and shall be subject to the approval of the mayor as provided by law. The ordinance shall specify the form or phrasing of the question to be placed upon the ballot. Thirty days' notice of the election shall be given by publication once a week for four consecutive weeks in two daily or weekly newspapers published or circulated in the municipality, which notice shall contain the full form or phrasing of the question to be submitted. The clerk of the council shall certify the passage of such ordinance to the officers having control of elections in such municipality, who shall cause such question to be voted on at the general or special election as specified in the ordinance. [103 v. 726.]

Sec. 4000-8. [Time of continuance of indeterminate permit; effect of acceptance.] Any indeterminate permit granted under the terms of this act shall continue in force until such time as the municipality shall acquire the property of the public utility as provided in this act, or until otherwise terminated according to the terms and conditions of the permit. The acceptance of an indeterminate permit shall be deemed to deprive the public utility of all rights under any license, permit, grant or franchise or granted in any municipal ordinance or resolution existing at the time of the granting of the permit. From the time of such grant, the rates, fares, charges, service, accounts, equipments, repairs, additions, extensions, improvements, transfers, joint use, depreciation, capitalization, bonded or other indebtedness and all other terms and conditions relating to the financing, construction, maintenance, and operation of such utility shall be subject to municipal regulation; provided, however, that such power of municipal regulation shall not be exercised in a manner inconsistent with the express terms of the ordinance granting the permit.

Provided, also, that the capitalization and bonded or other indebtedness for improvement and other purposes beyond the limits of the municipality granting the permit shall remain subject to regulation by the state public utilities commission as provided by law; but no such capitalization or indebted-

ness shall be given effect as a basis for purchase price to or rate regulation by the municipality contrary to the agreement of the municipality and public utility as expressed in the ordinance granting the permit.

Nothing in this act shall be construed as conferring upon any municipality, officer, department, or commission thereof any power to grant an indeterminate permit to any such public utility in any other manner than by ordinance, or to prescribe that such ordinance shall take effect in any other manner than by acceptance by the public utility to which it is granted by filing a written acceptance thereof with the clerk of the city council or other officers named in such permit. [103 v. 726.]

Sec. 4000-9. [Rates, tolls or charges.] In the absence of agreement as to rates, fares or charges, as provided in section 6 hereof, all rates, fares, tolls and charges for services rendered and commodities furnished by any public utility shall be sufficient to yield a reasonable compensation to the public utility operating under an indeterminate permit, and in the ascertainment of what shall constitute such reasonable rates, fares, tolls, and charges, the municipal corporation shall have due regard, among other things, to the value of all the property of the public utility actually used and useful for the convenience of the public, excluding therefrom the value of any franchise or right to own, operate or enjoy the same, in excess of the amount actually paid to such municipal corporation as the consideration for the grant of such indeterminate permit and exclusive of any value added thereto by reason of a monopoly or merger, and also with due regard to the necessity of making reservation out of the income for surplus, depreciation and contingencies. [103 v. 726.]

Sec. 4000-10. [Department may be created to exercise the powers conferred; procedure before department.] In the event that any municipality shall establish any department for the purpose of exercising any of the powers herein conferred, such department is hereby granted such powers of supervision and regulation of any public utility operating under an indeterminate grant, as are provided by law and in

the ordinance granting the permit, and as may be from time to time prescribed by the terms of any ordinance not inconsistent with the express provisions of the ordinance granting the permit. It is hereby made the duty of every such public utility to comply with all orders and regulations of such department issued by virtue of the powers herein granted. The procedure of, by and before such department shall be as ordained by the council of the municipality in the permit and other ordinances. The council shall also have power to prescribe the penalties for non-compliance with and the methods of enforcement of the orders and regulations of such department, not inconsistent with the express provisions of the ordinance granting the permit. The provisions of the permit or of any ordinance or order of the municipality passed or issued under this act shall be binding upon all public officers and commissions. [103 v. 726.]

Sec. 4000-11. [Appeals, when ordinance contains no provisions.] When the ordinance granting the permit contains no provisions whatever relative to appeal from or arbitration concerning the orders of the municipality, the utility may appeal to the public utilities commission of Ohio from any order of the municipality which is in violation of law or of the permit, or from any unreasonable order concerning matters upon which the parties have not agreed in the permit itself. Such appeal shall be by petition filed within thirty days from the issuance of the order. The filing of any such appeal shall not suspend the operation of the order appealed from unless the public utility shall give an undertaking payable to the municipality in such amount and containing such conditions as may be fixed by said commission. [103 v. 726.]

Sec. 4000-12. [Procedure on appeals to public utilities commission.] In the event that the ordinance granting the permit provides for an appeal to or arbitration by the state public utilities commission, then such commission shall determine such appeal or arbitration according to the procedure, methods, terms and conditions provided for in such ordinance. The provisions of law specially providing for judicial review of the orders of the public utilities commission shall not ap-

ply to actions of the commission upon such appeals or arbitration. Except as provided in this and the next preceding section, the provisions of law relating to appeals, complaints, or applications to the public utilities commission shall not apply to public utilities operating under indeterminate permits. [103 v. 726.]

Sec. 4000-13. [How duties shall be enforced.] In addition to the methods of enforcement herein provided, the duties herein imposed upon public utilities shall be enforceable by mandamus and all other judicial proceedings provided by law for the enforcement of the duties of public utilities. [103 v. 726.]

Sec. 4000-14. Nothing in this act shall be construed to deprive any municipality of its rights to prescribe, by charter, any other methods, terms or conditions according to and upon which indeterminate permits may be granted in such municipality. [103 v. 726.]

Sec. 4000-15. The invalidity of any section or any part of this act shall not be deemed to affect the validity of any other section or part thereof. [103 v. 726.]

Sec. 4000-16. [Appointment, qualification and term of members.][1] That whenever in any city the city council thereof shall, by ordinance, declare it to be essential to the interests of such city that a rapid transit commission, with the powers and duties described in this act, be appointed, the mayor of such city shall appoint a board of commissioners to be known as the board of rapid transit commissioners. Said board shall consist of five members, and they shall be electors of the county within which such city is located, and a majority of such commissioners shall be electors of such municipal corporation. Said commissioners shall serve without compensation, until such time as any of the contracts necessary for the construction herein authorized shall have been awarded. After which time said commissioners shall receive such compensation as may be fixed by the council of the city and shall give bond in an amount to be fixed by council and approved as other bonds of municipal officers and

the premium, if any, on said bonds shall be paid by the city. Such commissioners shall be appointed for the terms of one, two, three, four and five years respectively, and their successors shall be appointed for a term of five years, in cities having no charter, and in cities having charters in accordance with the provisions thereof, and in case of vacancy by death, resignation or removal of a member of such board the mayor shall immediately appoint a successor to fill the vacancy for the unexpired term. The mayor, with the approval of the city council, may remove for malfeasance or nonfeasance in office any member of the commission upon charges and specifications thereof preferred by the mayor; copy of such charges and specifications shall be furnished the commissioner accused and he shall be given a hearing by the mayor and have the opportunity to confront the witness against him and to present his defense in person or by counsel; if the mayor's decision upon said charges is in favor of removal, he shall certify the proceedings and his findings of the council for approval or disapproval and the action of council thereon shall be final. [108 v. 1101; 107 v. 406; 106 v. 286.]

(1) **Validity.**—The act entitled "an act authorizing the creation of a board of rapid transit commissioners in cities, defining its powers," etc., approved May 17, 1915 (106 O. L. 286), is a valid exercise of legislative power not repugnant to the Constitution or any limitation contained therein. State, ex rel., v. Cin. St. Ry. Co., 97 O. S. 283. (Act referred to embraces Secs. 4000-16 to 4000-28, inc.)

Sec. 4000-17. [Organization of board; rules and regulations.] Said board of rapid transit commissioners shall elect one of its members president and another vice-president, who in the absence or disability of the president shall perform his duties. The board shall make its own rules, but its meetings shall be open to the public and all questions acted upon shall be decided by a yea and nay vote, with the name of each member voting recorded on the journal, and no question shall be decided unless approved by a majority of the members of the board. [106 v. 286]

Sec. 4000-18. [Employment of clerks, engineers, superintendents, etc.; duties.] The board of rapid transit commis-

sioners may employ clerks, engineers, superintendents, real estate experts, attorneys,[1] and such other employes as may be necessary. The chief engineer of the subdepartment of engineering of the department of public service may be employed as the chief engineer of said board and receive compensation in addition to that paid him as chief engineer of the subdepartment of engineering of the department of public service. The duties performed by the chief engineer of the subdepartment of engineering of the department of public service as engineer of the board of rapid transit commissioners and the compensation paid to said engineer shall be separate and distinct from the duties and compensation of said engineer as the chief engineer of the subdepartment of engineering of the department of public service and the duties of said engineer as engineer of the board of rapid transit commissioners, as provided by law, shall not be construed as being in conflict with his duties as chief engineer of the subdepartment of engineering of the department of public service under the provisions of this act. The subdepartment of engineering shall perform such engineering services as may be determined by said board. The board of rapid transit commissioners shall fix the compensation and term of service of all of its employes. The superintendents, clerks, engineers, real estate experts, and attorneys of the board shall be in the unclassified civil service and all other employes shall be in the classified civil service of the municipality. Sections 4000-16 and 4000-18 of the General Code authorizing the creation of a board of rapid transit commissioners in cities, defining its powers, passed May 17, 1915, as herein amended shall apply to and govern all pending proceedings. [107 v. 407; 106 v. 286.]

(1) **Authority of commission to employ legal counsel.**—See Cincinnati v. Rogers, 98 O. S. 246.

Sec. 4000-19. [Control and management in construction, maintenance, etc.] The board of rapid transit commissioners shall have control and management of the construction of a rapid transit railway system, in, through, under, on or upon any lands, including also canal lands or parts thereof, together with the streets, alleys and public ways outside of

such canal lands, whether within or without the limits of such corporation, and of depots and terminals for interurban, suburban, street and other electric railways, and the construction of interurban, suburban, street or rapid transit electric railways, and of any combination of two or more of such purposes, and shall have power of the acquisition, repair, control, operation, management and maintenance of the utilities so constructed and acquired.

In all cases where the construction of a rapid transit system is in, through or under any land, including also canal lands or parts thereof, such board may construct a boulevard or parkway on, upon or adjacent to such lands or canal lands; plans therefor shall, however, be first approved by the board of park commissioners in cities having such a board. On completion of any such boulevard or parkway the same shall be committed to the control, charge and maintenance of the municipal board or officer in charge of the park system of such city. [106 v. 286.]

Sec. 4000-20. [Control and expenditure of appropriations; how moneys shall be provided; rejection of bids.] The board of rapid transit commissioners shall have control of the expenditure of all moneys appropriated by the city council or received from sale of bonds provided for in this act or from any other source whatever, for the purchase, construction, improvement, maintenance, equipment or enjoyment of all such rapid transit property, but no liability shall be incurred or expenditure made unless the money required therefor is in the city treasury to the credit of the board of rapid transit commissioners' fund and not appropriated for any other purpose, and moneys to be derived from the sale of bonds, the issue of which has been lawfully authorized shall be deemed to be in the treasury to the credit of said fund. All moneys expended for the construction and acquisition of parkways or boulevards, as authorized by this act, shall be provided for by special appropriation or bond issue, or partly by such special appropriation or bond issue and also partly by assessments, as specified in section 6 of this act, shall be separately accounted for, and such expenditure shall not be considered a part of the rapid transit expenditure as herein authorized.

Said board may let contracts for any and all part of the work to the lowest and best bidder after three weeks' advertisement in two newspapers of general circulation in the municipality.

Said board shall have the right to reject any and all bids, and the proceedings for said contracts and payment therefor shall be the same as are provided for the director of public service except the requirement of the approval of the board of control. [106 v. 286.]

Sec. 4000-21. [Assessment against property owners for construction of boulevard or parkway; limitations.] Such board of rapid transit commissioners may assess upon the abutting, adjacent, contiguous or other specially benefited lots or lands in the corporation fifty percent of the entire cost or expense connected with the construction of any boulevard or parkway as authorized by this act, and the proceedings by said board for the levying and collecting of any special assessments, including the issuance and sale of bonds in anticipation of the collection of such special assessments shall be as provided by law for the levy and collection of special assessments and the issuance and sale of bonds in anticipation of the collection of such assessments for street improvements in municipalities; providing that resolutions of necessity, determinations to proceed with the improvements, the making of the assessments and letting of contracts, the appointment of estimating and equalizing boards in cases of assessments in proportion to benefits, the authorizing, the issuance, and sale of bonds in anticipation of the levy or collection of such assessments, and all other steps and proceedings preceding or relating to the levy of such assessments shall be adopted, passed, made, taken or performed by such board of rapid transit commissioners, and such board is hereby granted full power to adopt, pass, make, take and perform all such resolutions, steps and proceedings; and in such municipal corporations the plans, specifications and estimates shall at the time of the passage of the resolution of necessity be on file in the office of such board, and notice of such resolution shall be served by said board or any person or persons designated by it for the purpose, and objections to assessments

and property owners claims for damages shall be filed with the clerk of said board, and said board shall determine whether claims for damages shall be judicially inquired into before commencement or after completion of the improvement, and in general all steps required by law to be taken by or with the clerk of council shall as regards said parkway construction authorized by this act be taken by or with the clerk of such board of rapid transit commissioners. Assessments for the above purpose shall be subject to the limitations provided by law for assessments for street and other improvements, and all collections made pursuant thereto shall be credited by the city auditor to the respective parkway improvement. [106 v. 286.]

Sec. 4000-22. [Issue of bonds; procedure; election.] When the board of rapid transit commissioners deems it necessary to issue bonds secured by the general credit of the municipality or to levy a tax for the purpose of carrying into effect the powers herein conferred the board shall, by written resolution, so declare its judgment and state therein the amount of bonds to be issued or the tax to be levied for such purposes and transmit the resolution to the city council, which may authorize the issuance of such bonds or levy a tax for the aforesaid purposes. Provided, however, that the total aggregate amount of bonds issued without being first submitted to a vote of the people shall not exceed one hundred and fifty thousand dollars. If the council fails to enact legislation for the issuance of bonds at its next regular or special meeting after the resolution has been received by the clerk of council, it shall then be the duty of council at its next regular or special meeting by ordinance to submit the question of the issuance of the bonds to a vote of the qualified electors of the municipality and the clerk of council shall file the ordinance with the board of deputy state supervisors of elections of the county; said board of deputy state supervisors shall then submit the question of the issuance of such bonds to the qualified electors of the city at either a special or a general election, as the ordinance may specify. Thirty days' notice of the election shall be given in one or more newspapers printed in the municipality once a week for four consecu-

tive weeks prior thereto, stating the amount of bonds to be issued and the purpose for which they are to be issued, and the time of holding the election. If a majority of the voters voting at such election upon the question of issuing the bonds vote in favor thereof it shall then become the duty of the council of the city to enact within ninety days thereafter all legislation necessary to carry into effect the will of the majority of the voters voting at such election and bonds shall be issued from time to time as they may be needed. [106 v. 286.]

Sec. 4000-23. [Aggregate amount not limited by any law of Ohio.] The aggregate amount of such bonds authorized by vote of the people or total indebtedness created under the authority of this act shall not be limited by the provisions of any act or statute of Ohio or law, except by the limitation herein set forth, and such aggregate or total indebtedness shall not exceed two per cent of the total value of all property in such municipal corporation as listed and assessed for taxation. [106 v. 286.]

Sec. 4000-24. [Application of proceeds from sale of bonds.] The proceeds from the sale of such bonds may be used by said board of rapid transit commissioners for the construction in, through, on, over, upon or under any canal lands or property leased by such municipal corporation from the state of Ohio, or any lands, rights of way, or property outside of such canal lands, whether within or without the municipal corporation, of depots and terminals for street, interurban or suburban or rapid transit or street electric railways, or for the constructon of interurban, suburban, street or rapid transit electric railways, or of any combination of two or more of such purposes, and the necessary tracks, way stations, depots, work shops, conduits, elevated structures, subways, tunnels, offices, sidetracks, turnouts, machine shops, bridges and other appurtenances, and for the purchase, acquisition or condemnation of the necessary lands, easements and rights of way, and for the purchase of the equipment necessary for the operation thereof; and the proceeds of bonds specially issued therefor shall be used to pay the cost

for the construction of boulevards or parkways on, upon or adjacent to such lands or canal lands, subject to the provisions relative to the construction of and assessments for boulevards or parkways, as specified in sections 4, 5 and 6 of this act. [106 v. 286.]

Sec. 4000-25. [Power in acquisition and appropriation of property.] The board of rapid transit commissioners is hereby given power to acquire by purchase or to appropriate, enter upon and hold any real estate or easement, partial or otherwise, therein, thereon, thereunder, or thereover, or any interests therein, both within and without the limits of the municipality, which it deems necessary for the purposes above specified; such power to be exercised in the manner provided by law for the acquisition and appropriation of property by municipal corporations. The board of rapid transit commissioners shall have the same powers and rights to cross and occupy streets and highways as are provided by law for street, suburban or interurban electric railways, and to receive from city, township, or county officers grants of the right to use or occupy streets and other public highways which officers are empowered to donate said grants to said board. The board shall have the power to order the removal of pipes, sewers, conduits, poles and other structures that are in the way of construction authorized by this act, and to temporarily suspend street car traffic. The cost of changing sewers and water pipes shall be included as part of the cost of construction, and the said board shall have the right to enter upon lands or buildings for examination and surveys prior to appropriation proceedings, if any, therefor. [106 v. 286.]

Sec. 4000-26. [Disposition of incomes.][1] All rentals, payments and fees of every description and all other income, earnings or revenues, received from all persons, firms and corporations for the use of said depot terminals and railways, shall be kept in a separate and distinct fund, and after paying the expenses of the municipal corporation for the maintenance, conducting and managing said depots, terminals and railways, including the setting aside of a reasonable sum

annually for depreciation to be applied to the repair or replacement of any portion of said work, from the remainder of said receipts there shall annually be paid into the sinking fund of the city such sum or sums as are necessary for the payment of accruing interest on the bonds, if any, issued and outstanding for the construction of such rapid transit system, and for providing a sinking fund for the redemption thereof at maturity; and to the extent that said remainder shall not be sufficient for the said payment of the interest on said bonds and for the bonds issued during construction and for the said accumulation of a sinking fund sufficient for payment thereof at maturity, the municipal corporation shall annually levy a tax sufficient for such purposes, and said taxes for bonds issued by vote of the people shall not be subject to any of the limitations provided by law for maximum tax rates on property in the municipal corporation, except the combined maximum rate fixed in section 5649-5b of the General Code and in addition thereto, one-half mill may be levied.

The surplus in any year above said expenses, depreciation charges, interest and sinking fund charges, shall up to the amount necessary to equal said deficiencies of previous years, be paid into the sinking fund of said city until the amounts paid into the sinking fund from the said revenues shall equal the total accrued interest and sinking fund charges on said bonds, and any amounts thus paid in on account of such past deficiencies, may be applied to interest or sinking fund charges on any indebtedness of said city. Any surplus above said expenses, depreciation charges, current interest and sinking fund charges and reimbursement of past deficiencies of interest and sinking fund charges, may be used for the reconstruction of, improvement of, additions to, or extensions of such depots, terminal and railway equipment. [106 v. 286.]

(1) **City cannot loan its credit.** —An ordinance of a city providing for the grant to a street railway company of the right to operate jointly a subway or street railway owned by the city with a system of street railways already owned and operated by the company, which provides that the gross proceeds from the operation of such properties shall be used for the payment of ex-

isting and hereafter issued securities of the company, is a pledging of the city's credit for the private debts of a street railway company, in violation of Section 6, Article VIII of the Constitution, which prohibits a city by vote of its citizens or otherwise from raising money for or loaning its credit to or in aid of any company, corporation or association. State, ex rel. v. Ry. Co., 97 O. S. 283.

Where a municipal franchise ordinance provides that a sufficient sum is to be produced by fares charged, so that the city shall in any event get a specified amount of money, the deferring of the payment thereof is not a lending of credit of the city. Rogers v. Cincinnati, 22 N. P. (N. S.), 401.

Sec. 4000-27. [Power to lease depots, terminals, etc.; submission of question.] Said board of rapid transit commissioners may grant to any corporation organized for street railway or interurban railroad purposes the right[1] to operate by lease or otherwise such depots, terminals and railways upon such terms and conditions as said board shall be authorized by ordinance to agree upon with such corporation, subject to the approval of a majority of the electors of the municipal corporation voting thereon. Said board shall certify said lease or agreement to the board of deputy state supervisors of election of the county, and said board of deputy state supervisors shall then submit the question of the approval of said lease or agreement to the qualified electors of the city at either a special or general election as the ordinance may specify. Thirty days' notice of the election shall be given in one or more of the newspapers printed in the municipality once a week for four consecutive weeks prior to the time of holding said election as heretofore specified, setting forth the terms of said lease or agreement and the time of holding the election. On the approval by a majority of the voters voting at such election said corporation is invested with the power to operate such depots, terminals and railways as provided in said lease or agreement, and corporations organized under the laws of Ohio for street railway or interurban railroad purposes are hereby invested with power to lease and operate such depots, terminals and railways. [106 v. 286.]

(1) **Not a delegation of legislative power.**—An ordinance of a municipality passed pursuant to law, which confers upon an ad-

ministrative board authority to grant to a corporation the right to operate a public utility owned by the municipality, upon the terms and conditions specified in the ordinance, and empowers such board to perform certain specified administrative duties which are necessary to the carrying out of the plan provided for in the ordinance, does not thereby delegate legislative power in violation of the Constitution. State, ex rel. v. Cin. St. Ry. Co., 97 O. S. 283.

Sec. 4000-28. [Section or provision held invalid shall not affect any other part.] Should any section or provision of this act be decided by the courts to be invalid, the same shall not affect the validity of the act as a whole or any part thereof, other than the part so decided to be invalid, and all acts of said board of rapid transit commissioners shall be authorized or approved by ordinance as may be required by the constitution of Ohio. [106 v. 286.]

CHAPTER 3.

UNIVERSITIES AND LIBRARIES.

UNIVERSITIES.[1]

Sec. 4001. [Administration, management.][2] In any municipal corporation having a university supported in whole or in part by municipal taxation all the authority, powers and control vested in or belonging to such corporation with respect to the management of the estate, property and funds given, transferred, covenanted or pledged to such corporation in trust or otherwise for such university, as well as the government, conduct and control of such university shall be vested in and exercised by a board of directors consisting of nine electors of the municipal corporation.[3] [96 v. 91, § 217.]

(1) **Other provisions** relating to municipal universities will be found under title "Municipal Universities," in Part II, §§ 7902-7922.

(2) **Old sections.**—See generally old §§ 4095 to 4104 R. S., repealed.

(3) **Validity.**—The §§ 4095 to 4104 inclusive (as written before amendments of 1904), providing for the acceptance by certain cities of trust funds for educational purposes, were held not unconstitutional for want of corporate capacity on the part of the municipalities to receive and execute the trust nor because the acts were special. State *ex rel.* v. Toledo, 3 C. C. (N. S.) 468, 23 C. C. 327; and see also Perin v. Carey, 65 U. S. 465.

Nor is a tax levy to aid such institutions as here provided for, unconstitutional. State *ex rel* v. Toledo, 23 C. C. 327.

Character of board.—A board of trustees such as provided for in these sections, is a legal board vested with certain powers, but is not a corporation. *Ib.;* see also State v. Powers, 38 O. S. 54.

Actions against board.—*Quo warranto* will not lie to oust the members of such board because they exceed their powers in extending the course of instruction. Injunction would be the proper remedy, and courts of equity would have jurisdiction in such cases. State *ex rel.* v. Toledo, 3 C. C. (N. S.) 468, 23 C. C. 327.

University.—The word "university" must be construed according to the legislative intent and not in

its strict, technical sense, in construing gifts to a "university." Waddick v. Merrell, 26 C. C. 437.

Erection of dwelling for president of university, held a proper application of university funds derived from taxation. Cincinnati v. Jones, 28 C. C. 210.

Sec. 4002. [Directors, how appointed.] Such directors shall be appointed by the mayor of the municipal corporation, three for a term of two years, three for a term of four years and three for a term of six years, and thereafter as the terms expire the mayor shall appoint three directors for a term of six years each and shall fill all vacancies in the board. Such board of directors shall be known as "The Board of Directors of ..... University" (filling out blank with the name of the university). [96 v. 91, § 217.]

Sec. 4003. [Powers and duties.] Such directors shall serve without compensation and shall have all the powers and perform all the duties conferred or required by law in the government of such university, and the execution of any trust with respect thereto imposed upon the municipal corporation. [96 v. 91, § 217.]

LIBRARIES.[1]

Sec. 4004. [Erection, equipment and control; appointment of trustees.] Except as provided in General Code, section 4005-1, the erection and equipment, and the custody, control and administration of free public libraries established by municipal corporations, shall be vested in six trustees, not more than three of whom shall belong to the same political party, and not more than three of whom shall be women. Such trustees shall be appointed by the mayor, to serve without compensation, for the term of four years and until their successors are appointed and qualified. In the first instance three of such trustees shall be appointed for a term of two years, and three for a term of four years. Vacancies shall be filled by like appointment for the unexpired term. [107 v. 612; 97 v. 35, § 218; 96 v. 91, § 218.]

(1) **Power to establish and maintain free public libraries is** given to municipalities in § 3620, *ante.*

Power to appropriate sites for library buildings is given in § 3677.

Power to issue bonds, for the erection and equipment of public library, §§ 3939, 4007-4012.

Special acts relating to public libraries.

Cincinnati, §§ 14993-15005 G. C., appendix.

Cleveland, §§ 15006-15026 G. C., appendix.

Toledo, §§ 15039-15051 G. C., appendix.

Dayton, §§ 15027-15033 G. C., appendix.

Portsmouth, 97 O. L. 625.

Canton, 94 O. L. 739.

Massillon, §§ 15034-15038 G. C., appendix.

Findlay, 85 O. L. 546.

Youngstown, 87 O. L. 105.

Ironton, 90 O. L. 311.

Cambridge, 95 O. L. 736.

Cities of fourth grade, second-class and certain other cities and villages, §§ 15052-15067 G. C., appendix.

Validity of special acts relating to libraries. As to validity act of May 9, 1902 authorizing the trustees of the public library of the school district of the city of Cincinnati to receive a donation from Mr. Andrew Carnegie and to establish branch libraries, see Sadler v. Porter, 67 O. S. 531 decided on the authority of Cincinnati v. Trustees of Hospital, 66 O. S. 440, and State *ex rel.* v. Spellmire, 67 O. S. 77.

School libraries.—For acts relating thereto, see §§ 7631-7642 G. C.

No power to pay premium on surety bonds. See Op. Atty. Gen. (1923), No. 431.

Sec. 4005. [Powers and duties.] Except as provided in General Code section 4005-1, such trustees shall employ the librarians and necessary assistants, fix their compensation, adopt the necessary by-laws and regulations for the protection and government of the libraries and all property belonging thereto, and exercise all the powers and duties connected with and incident to the government, operation and maintenance thereof. Four trustees shall constitute a quorum, and four votes shall be necessary to pass any measure to authorize any act, which votes shall be taken by the yeas and nays and entered on the record of their proceedings. In the making of contracts, the trustees shall be governed by the provisions of law applicable thereto. [107 v. 612; 97 v. 35, § 218; 96 v. 91, § 218.]

Sec. 4005-1. [Bonds for buildings and furnishings; erection, equipment and control vested in trustees; library organization may operate under agreement.] In any municipality where there is or may hereafter be a library organization created by will or otherwise for the purpose of maintaining

in perpetuity a public library, and which organization is endowed and owns and maintains a library, the trustees mentioned in General Code, section 4004, may issue bonds as provided for in General Code, sections 4007 to 4013, both inclusive, for the purpose of providing a building or buildings for such library and furnishing the same and to pay the cost and expense thereof. The erection, equipment, maintenance and control of such building or buildings shall be vested in the trustees mentioned in General Code, section 4004, and said trustees may enter into an agreement in writing with such library organization whereby said library organization may occupy all or a part of such building or buildings, and conduct, operate and maintain therein a free public library, the period of each such agreement to be not less than ten nor more than twenty-five years. Such library organization shall administer, operate and control such library in accordance with said agreement and the terms of the trust creating such organization, providing the same is free to all the inhabitants of the municipality, and if deemed necessary by the council of any such municipality, it may levy a tax and contribute to the expense of maintaining such library under the provisions of General Code, section 4019. And said trustees mentioned in General Code, section 4004, may enter into a similar agreement with any historical or other educational association whereby a part of said building or buildings may be used by such organization for the housing and displaying of its property and effects, providing the same is free to all the inhabitants of the municipality. [107 v. 612.]

Sec. 4006. [Women may be members of board.] Any woman born or naturalized in the United States, of the age of twenty-one years and upward, who has been a resident of the state at least one year, and of the municipality in which such library is established, for the period of thirty days, shall be qualified to be appointed and serve as such trustee. [97 v. 35, § 218; 96 v. 91, § 218.]

Sec. 4007. [Bonds to provide for and furnish library buildings.] Any public library board charged by law with the title, custody, control and maintenance of a public library in

the state, may issue bonds, with interest coupons attached, to provide buildings for the public library in their charge, and to furnish them, and to pay the cost and expense thereof. In anticipation of the income from such taxes levied from time to time as occasion requires, the board may issue and sell bonds, bearing interest payable semi-annually at a rate specified therein not to exceed five per cent per annum, and in such sums and at such times as the board determines, which bonds shall be numbered consecutively, made payable to the bearer, and be signed by the president and secretary of the board and denominated "public library bonds of the ..... library" (naming the one to provide and furnish buildings for which they are issued). [98 v. 260, § 1.]

Sec. 4008. [Record of bonds; how sold.] The secretary of the board shall keep a record of the number, date, amount, and rate of interest on each bond sold, the sum for which and the name of the person to whom sold, and the time when payable, which record shall be open to the inspection of the public at all reasonable times. The bonds so issued shall in no case be sold for a less sum than the par value, nor bear interest until the purchase money for them has been paid by the purchaser. The library board shall pay such bonds and the interest thereon when due, but the total issue of bonds shall not exceed three and one-half mills on the dollar of the tax duplicate of the district upon which taxes are levied for the support of such library. [98 v. 260, § 1.]

Sec. 4009. [Order for issue of bonds.] The order to issue such bonds shall be made only at a regular meeting of the board and by a vote of two-thirds of all the members thereof, taken by yeas and nays and entered on the journal of the board. [98 v. 260, § 2.]

Sec. 4010. [Advertisement of sale.] Such bonds shall be sold to the highest bidder after being advertised once a week for four consecutive weeks in a newspaper having a general circulation in the county where the bonds are issued. If there is more than one newspaper in the county, the sale of

such bonds shall be advertised in at least one such additional newspaper. [98 v. 260, § 2.]

Sec. 4011. [What advertisement shall state.] The advertisement shall state the total number of bonds to be sold, the amount of each, how long they are to run, the rate of interest to be paid thereon, whether annually or semi-annually, the law or section of law authorizing their issue, the day, hour, and place in the county where they are to be sold, and the privilege shall be reserved by such board to reject all or any bids, and if such bids are rejected, the bonds shall be readvertised. The moneys arising on premiums of their sale as well as the principal shall be credited to the fund on account of which they are issued and sold, and shall be used for the purpose only for which issued. [98 v. 260, § 2.]

Sec. 4012. [Question of bond issue must be submitted to vote.] No order for the issue of such bonds shall become operative until the question of such issue has been submitted to the qualified electors of the district maintaining the library, at a general or special election, and has been approved by a majority of the voters voting thereon at such election. [98 v. 260, § 2.]

Sec. 4013. [Tax levy for payment of bonds.] For the purpose of creating a sinking fund for the extinguishment of the bonds provided for in the preceding sections, the library board each year, until the payment of the bonds are fully provided for, may levy and collect a tax in addition to other taxes authorized to be levied by it, which shall not exceed two and one-half tenths of a mill upon the taxable property of the district taxed for the support of the library. Such tax shall be paid into the treasury of the board, and on order of the public officer charged by law with the duty of drawing warrants upon such treasury paid into the sinking fund hereinafter provided for, and by the trustees thereof applied, by order of the library board, to the extinguishment of such bonds, and to no other purpose whatever. The taxes so levied shall be certified and placed on the tax list and collected in the same manner as other taxes of the taxing district, and

such tax shall be a lien upon the property on which it is assessed, the same as state and county taxes, and subject to the same penalties if delinquent. [98 v. 261, § 3.]

LIBRARY SINKING FUND.

Sec. 4014. [Board of trustees of library sinking fund.] There shall be created in each such taxing district, a board of trustees of the library sinking fund who shall have the control of all moneys and securities for the payment of interest upon and for the redemption of bonds heretofore issued or issued under the authority of this chapter in such taxing district. Such board shall be composed of three citizens of the taxing district, to be appointed by the court of common pleas in the county in which the public library is situated. The first appointment shall be one for the term of one year, one for the term of two years, and one for the term of three years, and all trustees appointed thereafter shall serve for three years, except in case of vacancy, which shall be filled by such court for the unexpired term. [99 v. 263, § 4: 98 v. 261.]

Sec. 4015. [Bond of members.] Before any such money shall be paid to such board, or before any person appointed as a member of a board coming into existence assumes the duties of his office, each member thereof shall give bond to the state in amount equal to two per cent of the amount of the bonds issued by the library board, with not less than two sureties, to faithfully discharge his duties. [99 v. 263, § 4; 98 v. 261.]

Sec. 4016. [Organization of board; meetings and records.] Immediately after appointment and qualification, such trustees shall organize by appointing one of their number president, and the officer charged by law with the drawing of warrants on such treasury shall act as secretary. The library board shall provide such trustees with a place of meeting, and they shall hold regular meetings on the second Monday of January and July of each year, but other meetings may be called by the president or any member of the board. Their

proceedings shall be recorded in a journal kept for that purpose, which shall at all times be open to the inspection of the library board or any member thereof, and questions relating to the purchase or sale of securities, payment of bonds or interest, shall be decided by a viva voce vote with the name of each member voting recorded on the journal. No question shall be decided unless approved by a majority of the whole board. [98 v. 262, § 5.]

Sec. 4017. [Rate of tax to be certified to library board.] In the month of May in each year, and oftener if required, the trustees of such sinking fund shall certify to the library board the rate of tax, not to exceed the limit herein provided, necessary to provide a sinking fund for the payment of all bonds issued by authority of law for library purposes in such taxing district together with the amount necessary to be levied to provide for the payment of interest thereon, and the library board shall levy the amount so certified. Such board may increase the amount so certified, but the total amount so levied shall not exceed the limitation herein provided. [99 v. 264, § 6; 98 v. 262.]

Sec. 4018. [Investment of sinking fund.] The trustees of such sinking fund shall invest the sinking fund in bonds of the United States, of this state, of any municipal corporation, county, township or school district of any state or in bonds of such library board. All interest received from such investments shall be deposited as other funds of such sinking fund, and reinvested in a like manner. For the extinguishment of any bonded indebtedness included in such sinking fund, the board of trustees of the sinking fund may sell or use any of the securities or money of the fund. [98 v. 262, § 7.]

LIBRARY ASSOCIATIONS.

Sec. 4019. [Compensation to private company for maintaining library.] Repealed, 110 v. 410.

ART GALLERIES.

Sec. 4020. [Compensation to private company for maintaining free art gallery.] The council of each city may levy and collect a tax not to exceed one-quarter of one mill on each dollar of the taxable property of the municipality each year, and pay it to a private corporation or association maintaining and furnishing a free museum or gallery for the exhibition of paintings, sculpture and other works of art, and, in connection therewith, an academy for advancing, improving and promoting painting, sculpture, drawing, architecture and other fine arts, and furnishing instruction therein by lectures and otherwise, for the benefit of the inhabitants of the municipality, as and for compensation for the use and maintenance thereof. Without change or interference in the organization of such corporation or association, the council shall require the treasurer of such corporation or association to make an annual financial report, setting forth all the money and property which has come into its hands during the preceding year, and its disposition thereof, together with recommendation as to future necessities. [98 v. 146, § 218a.]

CHAPTER 4.

HOSPITALS.

MUNICIPAL HOSPITALS.[1]

Sec. 4021. [Council may levy tax to compensate free public hospital.] The council of each municipality, annually, may levy and collect a tax not to exceed one mill on each dollar of the taxable property of the municipality and pay the amount to a private corporation or association which maintains and furnishes a free public hospital for the benefit of the inhabitants of the municipality, or not free except to such inhabitants of the municipality as in the opinion of a majority of the trustees of such hospital are unable to pay.[2] Such payment shall be as and for compensation for the use and maintenance of such hospital. Without change or interference in the organization of such corporation or association, the council shall require the treasurer thereof, annually, to make a financial report setting forth all of the money and property which has come into its hands during the preceding year and the disposition thereof, together with any recommendations as to its future necessities. [98 v. 123, § 219; 96 v. 92, § 219.]

(1) **Establishment and management.**—Power to establish and maintain municipal hospitals is conferred upon municipalities by § 3646, and the power to levy taxes for their support is conferred by §§ 3784 and 3785. Municipal hospitals in cities are managed by the director of public safety, §§ 4370 and 4035. Municipal hospitals in villages are under the control of council, § 4356.

City may apportion proceeds of levy for hospitals between two institutions, but not with a hospital organized for profit. Op. Atty. Gen. (1915), p. 332.

City may levy for funds hereunder to care for indigent sick, but not to refund losses sustained by a hospital under contract. Op. Atty. Gen. (1916), p. 1377.

Other provisions.—See generally title "Charitable and Reformatory Institutions," in Part II.

(2) **Liability for negligence** of private corporation maintaining charity hospital, see Connor v. Sisters of the Poor, 7 N. P. 514.

Sec. 4022. [Council may agree with a corporation for hospital service.][1] Such council may agree with a corporation organized for charitable purposes and not for profit, for the erection and management of a hospital suitably located for the treatment of the sick and disabled of such municipality, or for an addition to such hospital, and for a permanent interest therein to such extent and upon such terms and conditions as may be agreed upon between them, and the council shall provide for the payment of the amount agreed upon for such interest either in one payment or in annual installments as may be agreed upon. Provided, that such agreement shall not become operative until approved by a vote of the electors of such municipality as provided for in the next section. [110 v. 359; R. S. Sec. 2166; 66 v. 199.]

(1) **Validity of such contract.** See Zanesville v. Crossland, 8 C. C. 652, reversed, 56 O. S. 735.

If permanent interest is secured in hospital hereunder it must be governed, how. Op. Atty. Gen. (1918), p. 1474.

When a city has subsidized a private hospital under contract to care for its sick or disabled, who may be rejected by such hospital\ Op. Atty. Gen. (1915), p. 649.

Sec. 4022-1. [Submission of question to electors.] Upon the execution of the agreement provided for in section 4022 the council of the municipality shall submit to the electors of the municipality, at the next general election occurring more than sixty days after the passage of the resolution providing for such submission, the question of the ratification of such agreement, and if the sum or sums to be paid by the municipality under the terms of such agreement are not available from current general revenues of the municipality, the council shall also submit to the electors, at the same election, the question of the issue of bonds of the municipality in the amount specified in such agreement for the purpose of providing funds for the payment thereof. The proceedings in the matter of such election and in the issuance and sale of such bonds, if authorized, shall be as otherwise provided by law for municipal bonds. Provided, that such agreement shall not be effective, and no bonds shall be issued, unless the electors approve of both the agreement and the

bond issue, if the question of the issue of bonds is so submitted. [110 v. 359, 360.]

Sec. 4023. [Board of hospital commissioners.] When the council of a municipality enters upon and takes possession of grounds purchased, appropriated, or otherwise obtained for hospital purposes, and, by resolution or ordinance, determines to erect thereon or rebuild a hospital, the erection and repair thereof, or any addition thereto, shall be vested in a board of five commissioners, called the "Board of Hospital Commissioners."[1] [R. S. Sec. 2153; 66 v. 197.]

(1) **Section 2153 R. S.,** of which the above section is a revision, provided that not only supervision of erection and repair, but the "management, direction and control" of such hospital should be vested in the board of hospital commissioners. This was inconsistent with the provisions of the municipal code giving the management of all municipal hospitals to the director of public safety. See note to § 4035.

Sec. 4024. [Who shall compose the board.] The board shall consist of the mayor, who, by virtue of his office, shall be its president, and four trustees, to be appointed by the mayor, with the consent of the council. Such commissioners shall be resident freehold electors of the corporation, and they shall not receive any compensation for their services. [R. S. Sec. 2154; 66 v. 197.]

Sec. 4025. [Terms of office.] The term of office of the appointed members of the board shall be four years, but the members first appointed shall hold their offices, respectively, as shall be determined by lot, at the first meeting of the board, for the periods of one, two, three, and four years, and thereafter one member shall be appointed each year for the full term of four years. A majority of the board shall constitute a quorum. [R. S. Sec. 2155; 66 v. 197.]

Sec. 4026. [Powers of board; compensation of appointees.] The board may appoint a clerk, an architect, a superintendent, and other necessary employes, fix their compensation, and adopt a suitable plan for such hospital, and make all contracts for the erection and furnishing thereof. The salary of

the appointees, and the plan of the hospital, before any contract for its erection is entered into, shall be submitted to and approved by the council. [R. S. Sec. 2156; 66 v. 197.]

Sec. 4027. [Regular meetings, and record thereof.] The board shall hold regular meetings at such time and place as is agreed upon, and cause to be kept a full record of its proceedings. No contract which it enters into shall be valid until concurred in at a regular meeting by a majority of all the members, and such concurrence entered on the minutes of its proceedings. [R. S. Sec. 2157; 66 v. 197.]

Sec. 4028. [No expenditure without authority of board; no member to be interested.] No money shall be paid for the erection, re-building, or repair of a hospital, or for any addition thereto, or for supplies therefor, unless first authorized by the board, and upon the warrant of the proper officer of the corporation. No member of the board shall be interested, directly or indirectly, in any contract concerning the institution. [R. S. Sec. 2158; 66 v. 197.]

Sec. 4029. [Plans and specifications.] Before entering into any contract for the erection of a hospital building, the board shall cause plans, specifications, detailed drawings, and forms of bids to be prepared, and when adopted by the board, it may, at its discretion, cause the plans and drawings to be lithographed, and the specifications, forms of bids, and a form of contract and bond, to be prepared by the solicitor of the corporation, and have them printed for distribution among the bidders. [R. S. Sec. 2159; 66 v. 198.]

Sec. 4030. [Terms of contracts.] All contracts shall be made in the name of the corporation, and it shall be stipulated therein that the contractor will not execute any extra work, or make any modifications or alterations mentioned in the specifications and plans, unless ordered in writing by the board, that he will not claim any pay therefor unless such written order is given, and the extra price of compensation fixed and agreed upon. Copies of the plans and drawings, attested by the contractor, and the original bids, specifications,

and contracts shall be deposited in the office of the clerk of the corporation. [R. S. Sec. 2160; 66 v. 198.]

Sec. 4031. [Proposals to be advertised for.] The board shall not enter into any contract for work or materials, except as relates to procuring plans, drawings, specifications, and forms of bids, without first causing thirty days' notice to be given in one or more newspapers of general circulation in the corporation, that sealed proposals will be received for doing the work or furnishing the materials. [R. S. Sec. 2161; 66 v. 198.]

Sec. 4032. [Bids to be accompanied by bond.] Each bid shall be accompanied with a bond, signed by sufficient sureties, for the acceptance of the contract, if awarded by the board, to fully secure any difference between the amount of such bid and the next higher bid, and such amount shall be collected by the board, and paid into the hospital fund, in case of refusal by the bidder to enter into contract according to his bid, within such reasonable time as the board may determine. [R. S. Sec. 2162; 66 v. 198.]

Sec. 4033. [Bids to be sealed and indorsed.] Each bid shall be inclosed in a sealed envelope and deposited with the clerk of the board, and such envelopes shall have indorsed thereon the nature thereof, and all bids shall be opened at a regular meeting of the board. [R. S. Sec. 2163; 66 v. 198.]

Sec. 4034. [Contract with lowest bidder.] The board shall enter into contract with the lowest responsible bidder, upon his giving bond to the corporation, with such surety as the board approves, that he will perform the work and furnish materials in accordance with his contract. On failure of such bidder within a reasonable time, to be fixed by the board, to enter into bond with such surety, a contract may be made with the next lowest responsible bidder, and so on, until a contract is effected by a contractor giving such bond, but the board may reject any and all bids. [R. S. Sec. 2164; 66 v. 198.]

Sec. 4035. [Director of public service to control hospital.] The director of public safety shall have the entire management and control of such hospital, when completed and ready for use, and subject to the ordinances of council, shall establish such rules for its government, and the admission of persons to its privileges, as he deems expedient.[1] Such director may also employ a superintendent, steward, physicians, nurses, and such other employes as he deems necessary, and fix the compensation of all persons so employed, which compensation shall be subject to the approval of the council. [R. S. Sec. 2165; 67 v. 71.]

(1) **Section 2156 R. S.,** of which the above section is a revision, provided that the board of hospital commissioners should have the management and control of such hospital. This was inconsistent with the provisions of the municipal code giving the management of all municipal hospitals to the director of public safety.

Compensation of employees of municipal hospital. See Op. Atty. Gen. (1921), p. 1095.

TRUSTEES OF HOSPITAL FUNDS.

Sec. 4036. [Care of property donated for hospital purposes.] In any municipal corporation which has become or may hereafter become the owner or trustee of property for hospital purposes, or of funds to be used in connection therewith, by deed of gift, devise or bequest, such property or funds shall be managed and administered in accordance with the provisions or conditions of such deed of gift, devise or bequest. [96 v. 92, § 220.]

Sec. 4037. [Bond of hospital trustees for such donated property.] When such deed of gift, devise or bequest requires the investment, or change of investment of the principal of such property funds, or any part thereof, to be made upon the approval of an advisory committee appointed by the court or judge, such property or funds, and any hospital property for the care or management of which in whole or in part, such fund is used, shall be managed, controlled and administered by a board of hospital trustees. [96 v. 92, § 220.]

Sec. 4038. [Appointment and term; vacancies.] Such board shall consist of four resident electors of the municipal corporation, who shall be appointed by the trustees of the sinking fund, and shall serve without compensation for the term of four years and until their successors are appointed and qualified. Such trustees shall be appointed in the first instance to serve for one, two, three and four years, respectively, and thereafter their successors shall be appointed one each year to serve for the term of four years, but not more than two shall be of the same political party. Vacancy in the board by death, resignation or otherwise shall be filled in like manner for the remainder of the term. [96 v. 92, § 220.]

Sec. 4039. [Powers and duties.] Such board of trustees shall have the right to apply, control and invest and reinvest the funds coming or arising from such gift, devise or bequest according to the terms and conditions on which acquired. [96 v. 92, § 220.]

Sec. 4040. [Compensation; oath; bond.] The members of such board of hospital trustees shall serve without compensation, and before entering upon the discharge of their duties shall take the oath of office prescribed by law, and shall give bond in the sum of twenty-five hundred dollars, conditioned according to law and to the approval of the mayor and council. [93 v. 709, § 3; Bates 2167-9 (1536-425).]

Sec. 4041. [Meetings; rules and regulations; clerk.] Such board shall hold meetings at least once a month, and shall adopt all necessary rules for the regulation of its business. It shall keep a complete record of all its proceedings, which record, or a copy thereof, duly certified by the clerk of the board, shall be competent evidence of the transactions of the board in all the courts of this state, and the ayes and nays shall be called upon the passage of every resolution or order. Three members of the board shall constitute a quorum for the transaction of all business, and no resolution or order shall be adopted or contract or other obligation entered into unless three members vote in favor thereof. No member of the board shall be interested, directly or indirectly, in any contract

concerning any hospital under the control of such board. The municipal auditor or clerk shall act as the clerk of such board, and shall receive no additional salary or compensation for such services. [93 v. 709, § 4; Bates 2167-10 (1536-426).]

Sec. 4042. [Powers of such board.] Subject to the ordinance of council, such board shall have the entire management and control of such property or funds, and shall establish such rules for the government thereof as it deems expedient. Such board shall also have the entire control of the expenditure of all moneys therefrom and they shall be disbursed by the treasurer of the municipality only upon the warrant of the municipal auditor or clerk, drawn in accordance with the order of such trustees. [93 v. 709, § 5; Bates 2167-11 (1536-427).]

Sec. 4043. [Regulations to protect such property.] Such board shall have the entire management and control of the erection, rebuilding and repair of all buildings, and the entire management and control of all grounds so acquired, and shall adopt rules and regulations for the protection, care and government thereof, and such rules, when approved by the council of the municipality, shall have the same effect and may be enforced by the same penalties as ordinances thereof. [93 v. 709, § 6; Bates 2167-12 (1536-428).]

Sec. 4044. [Procedure before entering into contracts.] Before entering into any contract for the erection of a hospital building, or for the rebuilding or repair of a hospital building, the cost of which exceeds one thousand dollars, such board shall cause plans, specifications, detailed drawings and forms of bids to be prepared, and when adopted by the board, it shall have them printed for distribution among the bidders. [93 v. 709, § 7; Bates 2167-13 (1536-429).]

Sec. 4045. [How contracts to be made.] All contracts shall be made in the name of such trustees, and it shall be stipulated therein that the contractors will not execute any extra work or make any modifications or alterations in the specifications and plans, unless ordered in writing by the

board, that they will not claim pay therefor unless such written order is given, and the extra price or compensation fixed and agreed upon. Copies of the plans and drawings attested by the contractor, and the original bids, specifications and contracts shall be deposited in the office of the clerk of the corporation. [93 v. 710, § 8; Bates 2167-14 (1536-430).]

Sec. 4046. [Notice for bids.] Such boards shall not enter into a contract for work, or supplies, where the estimated cost thereof exceeds one thousand dollars, without first causing thirty days' notice to be given in one newspaper of general circulation in the corporation, that sealed proposals will be received for doing the work or furnishing the materials and supplies. [93 v. 710, § 9; Bates 2167-15 (1536-431).]

Sec. 4047. [Bond shall accompany each bid.] Each bid shall be accompanied with a bond, signed by sufficient security, for the acceptance of the contract, if awarded by the board, to fully secure any difference between the amount of such bid and the next higher bid, and such amount shall be collected by the board and paid into the hospital fund, in case of the refusal by the bidder to enter into contract according to his bid, within such reasonable time, as the board determines. [93 v. 710, § 10; Bates 2167-16 (1536-432).]

Sec. 4048. [Bids shall be sealed.] Each bid shall be enclosed in a sealed envelope, and deposited with the clerk of the board, and such envelope shall have endorsed thereon the nature thereof. All bids shall be opened at a regular meeting of the board. [93 v. 710, § 11; Bates 2167-17 (1536-433).]

Sec. 4049. [With whom board to contract.] The board shall enter into contract with the lowest responsible bidder, upon his giving bond to such board, with such security as the board approves, that he will perform the work and furnish materials or supplies in accordance with the contract. On the failure of such bidder within a reasonable time, to be fixed by the board, to enter into bond with such security, a contract may be made with the next lowest responsible bidder, and so on, until a contract is effected by a contractor giving such

bond. The board may reject any and all bids. [93 v. 710, § 12; Bates 2167-18 (1536-434).]

Sec. 4050. [Power of board to incur liabilities.] Such trustees shall incur no liability for hospital purposes beyond the amount of the funds levied or received for such purposes. [93 v. 710, § 13; Bates 2167-19 (1536-435).]

Sec. 4051. [Employment of superintendents, physicians and employes.] The board of hospital trustees may employ such superintendents, physicians, nurses and other employes as it deems necessary for the execution of its duties and fix their salaries or compensation. Any of such persons may be removed by the board at any time. [93 v. 710, § 14; Bates 2167-20 (1536-436).]

Sec. 4052. [Report to council.] On the first Monday in January each year, the trustees shall make a report to the council of their proceedings, with a detailed statement of their receipts and expenditures during the year. They shall also at the proper time submit to the council a detailed estimate of the amount necessary to maintain and improve such hospital for the ensuing year. [93 v. 710, § 15; Bates 2167-21 (1536-437).]

CHAPTER 5.

PARKS.[1]

PARK COMMISSIONERS.

Sec. 4053. [Board of park commissioners; election.][2] When five per cent of the qualified electors of a city petition the board of deputy state supervisors of elections of the county for the privilege of determining by ballot whether there shall be a board of park commissioners with the powers hereinafter provided for, such board shall submit at the next general election held within such city, or at a special election, if the petition requests a special election, the questions presented in the petition, to the electors of the municipality. Such special election shall be held at the usual place or places for holding municipal elections and shall be governed by the same rules, regulations and laws as govern the holding of municipal elections. [99 v. 440, § 1.]

(1) **Municipal power and control.**—Power generally to hold and improve parks, see § 3631, *ante*. Appropriation of property for, see § 3677, *ante*. Issue of bonds for, see § 3939, *ante*. Management of parks in cities, see § 4326, *post*. Management of, in villages, see § 4356, *post*.

(2) **Validity of park commission act.**—See Henderson v. Cincinnati, 81 O. S. 27.

Sec. 4054. [Appointment, term, compensation, vacancy.] If a majority of the electors voting at such election on the questions vote in favor of the appointment of a board of park commissioners, the mayor shall immediately appoint three electors of the city as members of such board, to be known as the board of park commissioners. Such members shall be appointed for terms of one, two and three years, respectively, and their successors shall be appointed for terms of three years. In case of the death or resignation of a member of such board, the mayor shall immediately appoint a successor to fill the vacancy for the unexpired term. The members of

the board shall serve without compensation. The mayor may remove, with the consent of the city council, a majority of the members elected thereto concurring, any member of such board for incompetency or official misconduct. [99 v. 441, § 2.]

Sec. 4055. [Organization of board.] After appointment and qualification, the board of park commissioners shall elect one of its members president and another vice president, who, in the absence or disability of the president, shall perform his duties and exercise his powers. The board shall make its own rules, but its meetings shall be open to the public and all questions acted upon shall be decided by a yea and nay vote[1] with the name of each member voting recorded on the journal. No question shall be decided unless approved by a majority of the board. [99 v. 441, § 3.]

(1) **Provision mandatory.**— The provision of this section requiring yea and nay vote entered on the journal is mandatory. Henderson v. Cincinnati, 81 O. S. 27.

Sec. 4056. [Disbursements, how made.] All disbursements of money shall be made by the treasurer of the city upon warrants drawn by the auditor and no warrant shall be drawn by the city auditor or paid by the treasurer unless approved and attested by the signatures, in their own handwriting, of the president and secretary of the board of park commissioners. [99 v. 441, § 3.]

Sec. 4057. [Control and management of parks.] The board of park commissioners shall have the control and management of parks, park entrances, parkways, boulevards and connecting viaducts and subways, children's playgrounds,[1] public baths and stations of public comfort located in such parks, of all improvements thereon and the acquisition, construction, repair and maintenance thereof. The board shall exercise exclusively all the powers and perform all the duties, in regard to such property, vested in and imposed upon the director of public service. [99 v. 441, § 4.]

(1) Park commission may install Christmas tree in playgrounds, when; no authority to purchase gifts. Op. Atty. Gen. (1917), p. 56.

Powers and duties. See Op. Atty. Gen., March 9, 1921.

Sec. 4058. [Expenditure of moneys.] The board shall have the expenditure of all moneys appropriated by the city council or received from any other source whatever, for the purchase, acquisition, improvement, maintenance, equipment or enjoyment of all such property, but no liability shall be incurred or expenditure made unless the money required therefor is in the treasury to the credit of the park fund and not appropriated for any other purpose. [99 v. 441, § 4.]

Sec. 4059. [Rules and regulations.] The board may adopt and enforce regulations[1] as to the proper use and protection of all such property and the improvements thereon and impose penalties for the violation of such regulations. [99 v. 441, § 4.]

(1) Park commissioners cannot grant permission to baseball players to charge admission fee to enclosures upon public park grounds. Op. Atty. Gen. (1915), p. 306.

Sec. 4060. [Establishment and extension.] The board may establish or extend parks, parkways, boulevards and connecting viaducts and subways, public comfort stations and children's playgrounds and public baths located in such parks, within such city or the territory contiguous to such city, and acquire or appropriate,[1] in the manner provided by law, the necessary real estate for such purposes, and in the same manner, to appropriate for parkway or boulevard purposes, any street, avenue or public way of such city. [99 v. 441, § 4.]

(1) **Right to appropriate property in adjoining municipality.**—See note to Sec. 3678, *ante.*

Sec. 4061. [Employes.][1] The board may employ a secretary, general superintendent, engineer, clerks and such other necessary employes for carrying into effect the purposes of its creation, and shall fix the rate of compensation and term of service of its employes. [99 v. 441, § 4.]

(1) Board of Park Commissioners without authority to appoint police officers. See Op. Atty. Gen. (1922), p. 438.

Sec. 4062. [''The park fund.''] All moneys received by the city from taxation or otherwise for the purpose of acquir-

ing, constructing, equipping and maintaining parks, park entrances, parkways, boulevards and connecting viaducts and subways, children's playgrounds, public baths and stations of public comfort located in such parks, shall be deposited in the city treasury and transferred by warrants on the city auditor to the credit of the board of park commissioners in a fund designated as "the park fund." All expenditures incurred by such board shall be by warrant of the city auditor drawn in pursuance of the regularly authorized attested voucher of such board of park commissioners. [99 v. 441, § 5.]

Sec. 4063. [Contracts, how let.] In the letting of contracts, the board of park commissioners shall be governed by the same laws as govern the letting of contracts by the director of public service.[1] [99 v. 441, § 5.]

(1) See § 4328, *post,* and see Op. Atty. Gen. (1915), p. 425.

Sec. 4064. [Bond issue; vote for.] When the board of park commissioners deems it necessary to issue bonds or to levy a tax for the purpose of carrying into effect the powers herein conferred, the board shall by written resolution so declare its judgment and state therein the amount of bonds to be issued or the tax to be levied for such purposes and transmit the resolution to the city council. If the council fails to enact legislation for the issuance of such bonds or the levying of such tax, within ninety days after the time the resolution was received by the council, the question of the issuance of the bonds or the levy of the tax shall be submitted to a vote of the qualified electors of the city, and the board of park commissioners shall file the resolution and request with the board of deputy state supervisors of elections of the county.[1] Such board of deputy state supervisors shall then submit the question of the issuance of such bonds or the levying of such tax, or both, to the qualified voters of the city, at either a special or general election as the resolution and request may specify, to be held in the manner provided by law for voting on the question of the issue of bonds in excess of the limit fixed by law, except as otherwise provided herein. [99 v. 442, § 6.]

(1) **Object of section.**—The object of this section was to provide for the contingency of a difference of views between the park commission and the council respecting the proposed issue of bonds for park purposes within the limit of four per cent. of the taxable value of the property of the city. The majority vote was not intended as a substitute for the two-thirds vote required by § 3939 *et seq.*, but was only to be substituted for a favorable action of the city council when it refuses to act favorably upon the recommendation of the park commission. Henderson v. Cincinnati, 81 O. S. 27; Cincinnati v. Puchta, Mayor, 94 O. S. 433.

Effect on other bond acts.—This section does not either expressly or by implication, amend former legislation restricting the bond issues of municipalities. It does not amend or modify the provisions of § 3939 *et seq.* of the General Code. Henderson v. Cincinnati, 81 O. S. 27.

Sec. 4065. [Duty of council after vote is taken.] If a majority of the electors voting on such question vote in favor thereof, it shall become the duty of the council of the city to enact, within ninety days thereafter, all legislation necessary to carry into effect the will of the majority of the voters at such election. [99 v. 442, § 6.]

Sec. 4065-1. [Cities, villages and counties may maintain and operate playgrounds, gymnasiums, public baths, recreation centers.] That the council or other legislative authority of any city, village, or the county commissioners of any county, may designate and set apart for use as playgrounds, playfields, gymnasiums, public baths, swimming pools, or indoor recreation centers, any lands or buildings owned by any such city, village or county, and not dedicated or devoted to other public use. Such city, village or county may, in such manner as may be authorized or provided by law for the acquisition of land or buildings[1] for public purposes in such city, village or county, acquire lands or buildings therein for use as playgrounds, playfields, gymnasiums, public baths, swimming pools or indoor recreation centers. [109 v. 609.]

(1) Acquisition of property for recreation purposes. See Op. Atty. Gen. (1922), p. 1082.

Sec. 4065-2. [Supervision and maintenance vested in whom; employment of leaders, etc.] The authority to supervise and maintain playgrounds, playfields, gymnasiums, public baths,

swimming pools, or indoor recreation centers, may be vested in any existing body or board, or in a recreation board, as the city or village council or the county commissioners shall determine. The local authorities of any such city, village or county, may equip, operate and maintain, the playgrounds, playfields, gymnasiums, swimming pools, public baths or indoor recreation centers, as authorized by this act. Such local authorities may, for the purpose of carrying out the provisions of this act, employ play leaders, recreation directors, supervisors, superintendents or any other officers or employes as they may deem proper. [109 v. 609.]

Sec. 4065-3. [Recreation board, powers and duties; vacancy.] If the city or village council shall determine that the power to equip, operate, and maintain playgrounds, playfields, gymnasiums, public baths, swimming pools, or recreation centers, shall be exercised by a recreation board, they may establish in said city or village, such recreation board which shall possess all the powers and be subject to all the responsibilities of the respective local authorities under this act. Such board when established shall consist of five persons, and two of the members shall be members of the board of education of the city or village school district. The board shall be appointed by the mayor of such city or village, and shall serve for terms of five years, or until their successors are appointed, except that the members of such board first appointed shall be appointed for such terms that the term of one member shall expire annually thereafter. Members of such board shall serve without pay. Vacancies in such board, occurring otherwise than by expiration of term, shall be for the unexpired term and shall be filled in the same manner as original appointments. [109 v. 609.]

Sec. 4065-4. [Organization of board.] The members of a recreation board established pursuant to this act shall elect their own chairman and secretary, and select all other necessary officers to serve for a period of one year, and may employ such persons as may be needed. As authorized by this act, such board shall have power to adopt rules and regulations for the conduct of all business within its jurisdiction. [109 v. 609.]

Sec. 4065-5. [Joint acquisition and maintenance.] Any two or more cities or villages, or any city or village, or any city or village and county, may jointly acquire property for and operate and maintain any playgrounds, playfields, gymnasiums, public baths, swimming pools, or indoor recreation centers. Any school district shall have power to join with any city, village or county, in equipping, operating and maintaining playgrounds, playfields, gymnasiums, public baths, swimming pools, and indoor recreation centers, and may appropriate money therefor. [109 v. 609.]

Sec. 4065-6. [Bond issue authorized.] The city or village council, or the county commissioners, may issue bonds for the purpose of acquiring lands or buildings for playgrounds, playfields, gymnasiums, swimming pools, public baths, or indoor recreation centers, and for the equipment thereof. [109 v. 609.]

Sec. 4065-7. [How expense paid.] All expenses incurred in the operation of such playgrounds, playfields, gymnasiums, swimming pools, public baths, and indoor recreation centers, established as herein provided, shall be payable from the treasury of such city, village, county or school district. The local authorities of such city, village, county or school district, having power to appropriate money therein, may annually appropriate and cause to be raised by taxation an amount for the purpose of maintaining and operating playgrounds, playfields, gymnasiums, public baths, swimming pools and recreation centers. [109 v. 609.]

TRUSTEES OF PARK FUNDS.

Sec. 4066. [Care of property donated for park purposes.] In any municipal corporation which has become or may hereafter become the owner or trustee of property for park purposes, or of funds to be used in connection therewith, by deed of gift, devise or bequest, such property or funds shall be managed and administered in accordance with the provisions or conditions of such deed of gift, devise or bequest. [96 v. 92, § 220.]

Sec. 4067. [Board of park trustees for donated property.] When such deed of gift, devise or bequest requires the investment, or change of investment of the principal of such property or funds, or any part thereof, to be made upon the approval of an advisory committee appointed by a court or judge, or by an advisory committee appointed by a civic organization of the municipality, or by the council of such municipality, then such property or funds, and any park for the improvement of which in whole or in part such fund is to be used, or any property for the care or management of which in whole or in part such fund is used, shall be managed, controlled and administered by a board of park trustees. [110 v. 161; 96 v. 92, § 220.]

Sec. 4068. [Appointment and term; vacancies.] The board of park trustees shall consist of four resident electors of the municipal corporation, who shall be appointed by the trustees of the sinking fund, and shall serve without compensation for the term of four years and until their successors are appointed and qualified. The park trustees shall be appointed in the first instance to serve for one, two, three and four years respectively, and thereafter their successors shall be appointed one each year to serve for the term of four years, but not more than two shall be of the same political party. Vacancy in the board by death, resignation or otherwise shall be filled in like manner for the remainder of the term. [96 v. 92, § 220.]

Sec. 4069. [Powers and duties.] The board of trustees shall have the right to apply, control or invest and re-invest the funds coming or arising from such gift, devise or bequest according to the terms and conditions on which acquired. [96 v. 92, § 220.]

Sec. 4070. [Compensation, oath, bond.] The members of the board of park trustees shall serve without compensation. Before entering upon the discharge of their duties, they shall each take the oath of office prescribed by law, and give bond in the sum of twenty-five hundred dollars, conditioned accord-

ing to law, and to the approval of the mayor and council of the municipality. [93 v. 463, § 3; Bates 2515-39 (1536-944).]

Sec. 4071. [Meetings, rules and regulations.] The board of park trustees shall hold meetings at least once a month, and shall adopt necessary rules for the regulation of its business. It shall keep a complete record of its proceedings, which record, or a copy thereof, duly certified by the clerk of the board, shall be competent evidence of its transactions in the courts of this state. The yeas and nays shall be called upon the passage of every resolution or order. Three members of the board shall constitute a quorum for the transaction of business, but no resolution or order shall be adopted unless three members vote in its favor. The auditor or clerk, as the case may be, shall act as the clerk of the board of park trustees, but shall receive no additional salary or compensation for such services. [93 v. 463, § 4; Bates 2515-40 (1536-945).]

Sec. 4072. [Powers of board.] Such trustees shall have the entire management and control of such property or funds, all improvements of every nature within such park or parks, moneys derived from levies made for park purposes, moneys from the general fund appropriated by the council for such purposes, proceeds of bonds issued or sold for park purposes, and of moneys or other property donated to any such municipality for park purposes, and of all other park property legally acquired; all of which moneys shall be placed in a special fund called the "park fund," and shall be disbursed by the treasurer of any such city or village, only upon a warrant of the auditor or clerk, drawn in accordance with the order of the board of park trustees.

Such trustees shall have the control and management of parks, park entrances, parkways, boulevards and connecting viaducts and subways, children's playgrounds, public baths and stations of public comfort located in such parks, of all improvements thereon and the acquisition, construction, repair and maintenance thereof. The board shall exercise exclusively all the powers and perform all the duties in regard to such property, vested in and imposed upon the director of

public service. [103 v. 511; 93 v. 463, § 5; Bates, 2515-41 (1536-946).]

Sec. 4073. [Contracts, rules and regulations.] The trustees may make contracts for the improvements of the grounds, the erection of the necessary bridges and structures therein, and adopt rules for the protection, care and government of the parks under its charge, and such rules, when approved by the council shall have the same effect and may be enforced by the same penalties as ordinances. [93 v. 464, § 6; Bates 2515-42 (1536-947).]

Sec. 4074. [Power to incur liability.] The trustees shall not incur any liability for park purposes beyond the amount of the funds levied therefor or appropriated to their order by the council for such purposes. [93 v. 464, § 7; Bates 2515-43 (1536-948).]

Sec. 4075. [Employes.] The board may employ such superintendents, landscape gardeners and other employes as it deems necessary for the execution of its duties, and fix their salaries or compensation. Any such persons may be removed by the board at any time. [93 v. 464, § 8; Bates 2515-44 (1536-949).]

Sec. 4076. [Control of improvement of natural watercourses.] The board shall have entire management and control of all work of straightening, cleaning, deepening, or otherwise improving any natural watercourse, whether partly or wholly used for sewer purposes or not, within such city, and may purchase, acquire or condemn any water rights, easements or privileges in connection with any natural watercourse through such city, and may acquire or condemn such real estate necessary for such purposes. [94 v. 717, § 5; Bates 2515-45e (1536-951).]

Sec. 4077. [When bids shall be required.] Before entering into any contract for the performance of any work, the cost of which exceeds one thousand dollars, the board shall cause plans and specifications and forms of bids to be prepared and when adopted by the board, it shall have them printed for

distribution among bidders. [94 v. 718, § 6; Bates 2515-47f (1536-952).]

Sec. 4078. [Notice for proposals.] The board shall not enter into any contract for work or supplies where the estimated cost thereof exceeds one thousand dollars, without first causing thirty days' notice in one newspaper of general circulation in the corporation that sealed proposals may be received for doing the work or furnishing such materials and supplies. [94 v. 718, § 7; Bates 2515-45g (1536-953).]

Sec. 4079. [Bond to accompany bids.] Each bid shall be accompanied by a bond, signed by sufficient security, for the acceptance of the contract, if awarded by the board. [94 v. 718, § 8; Bates 2515-45h (1536-954).]

Sec. 4080. [Bids shall be under seal.] Bids for work and supplies shall be enclosed in a sealed envelope and deposited with the clerk of the board, and such envelope shall have endorsed thereon the nature of the bid, and all bids shall be opened at a regular meeting of the board. [94 v. 718, § 9; Bates 2515-45i (1536-955).]

Sec. 4081. [Awarding contracts.] The board shall enter into contract with the lowest responsible bidder, upon his giving bond to the corporation with sureties as the board approves, that he will perform the work or furnish the material and supplies in accordance with his contract, and the board shall be the final judges as to who are the responsible bidders. On the failure of such bidder, within a reasonable time, to be fixed by the board, to so enter into bond with surety, the contract may be made with the next highest responsible bidder, and so on until the contract is effected by the contractor giving bond. The board may reject any and all bids, and no member thereof shall be in any manner either directly or indirectly interested in any contract. [94 v. 718, § 10; Bates 2515-45j (1536-956).]

Sec. 4082. [Reports and estimates.] On the first Monday of January each year, the board of park trustees shall make

a written report to the council of its proceedings, with a detailed statement of its receipts and expenditures during the year. And they shall also at the proper time submit to the council a detailed estimate of the amount of money necessary to maintain and improve such park or parks for the ensuing year, and to dredge, straighten, clean, deepen, and otherwise improve such watercourses and purchase and acquire such water rights, easements and privileges. [93 v. 464, § 9; 94 v. 718, § 11; Bates 2515-45k (1536-757).]

Sec. 4082-1. [Joint use of fair grounds.] Any real estate controlled and managed by any agricultural society organized under the laws of Ohio, pertaining to agricultural societies, whether owned by it or by any county, or jointly by it and any county and which is situated within, adjacent or near any municipal corporation and used as a site for fairs, may be jointly used as such site for fairs and also as a public park of such municipal corporation, although the title thereto shall remain in such agricultural society or county, or both such agricultural society and such county as the case may be. [102 v. 458.]

Sec. 4082-2. [Agreement.] The duration of such joint use and all the terms and conditions thereof shall be such as may be agreed upon between such municipal corporation and such agricultural society or if such county has any interest in such real estate then such agreement shall be made between such municipal corporation on the one hand and such agricultural society and such county acting through its board of county commissioners. [102 v. 459.]

Sec. 4082-3. [Powers of municipality.] Such municipal corporation shall have the same authority and power to improve, equip and maintain such real estate as a public park and to do all things necessary for its use and enjoyment as such public park which it has under the laws of Ohio as to parks owned by it in fee. [102 v. 459.]

CHAPTER 6.

CHILDREN'S HOMES.

Sec. 4083. [Powers of trustees and managers.] In cities where children's homes or industrial schools are established under the incorporation law of the state, the trustees and managers of such institutions may take under their guardianship all children placed under their care and management in either of the following modes:

First—Children under sixteen years of age, who are voluntarily surrendered by the father and mother, or in case of the death or long continued or wilful absence of the father, by the mother, or by their guardians, to the care of such trustees and managers, they being by virtue of such surrender invested with the same power over the persons of the children as the parents or guardians.

Second—Children under sixteen years of age who are committed to their care by the juvenile court. [103 v. 895; R. S. Sec. 2181; 99 v. 190; 63 v. 51, § 1; S. & S. 726.]

(1) **Power of state** to exercise reasonable restraint over incorrigible children when parents are unable to take care of them, see State v. Stiles, 12 Dec. 338.

Sec. 4084. [May act as guardian of children, and procure them homes.] The trustees and managers shall have the guardianship of such children during their minority, and, when it seems proper, may place them in suitable homes, having scrupulous regard to the religious and moral character of the persons with whom such children are placed, in order to secure to them the benefits of good example and wholesome instruction, and the opportunity of becoming intelligent and useful men and women. [R. S. Sec. 2182; 63 v. 51, § 2.]

Sec. 4085. [May indenture children.] The trustees and managers shall require an agreement to be entered into, that

each and every child so placed shall be furnished with good and sufficient food and clothing and a suitable common school education. Such agreement shall be in a form to be prescribed by the board of state charities. [103 v. 895; R. S. Sec. 2183; 99 v. 190; 63 v. 51, § 3.]

Sec. 4086. [What records shall be kept.] Such trustees and managers shall provide themselves with records, in which shall be entered the age, parentage, place of residence, and present condition of every child received in any such children's home, or industrial school. They shall also cause to be entered in such records the time when, the place where, and the person to whom any of the inmates of such children's home or industrial school have been placed for suitable homes, together with a substantial statement of any contract made between such trustees and managers, and the persons receiving such child. [103 v. 895; R. S. Sec. 2183; 99 v. 190; 63 v. 51, § 3.]

Sec. 4087. [Cancellation of contract.] If a person so taking charge of a child, desires to be released from the contract, the trustees and managers, upon application, may cancel it, and resume the charge and management of the child, and shall have the same power and authority over him as before the agreement was made. [103 v. 895; R. S. Sec. 2184; 63 v. 51, § 4.]

Sec. 4088. [Trustees may remove children from unsuitable homes.] The trustees and managers may remove a child from a home, when, in their judgment, it has become an unsuitable one. In such cases, they shall resume the same power and authority as they originally possessed, but they may return a child to parents or a surviving parent or guardian, or when they believe the child to be capable of caring and providing for himself, may discharge him to his own care. They shall have the same power respecting such children and be subject to the same obligations as provided in the case of county children's homes by sections 3098, 3099, 3100, 3101, 3102 and 3103 of the General Code. [103 v. 895; R. S. Sec. 2185; 63 v. 51, § 5.]

CHAPTER 7.

INFIRMARIES.

Sec. 4089. [Management and control.] The management of the affairs of corporation infirmaries and the care of the inmates thereof, the erection and enlargement of infirmary buildings and additions thereto, the repair and furnishing thereof, the improvement of the grounds therewith connected, and the granting of out-door relief to the poor, shall be vested in the director of public safety.[1] [R. S. Sec. 2168; 80 v. 46; 77 v. 16; 72 v. 76.]

(1) **Management** is given to director of public safety by § 4370, *post.*

Management in villages, see § 4356, *post.*

Other provisions, see generally, title "Charitable and Reformatory Institutions" in Part II.

Accounting officer.—The board of infirmary directors provided for under former statutes were held to be accounting officers within the meaning of § 7875 R. S. (13105 G. C.). Hauck v. State, 45 O. S. 439.

Sec. 4090. [Location of infirmary or pest-house.] The infirmary, or the pest-house of the corporation may be located either within or outside of the corporation limits, and the council may purchase and hold the necessary real estate on which to build them. [R. S. Sec. 2169; 72 v. 76.]

(1) **Pest house outside corporate limits** can be so located without the consent of the township trustees. Lorain v. Rolling, 3 C. C. (N. S.) 660, 24 C. C. 82.

When a nuisance, see Youngstown Township v. Youngstown, 25 C. C. 518; Lorain v. Rolling, 24 C. C. 82.

Power to establish pest houses and infirmaries, see § 3646, *ante.*

Power to appropriate property for, see § 3677, *ante.*

Power to issue bonds for, see § 3939, *ante.*

Sec. 4091. [Regulations applicable to hospitals shall govern.] In the management of an infirmary, in the care and treatment of the inmates thereof, and in the erection, en-

largement, or repair of any building for infirmary purposes, or of any addition thereto, the director of public safety shall have the same powers, be governed by the same regulations, and perform the same duties, as far as applicable, as are vested in him in relation to municipal hospitals. The power of the council in relation thereto, shall be the same, so far as applicable, as herein provided in relation to hospitals. [R. S. Sec. 2171; 66 v. 200.]

Sec. 4092. [Care for the inmates; separation of sexes.] Such director shall see that the inmates of such infirmary are comfortably provided for and kindly treated, and, whenever deemed necessary, he may provide for the care and support of the males and females in separate buildings, or in separate departments of the same building. [R. S. Sec. 2172; 66 v. 200.]

Sec. 4093. [Appointment of overseers of the poor.] Council shall provide by ordinance for the appointment by the director of public safety of such number of persons as is deemed necessary, not to exceed one in each ward, to act as overseers of the poor. The director shall prescribe their duties as to the care of the poor, and their removal, when necessary, to the infirmary, but such persons shall receive no compensation for their services. [R. S. Sec. 2173; 77 v. 16; 72 v. 12.]

Sec. 4094. [Duties in case of partial relief.] Upon complaint being made or information given to such director, that a person residing in the city requires public assistance or support, the director shall inquire into the condition and necessities of such person, and if satisfied that relief ought to be granted at public expense, and that the person requires temporary or partial relief only, and that for any cause it would not be prudent to remove him to the city infirmary, the director may afford relief, at the expense of the city, without such removal. The director of public safety has the same power of removing paupers settled in some other county in this state which, by law, is conferred on county infirmary directors. [R. S. Sec. 2174; 73 v. 233.]

Sec. 4095. [Duties of director in case of no legal settlement.] When an infirmary is erected and established in a city for the accommodation of its poor, the director of public safety shall not require the directors of the county infirmary of the county in which such city is situated, to receive and provide for persons having no legal settlement within this state,[1] or whose place of residence is unknown, or to charge the commissioners of the county with the expense of providing for such persons in the city infirmary, but he shall furnish relief and support to such persons in the city infirmary, applying therefor, the same as county infirmary directors are required to do, and have like power of removing such persons as county infirmary directors have to such other city or county infirmary where such pauper's legal settlement is. The provisions of this section shall only apply to counties in which there is a county and a city infirmary. [R. S. Sec. 2175; 73 v. 235.]

(1) **Legal settlement, how gained.**—Residence for a year of pauper is necessary and it must be open and notorious. Henrietta Twp. v. Brownhelm Twp., 9 O. 76.

But the authorities do not have to be informed; *bona fide* residence is all that is necessary. Henrietta Twp. v. Oxford Twp., 2 O. S. 32.

Residence must be accompanied with the intention to make it the place of abode. *Ib.*

How lost.—Settlement is not lost by residing elsewhere for a year, provided there is an intention to return. *Ib.*

By voting in another state and acquiring a legal settlement there, the former legal settlement is lost. Crane Twp. v. Antrim Twp., 12 O. S. 430.

Pauper, who is.—One having credit and no property is not a pauper. Beach v. Marion Twp., 2 W. L. M., 95. But one having property elsewhere, but who is unable to support himself, is entitled to relief. *Ib.*

Sec. 4096. [When there are orphan asylums in cities.] In cities in which orphan asylums are established by law, or as private institutions, the director of public safety may make such arrangements with the trustees or the person having charge of such asylums, for the support and education of all orphan or other children coming under his control by virtue of the laws in force at the time, as he deems proper, and shall allow such compensation as is reasonable and just, to be paid from the poor fund of the city. [R. S. Sec. 2176; 51 v. 412.]

CHAPTER 8.

REFORMATORY INSTITUTIONS.

HOUSES OF REFUGE.[1]

Sec. 4097. [When infants received.] The director of public safety may receive into a house of refuge infants under the age of seventeen years, lawfully committed to his custody.[2] [R. S. Sec. 2050; 66 v. 189, § 238.]

(1) **Municipal power and control.**—Power to establish and maintain houses of refuge, see § 3624. *ante.*

Power to appropriate property for, see § 3677, *ante.*

Bonds for, see § 3939, *ante.*

Management in cities, see § 4370, *post.*

Management in villages, see § 4356, *post.*

Other provisions relating to houses of refuge, see general title "Charitable and Reformatory Institutions" in Part II.

(2) **How committed.**—Former § 2050 R. S., provided how children should be committed to houses of refuge. The provisions relating to the mode of commitment are omitted from the revision. As to commitment under present statutes, see § 1639 *et seq.*, G. C.

Validity.—As to the constitutionality of a statute such as this, see Prescott v. State, 19 O. S. 184; House of Refuge v. Ryan, 37 O. S. 204.

Support of infants.—Under former § 2050 R. S., it was held that infants committed to a house of refuge and correction for "incorrigible conduct" were not committed "for offenses against a law of the State" within the meaning of § 2071 R. S. (4116 G. C.), and hence they must be supported as provided in § 2072 R. S. (4117 G. C.) and not by the county. State v. Schlatterbeck, 39 O. S. 268.

Construction.—For construction of former provisions of the Revised Statutes, see House of Refuge v. Ryan, 37 O. S. 197. In this case it was held that § 2050 R. S. provided that the officer in charge might in his discretion receive infants committed for incorrigible conduct, etc., while §§ 2051 to 2053 R. S. provided for commitment of infants convicted of crimes and offenses.

Sec. 4098. [Infants may be confined after conviction.] An infant under the age of seventeen years, who has been so committed, may be confined in such house of refuge and cor-

rection, under such rules and regulations as the director prescribes, and the director shall receive and take charge of any children so committed. [R. S. Sec. 2051; 67 v. 75.]

Sec. 4099. [When infant may be put to hard labor.] A minor over the age of seventeen years, convicted of a violation of any ordinance, and liable to be punished therefor by imprisonment, or who may be liable to imprisonment for neglect or refusal to pay a fine imposed for the violation of an ordinance, may, instead thereof, be committed to the house of refuge and correction, and put to hard labor, in such manner as may be prescribed by ordinance of council. [R. S. Sec. 2052; 66 v. 190, § 240.]

Sec. 4100. [Authority to commit infants to any house of refuge.] Courts or officers, who, by virtue of law, may commit infants to the care and guardianship of directors of houses of refuge, or to the board of trustees for industrial schools, may commit such infants to the care and guardianship of the director of any house of refuge and correction in the state, organized and erected by a municipal corporation, with which the state has made arrangments therefor, the same as they may commit infants to the custody of the board of trustees of industrial schools or the directors of any house of refuge, whether such house of refuge and correction is located within the county where such commitment is made or not. Infants so committed to a house of refuge who are, or whose parents or guardians are, at the time of such commitment, resident of the municipal corporation where such house of refuge is located, shall be kept and maintained at the expense of such corporation. [73 v. 143, § 1; Bates 2053-1 (1536-338).]

Sec. 4101. [Director in municipalities may receive children.] The director of public safety having control of a house of refuge and correction situated in a municipal corporation, with which the state has made arrangements for the custody and guardianship of infants under the age of seventeen years, as provided in the preceding section, may receive into his care and guardianship all such infants committed to his custody. [73 v. 143, § 2; Bates 2053-2 (1536-339).]

Sec. 4102. [Infants placed in house of refuge instead of jail.] An infant under the age of seventeen years who is committed for trial, or as a witness, in a county in which a house of refuge and correction is situated, may be placed in such institution subject to the order of the court making such commitment, and in no case in the county jail. [R. S. Sec. 2057; 66 v. 191, § 245.]

Sec. 4103. [Disposition when house of refuge full.] If at any time a house of refuge and correction has as many infants under its charge as can be conveniently accommodated therein, or as many as the funds of such institution are adequate to maintain, the director shall not be required to receive other infants, but shall order the chief officer thereof to return that fact to the court authorized to commit, who has sent such infant to the institution. Thereupon the case of such infant shall be otherwise disposed of as the court deems proper. [R. S. Sec. 2058; 66 v. 191, § 246.]

Sec. 4104. [Statement of age, residence and cause.] When an infant is committed to the instruction and discipline of a house of refuge and correction, under the guardianship of the director thereof, the court or judge ordering such commitment, at the same time, shall furnish to the director, or officers of such institution a true statement, in writing, of the age of the infant, and the reason for the commitment. Until the statement is furnished, such director or officers may decline to receive the infant. [R. S. Sec. 2059; 66 v. 191, § 247.]

Sec. 4105. [What record of commitment shall contain.] When the occasion of the commitment is a criminal charge against the infant, no other record shall be made, unless demanded by the infant, or his parents, or guardian, than that, in substance, such infant (naming him), who, on a day therein named, was of the age of ..... years, having been brought before such court, and the court having ascertained by the testimony of the witnesses therein named, that such infant was a suitable person to be committed to the discipline and instruction of the house of refuge and correction, under the guardianship of the director, such infant was so committed,

and delivered to the charge of such director. [R. S. Sec. 2060; 66 v. 191, § 248.]

Sec. 4106. [Duration of commitment to reformatory institution; discharge.] No commitment of an infant to a house of refuge and correction shall be for a shorter period than until such infant is reformed or attains the age of majority except in case of infants committed to await their trial, or as witnesses, and except in such cases as the director of public safety may by general rules, provide. An infant by whomsoever or for whatever cause committed may at any time be discharged upon order of the director, duly entered upon his minutes or may, by his order duly entered upon his minutes, be permitted to leave such institution until directed to return thereto by such director or the superintendent of such house. Such permission shall not in any way be construed to be a discharge from such house and from the guardianship of such director.[1] [R. S. Sec. 2061; 78 v. 253; 66 v. 191, § 249.]

(1) **Validity.**—A section providing proceedings for and authorizing commitment of homeless children is not repugnant to § 14 or § 16, Art. 1 of the Constitution of Ohio, as the law provides full remedy by *habeas corpus*. House of Refuge v. Ryan, 37 O. S. 197, 201.

The father, if an unsuitable person, is not entitled to the custody of the child, on the hearing of *habeas corpus*, on the ground that he had no notice of the proceedings under which the child was committed. *Ib.*

Sec. 4107. [How minors employed.] The director may place infants committed to his care, during their minority, at such employment for account of the institution or otherwise, and cause them to be instructed in such branches of useful knowledge, as may be suited to their years and capacities. [R. S. Sec. 2062; 66 v. 192, § 250.]

Sec. 4108. [Director may place children in private homes and employ visitor.] The director of public safety may, at his discretion, place children committed to his care in private homes which have been previously investigated to ascertain their fitness for the purpose. He may at his discretion pay board for children so placed. He shall employ a competent person to visit children so placed in such homes at least

twice a year, and may at any time, at his descretion remove children so placed from such homes, and return them to such house of refuge or place them in another home at his discretion. [103 v. 864, 896; R. S. Sec. 2063; 66 v. 192, § 251.]

Sec. 4109. [Indentures.] Repealed, 103 v. 864.

Sec. 4110. [When indentures to be cancelled.] Repealed, 103 v. 864.

Sec. 4111. [When indentured infant returned to institution.] Repealed, 103 v. 864.

Sec. 4112. [Arrest and return of fugitives.] A fugitive from a house of refuge and correction may be arrested and returned to the institution by a sheriff or constable of any county in this state, or police officer of the corporation, or officer of such institution, on the written order of the director of public safety, directed to the officer, and may be delivered to the custody of such officer of the house of refuge and correction as the director may name. [103 v. 864, 896; R. S. Sec. 2067; 66 v. 192, § 255.]

Sec. 4113. [Stubborn infant; how dealt with.] When an infant is convicted of an offense against the laws of this state punishable with imprisonment in the penitentiary, or in the jail of the county where such house of refuge and correction is situated, and is sent to the house of refuge and correction, instead of the penitentiary or jail, and refuses to submit to the rules of the institution, and proves to be stubborn and irreclaimable, in the opinion of such director, it may, by his order, be delivered into the custody of the sheriff of the county, with a written statement of the cause of commitment, and of its conduct and character, as exhibited in such institution, which statement shall be prepared and signed by the superintendent. [R. S. Sec. 2068; 66 v. 193, § 256.]

Sec. 4114. [Sheriff to notify prosecuting attorney in such case.] The sheriff shall receive such infant into his custody, and file the statement in the office of the clerk of the court in

which the infant was tried, and notify the prosecuting attorney of the county thereof. [R. S. Sec. 2069; 66 v. 193, § 257.]

Sec. 4115. [Stubborn infants; final disposition.] On receiving such notice, the prosecuting attorney shall cause the infant to be brought before the court in which it was tried, to receive the sentence which the court deems just, according to the law, for the offense of which the infant was convicted. [R. S. Sec. 2070; 66 v. 193, § 258.]

Sec. 4116. [How expenses shall be paid.] The expense of maintaining infants committed to a house of refuge and correction, for offenses against a law of the state, or for trial, or as a witness, shall be paid by the county. The expense of infants committed by township trustees shall be paid by the township, and of those committed by parents and guardians shall be paid by them, except in cases where the director otherwise determines, all which expense shall be ascertained and fixed by such director. [R. S. Sec. 2071; 66 v. 193, § 259.]

Sec. 4117. [Deficiency; how raised.] The expense of maintaining and administering the affairs of houses of refuge and correction, above the receipts thereof, shall be audited and paid, from time to time, by the council of the corporation, and a tax for such expense shall be levied and collected as a part of the ordinary expenses of the corporation. [R. S. Sec. 2072; 66 v. 193, § 260.]

Sec. 4118. [Return to writ of habeas corpus.] It shall be a sufficient return to a writ of habeas corpus, directed to any person or officer, inquiring into the cause or detention of an infant committed to a house of refuge and correction, that the infant named in the writ was, on a day therein named, committed to the guardianship of the director of the house of refuge and correction, in the city or village of ..... (as the case may be), by the person or officer who executed the commitment, naming him, until such infant should arrive at legal age, and that that period has not arrived. [R. S. Sec. 2073; 66 v. 193, § 261.]

Sec. 4119. [Commitment; how far, examinable.] Where a commitment has, in fact, been executed by a person authorized herein to execute it, the existence of the circumstances justifying its execution shall not be otherwise examinable than in an action against such director, as provided in this chapter. [R. S. Sec. 2074; 66 v. 193, § 262.]

Sec. 4120. [Aggrieved party may apply to the board.] If a parent, guardian, master to whom an infant has been apprenticed, a person occupying the position of parent, protector, or guardian in fact, or a relative by blood or marriage, not further remote than first cousin to such infant, feels aggrieved by the commitment of an infant to the director of a house of refuge and correction, he may make a written application to such director at such time as he by rule or order provides for hearing applications, not later than thirty days thereafter, to have the infant delivered to him, which application shall state the ground of the applicant's claim to the custody of the infant, and the reason for claiming such custody. [R. S. Sec. 2075; 66 v. 194, § 263.]

Sec. 4121. [Decision of application.] Within ten days after hearing the application, the director shall decide, and, if he is of opinion that the welfare of the infant will be promoted by granting the application, he shall make an order to that effect, otherwise he shall decline the application.[1] [R. S. Sec. 2076; 66 v. 194, § 264.]

(1) How order made under former statutes, see *Ex parte* Walker, 8 B. 198.

Sec. 4122. [Action against director.] The applicant may, if the application be declined, upon first giving security for the payment of costs, commence an action against the director of public safety in the court of common pleas or superior court of the county in which the house is situated, for the recovery of the infant, or his liberation. The action shall be conducted in all respects as actions under the code of civil procedure, except the case shall have precedence of all others in the time of trial. [R. S. Sec. 2077; 66 v. 194, § 265.]

Sec. 4123. [Costs in such cases.] The costs of the action shall be paid by the applicant, or out of the county treasury, unless the court certifies in the journal entry of the judgment, that the refusal of the director to grant the application of the plaintiff was plainly unreasonable, or the original commitment manifestly improper and unnecessary, in which case the costs shall be taxed against the party in fault, on notice to him. [R. S. Sec. 2078; 66 v. 194, § 266.]

Sec. 4124. [Action against director; where brought; service.] Such actions may be brought by and against the director of public safety, before any court of competent jurisdiction, and process may be served by leaving a copy of the writ with such director, or at the office of such institution, with any officer thereof. [R. S. Sec. 2081; 66 v. 194, § 269.]

PRISONS AND STATION HOUSES.[1]

Sec. 4125. [Sustenance for prisoners.] The marshal or chief of police shall provide all persons confined in prison or station houses with necessary food during such confinement, and see that such places of confinement are kept clean and made comfortable for the inmates thereof. [R. S. Sec. 2092; 66 v. 186, § 216.]

(1) **Power to establish prisons and station houses** is conferred on all municipalities in § 3624, *ante.*

Station house keepers, appointment and control of, see §§ 4374 and 4375, *post.*

Appropriation of property, for prisons, etc., see § 3677, *ante.*

Bonds for, see § 3939, *ante.*

Management, in cities, see § 4370, *post;* in villages, see § 4356, *post.*

Sec. 4126. [Council by ordinance shall make provisions therefor.] Council shall provide, by ordinance, for sustaining all persons sentenced to or confined in such prison or station houses, at the expense of the corporation, and in counties where said prisons or station houses are in quarters leased from the county commissioners may contract with said commissioners for the care and maintenance of such persons by the sheriff or other person charged with the care and maintenance of county prisoners. On the presentation of bills

for food, sustenance, and necessary supplies, to the proper officer, certified[1] by such person as the council may designate, such officer shall audit them, under such rules and regulations as the council prescribes, and draw his order on the treasurer of the corporation in favor of the officer presenting such bill, but the amount shall not exceed forty cents a day for any person so confined. [107 v. 502; 66 v. 186; R. S. Sec. 2093.]

(1) Chief of police may not certify to any bill for food furnished prisoners in excess of contract price; chief of police receives salary; no additional compensation. Op. Atty. Gen. (1916), p. 1336.

Sec. 4127. [Disposition of prisoners where there is no workhouse.] In corporations in which there is no workhouse, the council may, by ordinance, provide for the keeping of persons convicted and sentenced to hard labor, during the term of their imprisonment, at such place or places within the corporation as the council determines. [R. S. Sec. 2094; 66 v. 186, § 218.]

WORKHOUSES.[1]

Sec. 4128. [Who may be committed to workhouse; expense.] When a person over sixteen years of age is convicted of an offense under the law of the state or an ordinance of a municipal corporation, and the tribunal before which the conviction is had is authorized by law to commit the offender to the county jail or corporation prison, the court, mayor, or justice of the peace, as the case may be, may sentence the offender to the workhouse, if there is such house in the county. When a commitment is made from a city, village, or township in the county, other than in the municipality having such workhouse, the council of such city or village, or the trustees of such township, shall transmit with the mittimus a sum of money equal to not less than seventy cents per day for the time of the commitment, to be placed in the hands of the superintendent of the workhouse for the care and maintenance of the prisoner.[2] [110 v. 12; R. S. Sec. 2099; 99 v. 125; 73 v. 211, § 275.]

(1) **Municipal power and control.**—Power to establish, maintain, and regulate, § 3624, *ante*.

Power to appropriate property for, § 3677, *ante*.

Power to issue bonds for, § 3939, *ante*.

Management, in cities, § 4370, *post;* in villages, § 4356, *post*.

Other provisions relating to, generally, see title "Charitable and Reformatory Institutions" in Part II.

(2) **Validity.**—This section was held constitutional in Kimbleawecz v. State, 51 O. S. 228.

Discretion of court.—It is discretionary with the court whether a minor under age of sixteen shall be confined in the workhouse or house of refuge. *Ex parte* Walker, 8 B. 198.

This section prior to amendment of 1908 applied to cases where, by the statute under which conviction was had, the court was given discretion to sentence either to jail or to workhouse. Lemmon v. State, 77 O. S. 427.

The rule in Lemmon v. State does not apply to counties which do not contain a workhouse. State v. Wirick, 81 O. S. 343.

Power of police court in municipality having a workhouse, to commit to such workhouse on conviction of misdemeanor, see *In re* Schooler, 19 Dec. 465.

Apportionment of expense of maintaining prisoners violating statutes or ordinances is governed by § 2099 R. S. (4128 G. C.) and municipality cannot recover from county for maintenance in city workhouses of prisoners committed for violation of state statutes. Cleveland v. Commissioners, 30 C. C. 193; 10 C. C. (N. S.) 277, (aff'd, 80 O. S. 752).

Sec. 4129. [Employment of prisoners.] A person so sentenced shall be received into such workhouse, and shall be kept and confined at labor therein, or if such labor cannot be furnished therein, such person may be employed at labor elsewhere when such employment is authorized by ordinance, and shall be subject to the rules, regulations and discipline thereof, until the expiration of his sentence, when he shall be discharged. No person committed or held in default of the payment of a fine, penalty, or costs of a prosecution, shall be released under the laws providing for the relief of insolvent debtors.[1] [110 v. 12; R. S. Sec. 2100; 82 v. 117; 66 v. 195, § 276.]

(1) Release of insolvent debtors provided in § 11174.

Municipal liability.—Municipal corporation, through officer having management and control of workhouse acts in governmental capacity and not in proprietary or business relation to inmates or employes, even though incidentally some revenue is derived from labor of inmates, and guard injured in course of his employment cannot recover from the municipality. Bell v. Cincinnati, 80 O. S. 1.

Workhouse cannot be maintained for profit, but it does not cease to be a public or governmental agency because, incidentally, some revenue is derived from the labor of inmates, applied mainly to expenses of maintenance. *Ib.*

Sec. 4130. [Cumulative sentence.] Every person who, after having been convicted, sentenced and imprisoned, in any workhouse for an offense committed in this state in violation of an ordinance of a municipality, or law of the state, is convicted of a second misdemeanor whether committed in violation of an ordinance of a municipality or a law of this state, punishable by imprisonment in any workhouse, within this state, shall for such second offense, be punished by imprisonment for not less than double the penalty imposed for the first offense, and in case of two previous convictions for such misdemeanors, the penalty for a third misdemeanor shall not be less than double the penalty imposed in the last of such previous misdemeanors. But no greater punishment shall be inflicted for the second or third misdemeanor, than the maximum penalty provided by law or ordinance for the particular offense committed. [R. S. Sec. 2100c; 92 v. 359; 90 v. 178.]

Sec. 4131. [Habitual offender.] Every person who, after having been three times convicted, sentenced and imprisoned in any workhouse or workhouses for offenses committed in this state, whether in violation of law or ordinance, shall be convicted of a fourth misdemeanor, whether committed in violation of an ordinance of a municipality or law of the state, punishable by imprisonment in any workhouse within this state, shall, upon conviction for such offense be held and deemed to be an habitual offender and shall be imprisoned in a workhouse for a period of not less than one year nor more than three years. In all such cases the court may order that the offender stand committed to such workhouse until the costs of prosecution are paid. The fact of former convictions shall be charged in the information or complaint and, if proved, shall be stated in the commitment. A pardon for a former offense granted on the ground of innocence shall operate as a full defense in any charge under this section of a

prior conviction for such offense. [R. S. Sec. 2100c; 92 v. 359; 90 v. 178.]

Sec. 4132. [Prompt commitment; fees.] The officer having the execution of the final sentence of a court, magistrate, or mayor, shall cause the convict to be conveyed to the workhouse as soon as practicable after the sentence is pronounced, and all officers shall be paid the fees therefor allowed by law for similar services in other cases. Such fees shall be paid, when the sentence is by the court, from the county treasury, and when by the magistrate, from the township treasury. [R. S. Sec. 2101; 66 v. 196, § 277.]

Sec. 4133. [Discharge and record thereof.] An officer vested by statute with authority to manage a workhouse, may discharge, for good and sufficient cause, a person committed thereto.[1] A record of all such discharges shall be kept and reported to the council, in the annual report of the officer, with a brief statement of the reasons therefor. [R. S. Sec. 2102; 97 v. 488; 66 v. 196.]

(1) **Power to discharge.**— "Good and sufficient cause" must be construed to mean a cause which arises from facts and circumstances which supervene the commitment or did not enter into the conviction or sentence. Such discharge must be an act of humanity as distinguished from a pardon. Jiha v. Barry, 16 Dec. 33; 3 N. P. (N. S.) 65 (aff'd, Circuit Court without report).

The power to discharge is only in case sentence was imposed by the municipal court. *Ib.*

Sec. 4134. [Parole of inmates.] Such officer also may establish rules and regulations under which, and specify the conditions on which, a prisoner may be allowed to go upon parole outside of the buildings and enclosures. While on parole such person shall remain in the legal custody and under the control of the officer, and subject at any time to be taken back within the enclosure of the institution. Full power to enforce the rules, regulations and conditions, and to retake and reimprison any convict so upon parole, is hereby conferred upon such officer, whose written order shall be sufficient warrant for all officers named therein to authorize them to return to actual custody any conditionally released or paroled

prisoner. All such officers shall execute such order the same as ordinary criminal process. [R. S. Sec. 2102; 97 v. 488; 66 v. 196.]

Sec. 4135. [Violation of parole.] Such officer may employ or authorize any person or persons to see that the conditions of a parole are not violated, and in case of violation to return to the workhouse any prisoner so violating his parole, and the time between the violation of the conditions of such parole, or conditional release by whatever name, as entered by order of the officer on the records of the workhouse, and the reimprisonment or return of the prisoner, shall not be counted as any part or portion of time served under his sentence. [R. S. Sec. 2102; 97 v. 488; 66 v. 196.]

Sec. 4136. [Return of paroled to custody.] Any prisoner at large upon parole who fails to return to the actual custody of the workhouse as specified as one of the conditions of his parole, or commits a fresh crime and is convicted thereof, shall be, on the order of the officer, treated as an escaped prisoner and subject to the penalties named in section twelve thousand eight hundred and forty. But no parole shall be granted by any such officer without previous notice thereof to the trial judge. [R. S. Sec. 2102; 97 v. 488; 66 v. 196.]

Sec. 4137. [Officers to have police powers.] The superintendent, assistant superintendent, and each guard of the workhouse shall have such powers of policemen as may be necessary for the proper performance of the duties of his position.[1] [R. S. Sec. 2105; 66 v. 196, § 281.]

(1) Workhouse guards have such powers of policemen as may be necessary for performance of their duties, and while in discharge of their duties are performing service in aid of enforcement of law. Bell v. Cincinnati, 80 O. S. 1.

Sec. 4138. [Infants received where there is no house of refuge.] The council of a corporation owning a workhouse, but not owning a house of refuge and correction, may provide for receiving infants into such workhouse, in the manner herein prescribed for receiving infants into houses of refuge.[1]

The director of the workhouse may make such rules and regulations in regard to the admission of infants, and their management as are provided in such houses of refuge. [R. S. Sec. 2106; 66 v. 196, § 282.]

(1) See § 4097, *et seq., ante.*

Sec. 4139. [Commissioners may unite with city erecting workhouse.] The commissioners of a county may unite with any municipality located in such county in the acquirement or erection, management and maintenance of a workhouse for the joint use of such county and municipality, upon such terms as they may agree, and the commissioners may levy and collect the necessary funds therefor from the taxable property of the county. [R. S. Sec. 2107; 97 v. 448; 81 v. 129; 68 v. 114.]

Sec. 4139-1. [County may withdraw from support and maintenance of joint workhouse; application of fund in case of sale.] That in any county wherein there has been heretofore constructed and maintained a joint city and county workhouse, either the municipality or the county be and they are hereby authorized and empowered to withdraw therefrom, and either such municipality or such county may decline to further participate in the expense of maintaining such institution, and either such municipality or such county may sell, in accordance with the sections of the General Code in such cases made and provided, its interest in such joint institutions; and in the event of a sale thereof by such municipality, the proceeds thereof shall be used in the payment of such indebtedness as may have been incurred in behalf of such municipality in the management, control and operation of such workhouse, and the balance thereof, if any remaining, shall be placed in the general fund of such municipality. In the event of such sale by any county, the proceeds of such sale shall be used in the payment of such indebtedness as may have been incurred in behalf of such county in the management, control, and operation of such workhouse, and the balance thereof, if any remaining, shall be placed in the general fund of such county. [108 v. 1232.]

Sec. 4140. [Powers of joint board.] In cities, such workhouse shall be managed and controlled by a joint board composed of the county commissioners and the board of control of the city, and in villages by the county commissioners and the board of trustees of public affairs. Such joint board shall have all the powers and duties in the management, control and maintenance of such workhouse as are conferred upon the director of public safety in cities, and in addition thereto the joint board may construct sewers for such workhouse and pay therefor from funds raised by taxation for the maintenance of such institution. The board may lease or purchase suitable property and buildings for a workhouse, or real estate, for the purpose of erecting and maintaining a workhouse thereon, but it shall not expend more than ten thousand dollars for any such purpose unless the amount be approved by a majority of the voters of the county, exclusive of the municipality voting at a general election. [101 v. 240; R. S. Sec. 2107; 97 v. 448; 81 v. 129; 68 v. 114.]

Sec. 4141. [City or district workhouse may receive persons sentenced from other counties.] Any city or district having a workhouse, may receive as inmates thereof persons sentenced or committed thereto, as provided by law, from counties other than the one in which such workhouse is situated, upon such terms and during such length of time as agreed upon by the commissioners of such counties, or by the council of such municipality, and the council of the city, or the board of the district workhouse, or other authority having the management and control of such workhouse. Convicts so received shall in all respects be and remain under the control of such director or board of workhouse directors, and subject to the rules, regulations and discipline of such workhouse, the same as other convicts therein detained.[1] [110 v. 12, 13; R. S. Sec. 2107a; 80 v. 220.]

(1) Constable cannot commit to such workhouse, prisoner found guilty of violating a state law, unless sentence so provides. Young v. State, 11 C. C. (N. S.) 466, 31 C. C. 1.

Expense of burial of inmate. See Op. Atty. Gen. (1922), p. 60.

Sec. 4142. [Commissioners of counties may unite in erecting a workhouse; submitted to electors.] The commissioners of any counties may unite in the erection, management and maintenance of a workhouse for the joint use of such counties, but before such workhouse can be established the question of the establishment thereof shall be first submitted to the qualified electors of each such county at a general election and a majority of the qualified electors voting upon the proposition in each county shall have voted in favor thereof. Notice of the submission of the question of building a workhouse shall be published for four weeks prior to such election in a newspaper of general circulation in each county interested. [R. S. Sec. 2107a; 80 v. 81.]

Sec. 4143. [Board of directors.] The construction, management and control of a workhouse established under the preceding section, and the maintenance and care of the convicts therein, shall be vested in a board of directors, who shall be called the board of workhouse directors, and shall be composed of two persons from each county composing the district, who are electors of the county from which they are appointed, and are free-holders therein, to be appointed by the board of county commissioners of such county who shall belong to different political parties, one of whom shall hold his office for the term of six years, and one for the term of three years. At the first meeting in May, and annually thereafter, the board shall elect a president, and appoint a secretary, who shall make a complete record of all proceedings, and such other officers as may be necessary, and fix the compensation for their services. The board of directors shall not be entitled to any compensation for their services, but shall have paid all legitimate expenses connected with their duties. [R. S. Sec. 2107b; 90 v. 193; 80 v. 81.]

Sec. 4144. [Board to determine location and estimate of cost.] When a board of workhouse directors have complied with the requirements of the preceding section, they shall proceed to determine the location of the workhouse, and make an estimate of the cost thereof, including the cost of purchas-

ing grounds for location, which, together with all other transactions of the board, shall be recorded by the secretary in a book to be kept for that purpose, which record shall be approved by the board and countersigned by the president, and shall be open at all times to the inspection of any resident of the district. [R. S. Sec. 2107c; 80 v. 82.]

Sec. 4145. [Certificate of estimates to commissioners.] After the selection of a location and the approval of estimates as to the cost of purchasing a site and the construction of necessary buildings and appliances for the workhouse, the board shall certify over the seal of the president and secretary, to each of the boards of county commissioners within the district, the full amount of the estimated cost of location, construction, and maintenance of the workhouse for one year from the first regular meeting in May next succeeding this certification. [R. S. Sec. 2107c; 80 v. 82.]

Sec. 4146. [Levy therefor; bonds may be issued.] Thereupon each board of county commissioners shall levy upon the general duplicate of the county in which they are commissioners, a tax equal to such county's proportion of the entire estimated cost, in the proportion of such county's valuation in the general duplicate to the aggregate valuation of all the counties joining in the formation of the board and district. After the levies are made by each of the county boards of commissioners, each of such boards may anticipate the levies by the issuing of bonds, as provided for the purchase of a site for a courthouse. [R. S. Sec. 2107c; 80 v. 82.]

Sec. 4147. [How money shall be distributed.] The avails arising from the sale of the bonds shall be paid to the treasurer of the board of workhouse directors, after the treasurer has filed with the board a bond, approved by the board, in double the amount of the estimated expense of construction and maintenance of the workhouse. All payments for construction, maintenance, or any other purpose of expense, whatever, shall be paid by the treasurer, when such bills have been approved by a majority of the board at any regular or adjourned meeting, and when a voucher therefor is issued by

the secretary and countersigned by the president of the board. [R. S. Sec. 2107c; 80 v. 82.]

Sec. 4148. [How cost of maintenance provided.] The cost of maintaining a workhouse so established over and above the proceeds arising from the sale of the products thereof shall be paid by each of the counties comprising the district, in proportion to the number of inmates furnished such workhouse by each county, to the aggregate number furnished by all, and such expense shall be paid quarterly by each of the boards of county commissioners, upon the certificate of the secretary of the board of workhouse directors, approved by the board and countersigned by the president. [R. S. Sec. 2107c; 80 v. 82.]

Sec. 4149. [Levy of taxes therefor.] For such maintenance, such boards of county commissioners may levy a tax upon the general duplicate of the county, under the provisions of law authorizing levies for county purposes, such a sum as may be necessary, but not to exceed one-tenth of one mill. [R. S. Sec. 2107c; 80 v. 81.]

Sec. 4150. [Directors may enlarge buildings or grounds; may admit other counties.] The board of workhouse directors may enlarge or improve the buildings, shops or grounds from any surplus that may arise from sale of the products or from the levy for maintenance made by the counties forming the district, but no levy for maintenance shall be made when it has not been necessary to use more than one-half of the avails of the levy of the year preceding. Any surplus arising from the carrying on of the district workhouse shall be returned to the general fund of each of the counties comprising the district, in the proportion to the number of inmates furnished by each of such counties to the whole number furnished by the district for the current year. The directors may receive any other county into the district upon such terms and conditions as the board may determine, and when a county is thus admitted it shall be entitled to a member of the board as herein provided. [R. S. Sec. 2107d; 80 v. 83.]

Sec. 4151. [Who may be sentenced to such workhouse.] When a person has been convicted of a misdemeanor by a court or magistrate in a district in which there is a workhouse, such court or magistrate may sentence such person to such workhouse for a period not exceeding the maximum period of confinement in the jail of the county provided by statute for such offenses. In all such cases the court or magistrate may further order that such person stand committed to such workhouse until the costs of prosecution are paid, or he be discharged as herein provided. In all cases where a fine may be imposed in punishment in whole or in part for an offense and the court or magistrate could order that such person stand committed to the jail of the county until such fine and the costs of prosecution are paid, the court or magistrate may order that such person stand committed to the workhouse until such fine and costs are paid, or until he be discharged at the rate of sixty cents per day[1] for each day of confinement, or be otherwise legally discharged. [R. S. Sec. 2107e; 80 v. 83.]

(1) **Payment of fine.**—The provision of this section for sentencing a prisoner to the workhouse "until he be discharged at the rate of sixty cents per day for each day of confinement" means that the prisoner pays his fine at the rate of sixty cents a day by his labor. Salen v. State, ex rel., 18 C. C. (N. S.), 538.

Sec. 4152. [Proceeding on such sentence.] When a person is sentenced to such workhouse by the court of common pleas, the clerk shall make and deliver to the sheriff a certified copy of the docket and journal entries showing the crime charged and the sentence of the court, which shall be delivered by the sheriff to the proper officer in charge of the workhouse, and shall be his warrant for detaining such person in custody therein. In cases of such convictions by any other court or magistrate,[1] such court or magistrate shall make a certified transcript of the docket in the case, which shall in like manner be delivered to the marshal or constable, or sheriff by the court or magistrate, which shall be delivered by the officer to the proper officer in charge of the workhouse, and shall be his warrant for detaining the person in custody therein. In all cases of sentence to such workhouse, the person so

sentenced may be confined in the jail of the county for such period as may be reasonably necessary for the officer to procure the papers and make arrangements to transport him to the workhouse. [R. S. Sec. 2107e; 80 v. 83.]

(1) **Prisoners coming from other counties.**—When persons from other counties are committed to a workhouse, a full transcript of the docket of the magistrate committing should accompany the *mittimus*. Edis v. Butler, 8 N. P. 183 (aff'd, 68 O. S. 645).

But the *mittimus* is not necessary when officer who brings prisoner also brings the transcript. Anonymous, 7 N. P. 554.

RELIGIOUS SERVICES.

Sec. 4153. [Religious services in prison or workhouses.] Each administrative board or other authority in the state having charge or control of a city prison or workhouse shall provide for holding religious services therein on each Sunday, and may employ a clergyman or religious organization to conduct such services. Any expense so incurred by such board or authority shall be paid from the general fund of the city. [99 v. 225, § 3.]

CHAPTER 9.

CEMETERIES.

Sec. 4154. [Council to provide cemeteries.] The council may provide places for the interment of the dead outside of the corporate limits, and the police powers of the corporation shall extend to those places. [R. S. Sec. 2516; 66 v. 210, § 361.]

Sec. 4155. [Powers of council as to cemeteries.][1] The council of a municipality owning a public burial ground or cemetery, whether within or without the corporation, may pass and provide for the enforcement of ordinances necessary to carry into effect the provisions of this chapter, and regulate such public burial grounds and cemeteries, the improvement thereof, the burial of the dead therein, define the tenure and conditions on which lots therein shall be held and protect such burial grounds and cemeteries and all fixtures thereon. [R. S. Sec. 2548; 70 v. 274, § 392.]

(1) **Municipal power and control.**—Power to provide and regulate, § 3622, *ante.*

Appropriation of property for, § 3677, *ante.*

Bonds for, § 3939, *ante.*

Management, in cities, § 4326, *post;* in villages, § 4356, *post.*

Sec. 4156. [Power to sell portions of cemetery.] The council may sell any portion of the cemetery grounds not used for the burial of the dead, which are unsuitable for burial purposes, and purchase with the proceeds thereof other suitable lands lying contiguous thereto. No such sale shall be made until the council shall have contracted for an equal or greater quantity of land suitable for burial purposes. For the purpose of paying indebtedness, arising out of the purchase or improvement of such cemetery, the director of public service in cities, or the cemetery trustees in villages, with the consent of the council of the corporation, may sell or mortgage such portion of the real estate, belonging to the

cemetery, as has not been used for burial purposes, or as may not be, in his opinion, needed for such purposes, and the money arising from the sale or mortgage, shall be applied by him to the payment of the indebtedness, and to no other purpose, except upon such sale, if there is a surplus after the payment of the indebtedness, the surplus money shall be used by the director in the improvement of the cemetery grounds, and for no other purpose. [R. S. Sec. 2549; 70 v. 274, § 392; 64 v. 110.]

Sec. 4157. [Burials may be prohibited within corporate limits.][1] Council may prohibit the interment of the dead within the corporation limits, and, for the purpose of making such prohibition effective, may not only impose proper fines and penalties, but shall also have power to cause any body, interred contrary thereto, to be taken up and buried without the limits of the corporation. [R. S. Sec. 2550; 66 v. 214, § 393.]

(1) Private cemetery within city limits—steps to establish same. Op. Atty. Gen. (1916), p. 1493.

Sec. 4158. [Bonds of director to secure cemetery funds.] Council may require the officer authorized to receive and disburse moneys arising from the sale of lots, or otherwise, and to invest, manage, and control the property and funds in his hands, to enter into a bond to the corporation with sufficient sureties, conditioned for the faithful performance of his duty, in that behalf, and account for all moneys by him received, and pay over to his successor all moneys or other property unexpended. Such bond shall be filed in the office of the corporation clerk. [R. S. Sec. 2552; 84 v. 84; 66 v. 214, § 395.]

Sec. 4159. [Conveyance of lands abandoned for cemetery purposes.] When a municipality holds land within its limits which has been used as a cemetery or burial ground, and in which interments have been prohibited by such corporation, and it has been decided to remove the bodies interred therein, the council may sell or otherwise dispose thereof, but such sale or transfer shall not operate to give the purchaser pos-

session until the bodies therein interred have been removed, and all monuments and tombstones are removed and reerected at the place of reinterment of the remains of each person, respectively. [R. S. Sec. 2555; 68 v. 124, § 1.]

CEMETERIES FOR CITIES.

Sec. 4160. [Title shall be vested in corporation.][1] The title to, and right of possession of, public graveyards, and burial grounds, located within a city, and set apart and dedicated as public graveyards or burial grounds, and grounds used as such by the public but not dedicated, except those owned or under the care of a religious or benevolent society, or an incorporated company or association, are hereby vested in the corporation where such graveyard or burial ground is located. [R. S. Sec. 2517; 66 v. 210, § 362.]

(1) Money received for cemetery purposes—how held and disposed of. Op. Atty. Gen. (1918), p. 219.

Sec. 4161. [Duties of director of public service.] The director of public service shall take possession and charge, and have the entire management, control, and regulation of public graveyards, burial grounds, and cemeteries located in or belonging to the corporation, subject to its ordinances.[1] When he deems it necessary, he shall direct the laying them out into lots, avenues, walks, and paths, or other subdivisions, which lots shall be numbered and the avenues named. A plat thereof shall be made so as to exhibit a fair and distinct outline of the grounds, and kept in the office of the auditor of the corporation for the use of the public. [R. S. Sec. 2521; 66 v. 211, § 366.]

(1) **Management.**—See further § 4326.

Sec. 4162. [Powers of the director.] The director shall direct all the improvements and embellishments of the grounds and lots, protect and preserve them,[1] and, subject to the approval of the council, appoint necessary superintendents, employes, and agents, determine their term of office and the amount of their compensation. [R. S. Sec. 2522; 66 v. 211, § 367.]

(1) **Bids for work.**—Under former § 2522 it was held not necessary that bids be advertised for and received for the work and materials used, in the improvements and embellishments here authorized. See Walsh v. Columbus, 36 O. S. 169.

Municipal liability.—A city is liable for injuries to an employee while engaged in improving a vault owned by the city in its cemetery, such injury occurring through the negligence of the superintendent of the cemetery and the board having control and management of it. Toledo v. Cone, 41 O. S. 149.

Approval by council of appointment by director of public service. See Op. Atty. Gen. (1921), p. 141.

Sec. 4163. [May institute suits.] When necessary, the director shall institute suits in the name of the corporation to recover the possession of such grounds, remove trespassers therefrom, and recover damages for injuries thereto, or to any tombstone or monument therein. He shall see that all laws and ordinances passed for the protection of public burial grounds and cemeteries, and the burial of the dead, are enforced. [R. S. Sec. 2523; 66 v. 211, § 368.]

Sec. 4164. [By-laws and regulations.] The director of public service shall make by-laws and regulations, not inconsistent with the ordinances of the corporation and the constitution and laws of the state, as he deems useful and necessary for the management and protection of the burial grounds and cemeteries under his control, and the burial of the dead therein, which shall have the same validity as the ordinances of the corporation. He shall perform such other duties pertaining to the office as the council by ordinance prescribe. [R. S. Sec. 2524; 66 v. 211, § 369.]

Sec. 4165. [Price of lots and terms of payment.] The director shall determine the size and price of lots, the terms of payment therefor, and shall give to each purchaser a receipt, showing the amount paid and a pertinent description of the lot or lots sold. Upon producing such receipt to the proper officer, the purchaser shall be entitled to a deed for the lot or lots described therein. [R. S. Sec. 2525; 66 v. 211, § 370.]

Sec. 4166. [Charge for cemetery lots limited.][1] No more shall be charged for lots than is necessary to reimburse the corporation for the expense of lands purchased or appro-

priated for cemetery purposes, and to keep in order and embellish the grounds, and provision shall be made for the interment in such cemetery of persons buried at the expense of the corporation. [R. S. Sec. 2526; 66 v. 211, § 371.]

(1) Director of Public Service has power to fix price for burial lots. Op. Atty. Gen. (1912), p. 1664.

Sec. 4167. [Sale of lots; laying off and embellishing of grounds; donations.] The director of public service shall have entire charge and control of receipts from the sale of lots, and of the laying off and embellishing the grounds. He may receive donations[1] by bequest, devise, or deed of gift, or otherwise, or money, or other property, the principal or interest of which is to be used for the enlargement, improvement, embellishment, or care of the cemetery grounds generally, or for any particular part or parts, lot or lots therein, as the donor directs, or as the director may from time to time determine if no direction is given. He shall sell lots, receive payment therefor, direct the improvements, and make the expenditures, under such rules and orders as he prescribes, and invest, manage, and control property received by donations and surplus funds in his hands from any source whatever. [R. S. Sec. 2527; 84 v. 84; 66 v. 211, § 372.]

(1) Money received for cemetery purposes; how held and disposed of. Op. Atty. Gen. (1918), p. 219.

Sec. 4168. [City may accept and maintain permanent fund for care of lots in cemeteries.] In the by-laws and regulations, the director shall declare the amount of money he will accept by agreement, gift, devise, bequest or otherwise and hold as a permanent fund of the cemetery. He shall pledge the faith and credit of the city for the perpetual care of the lot or lots designated, using only the interest or income of the money. On receipt of the sum of money they designate, the director shall issue therefor a written receipt and acknowledgment thereof, signed by him, and bind the faith and credit of the corporation to forever hold such money as a permanent fund, and to provide perpetual care of the lot or lots therein named, for the use, income or interest of such

money. He shall enter on the minutes of his proceedings full detail of the obligation, and shall enter the receipt and incomes of the money and the expenditure thereof in detail of his books of accounts, keeping each case separately. [R. S. Sec. 2527a; 95 v. 543.]

Sec. 4169. [Funds shall be turned over to council.] The director shall turn over to the council property on hand or held by him as a permanent fund, for such purposes under his control, or such money as may thereafter come to him for such purpose, rendering a full statement thereof, by whom, when, and for what purpose paid. The council shall acknowledge receipt thereof in writing to the director signed by its clerk. By resolution duly passed and entered on the minutes of its proceedings, the council shall pledge the faith and credit of the corporation to forever hold such money as a permanent fund, and pay in semi-annual payments, to the director as interest on the funds, sufficient to provide perpetual care of the lot and lots as agreed by the director. The council and its successors shall invest and keep invested such funds in interest bearing debts of the city, if any, and if no such debts are owing by the city, in safe interest bearing bonds, or stocks for the benefit of such cemetery funds, that will bear as great an income as possible, and all such money and the income thereof shall be exempt from taxation, the same as other cemetery property. [R. S. Sec. 2527a; 95 v. 543.]

Sec. 4170. [Clerk; quarterly report.] The director shall appoint a clerk, and keep accurate minutes of all his proceedings, and report quarterly to the council all the moneys received and disbursed by him in the management and control of the cemetery. [R. S. Sec. 2528; 66 v. 211, § 373.]

Sec. 4171. [Annual report to council.] On the first Monday of January, each year, or as soon thereafter as is practicable, the director shall report in writing to the council, the number of lots sold, to whom sold, and the amount received therefor, during the year preceding, and a detailed statement

of the expenditures during the same period, showing the time and purpose of each payment, and to whom made. [R. S. Sec. 2529; 66 v. 212, § 374.]

Sec. 4172. [Statement as to funds.] The report shall also contain a pertinent statement whether the funds, if any on hand, are invested, and the character of the securities therefor, and such other matters as the director deems expedient or the council requires. [R. S. Sec. 2530; 66 v. 212, § 375.]

Sec. 4173. [Enlargement of grounds.] When, in his judgment, an enlargement of any burial or cemetery grounds has become necessary, or grounds for additional cemeteries should be provided, the director shall report the fact to the council, and recommend such action as he deems most expedient. [R. S. Sec. 2531; 66 v. 212, § 376.]

CEMETERIES FOR VILLAGES.

Sec. 4174. [Title shall be vested in corporation.] The title to, and right of possession of public graveyards and burial grounds, located within a village and set apart and dedicated as public graveyards or burial grounds, grounds used as such by the public, but not dedicated, except those owned or under the care of a religious or benevolent society, or an incorporated company or association, are hereby vested in the corporation where such graveyard or burial ground is located. [R. S. Sec. 2517; 66 v. 210, § 362.]

Sec. 4175. [Board of cemetery trustees; appointment; term.] The mayor of a village owning a public burying ground, or cemetery, may appoint a board to be known as the board of cemetery trustees. Such board shall consist of three members, whose term of office shall be three years, but the term of office of a board first appointed shall extend until the first municipal election thereafter and the officers chosen at such election are duly qualified and placed in office. Thereafter the mayor shall appoint a board of three trustees as follows: One for a term of six years, one for a term of four years, and one for a term of two years. Biennially thereafter

after the municipal election has been held and the newly elected officers have been duly qualified and placed in office, the mayor shall at the first meeting night of the council within his village appoint one member on the board of cemetery trustees whose term of office shall be for six years, or until his successor in office has been regularly appointed and qualified. [R. S. Sec. 2518; 97 v. 538; 66 v. 210.]

Sec. 4176. [Vacancies.] In case of vacancy in the board of cemetery trustees in any village, by reason of death, disability, or removal from office of a member, the mayor shall appoint a member to fill such vacancy, and the person so appointed shall serve out the unexpired term or until his successor is regularly appointed and qualified. Appointments to fill a vacancy shall be made at the first meeting night of the council after it has been brought to the attention of the mayor and council. [R. S. Sec. 2518; 97 v. 538; 66 v. 210.]

Sec. 4177. [Removals.] The mayor of a village where a board of cemetery trustees is so appointed may remove from office any member of such board for misconduct, neglect of duty or malfeasance in office. [R. S. Sec. 2518; 97 v. 538.]

Sec. 4178. [Organization of trustees for village cemeteries.] The board of cemetery trustees shall have the powers and perform the duties prescribed in this chapter for the director of public service. Such trustees shall organize in accordance with the provisions in this chapter for the organization of trustees of union cemeteries. [R. S. Sec. 2518; 97 v. 538.]

Sec. 4179. [When property in village supporting cemetery exempt from tax.] All property within a village, in which there is a cemetery established and maintained by such village, shall be exempt from taxes for the purchase or maintenance of cemeteries, or for the purchase of a hearse, or for the construction of a vault under the superintendence of the township trustees, and for the use of the township exclusive of the village. [R. S. Sec. 2554; 77 v. 117; 66 v. 74.]

Sec. 4180. [Villages may tax for hearse or vault on vote of electors.] The council of a village may levy a tax in such amount as it determines, either to purchase a hearse or to construct a vault for the dead, for the use of the village. The question of levying such tax, for either or both purposes, and the amount asked therefor, shall be separately submitted to the electors of the corporation, at a general election, twenty days' notice thereof having been previously given, by posting in at least three public places in the village. The notice shall state specifically the amount to be raised, and for what purpose. If a majority of all the votes cast at the election is in favor of either or both propositions, they shall be considered adopted, and the tax herein provided for authorized. The hearse and vault shall be under the control of the trustees of cemeteries of the village, where there is such board, otherwise under the control of the council, or person appointed by it. [R. S. Sec. 2556; 75 v. 46.]

Sec. 4181. [Form of ballot.] The electors voting at such election shall have placed on their ballots the words, "Tax for Hearse—Yes", or "Tax for Hearse—No", and upon the same ballot, "Tax for Vault—Yes", or "Tax for Vault—No", and may vote for one proposition and against the other, or for or against both. [R. S. Sec. 2557; 75 v. 46.]

Sec. 4182. [Council may borrow money in anticipation of collection of tax.] When a tax for erecting a vault has been voted in a village, the council, in anticipation thereof may issue the bonds in the village in an aggregate amount not to exceed the tax voted, of denominations not less than fifty dollars, bearing interest at a rate not exceeding six per cent, payable not later than two years from the date thereof, and signed by the mayor and clerk of the village. Such bonds shall be paid from the tax so voted, and the proceeds of the sale thereof shall be used solely for the construction of such vault. [R. S. Sec. 2558; 76 v. 43.]

UNION CEMETERIES.

Sec. 4183. [Union of municipalities and townships for cemetery purposes.] The councils of two or more municipal corporations, or of such corporation or corporations, and the trustees of a township or townships, when conveniently located for that purpose, may unite in the establishment and management of a cemetery, by the purchase or appropriation of land therefor, not exceeding in extent one hundred acres, to be paid for as hereinafter provided. [R. S. Sec. 2532; 68 v. 73, § 1; 66 v. 212, § 377.]

Sec. 4184. [Cemetery trustees, biennial election of.] Repealed, 103 v. 272.

Sec. 4185. [Organization of union board of trustees.] Repealed, 103 v. 272.

Sec. 4186. [How appropriations shall be made.] When an appropriation of land for such purpose becomes necessary, it shall be made by the municipal corporation, or if there be more than one such corporation, then by the one having the largest number of inhabitants at the last federal census, which corporation, in making the appropriation, shall act for itself and any other corporation or township uniting with it, and the proceedings therefor shall be the same as required in this title where the appropriation is to be made for the use of the corporation alone. [R. S. Sec. 2534; 66 v. 212, § 378.]

Sec. 4187. [Titles, how vested.] The title to such cemetery grounds, whether by purchase or otherwise, shall vest in and be held by the corporation making the appropriation, in trust for the use of its inhabitants and the inhabitants of the other corporations or townships in common, and provision shall be made for the interment in such cemetery of all persons buried at the expense of the corporation or townships. [R. S. Sec. 2535; 66 v. 212, § 379.]

Sec. 4188. [Expense, how proportioned.] The expense of the purchase, or of the proceedings in case of appropriation,

and the damages awarded, or both, shall be borne by the corporations and townships in proportion to the property of each on the duplicate for taxation. The amount of bonds issued by each in any case, for such cemetery purposes, shall be in the same proportion, and the percentage of taxation for all such cemetery purposes shall be the same in the corporations and townships, but moneys in the hands of the trustees of the cemetery, derived from any source, not needed to keep in order or embellish the grounds, by resolution of the council and trustees of the municipalities and townships interested, may be applied to the expenses of purchase, or appropriation and damages awarded, or both, in securing additional lands for the cemetery. [R. S. Sec. 2536; 99 v. 70; 66 v. 212, § 380.]

Sec. 4189. [Control and management.][1] The cemetery so owned in common, shall be under the control and management of the trustees of the township or townships and the council of the municipal corporation or corporations and their authority over it and their duties in relation thereto shall be the same as where the cemetery is the exclusive property of a single corporation. [103 v. 272; R. S. Sec. 2537; 66 v. 212, § 381.]

(1) **Management of cemetery.**— When jointly owned and maintained by two municipalities or by municipality and township; how managed. Op. Atty. Gen. (1915), pp. 1506, 2008.

Sec. 4190. [Power to enforce ordinances.] The council of a municipality so owning a cemetery in common with any other municipality, or township, may pass and enforce all ordinances necessary to carry into effect the provisions herein contained, and such as are deemed necessary for the preservation and regulation of the cemetery and the protection thereof, and for the punishment of any person violating the ordinances, rules and regulations, relating to the cemetery. The mayor and police officers of the corporation shall have full and complete jurisdiction and authority to enforce all ordinances, rules, and regulations, as if the cemetery grounds were located within or owned exclusively by the corporation. [R. S. Sec. 2538; 66 v. 212, § 382.]

Sec. 4191. [Discrimination forbidden.] No distinction or discrimination of any kind shall be made by the trustees of the cemetery owned in common, in favor of one corporation against another, or in favor of a corporation against a township, or in favor of a township against a corporation, but the affairs of the cemetery shall in all respects be managed as though it were owned and governed in the interests of the corporation or township alone. [R. S. Sec. 2539; 66 v. 213, § 383.]

Sec. 4192. [Joint meeting of council and trustees.] In case of a union for cemetery purposes between a municipal corporation and a township, the council of the corporation and the trustees of the township shall have a joint meeting at the council-chamber of the corporation, on the day of the first regular meeting of the council in the month of May of each year, for the purpose of determining the rate of tax to be levied upon the taxable property of the corporation and the township for the purposes herein required. Upon the passage of a joint resolution by a majority of the members of the council and the trustees, fixing the rate of taxation, the clerk of the corporation shall certify such rate to the auditor of the county for assessment and collection. If there is more than one municipal corporation or township united for such purposes, the councils and trustees of the townships shall become such joint body with the same powers as if there had been one such corporation and township, and the clerk of the corporation containing the greatest number of inhabitants shall certify to the auditor as above provided, the rate of taxation. [R. S. Sec. 2540; 66 v. 213, § 384.]

Sec. 4193. [Joint meetings to make rules.] The trustees of such township or townships, or the council or councils of such municipal corporation or corporations may at any time call a joint meeting of the council or councils and the trustees of the township or townships, on a reasonable notice given by either, for the purpose of making joint rules and regulations for the government of the cemetery, or changing them, and making such orders as may be found necessary for

the application of moneys arising from the sale of lots, taxes, or otherwise. [R. S. Sec. 2541; 66 v. 213, § 385.]

Sec. 4193-1. [Election of cemetery trustees; qualifications of members; powers and duties; vacancies.] At any such joint meeting or at the joint meeting provided for by section 4192 of the General Code, by a majority vote of all present counting council members and trustees, such meeting may elect a board of cemetery trustees consisting of three members, of which one or more must be a member of each of the separate boards of township trustees and municipal councils comprised in the union cemetery association represented by such joint meeting. Such board of cemetery trustees so elected, shall have all the powers and perform all the duties exercised and performed by directors of public service of municipalities under sections 4161 and 4168 inclusive of the General Code, and such board of cemetery trustees shall together with other powers herein granted have the power to create a permanent endowment fund for the express purpose of keeping such cemetery clean and in good order and may add to the price regularly charged for lots therein a sum for said purpose or may receive gifts for said purpose or may enter into separate agreements with the purchasers of such lots whereby an agreed part of the purchase price of said lot or lots shall be and constitute a permanent fund, or may receive individual gifts for said fund, the income thereof to be used for the upkeep and care of such lot or lots, and when any such fund or funds shall have been received or created the same shall be a permanent fund for such use and the income therefrom shall be used for the said purpose and for no other purpose and the principal sum shall be kept and invested under the same terms and conditions fixed by law for the investment of the funds of a minor by his guardian. At the first election of such board of cemetery trustees, one shall be chosen for one year, one for two years and one for three years, together with such part of a year as may intervene between the time of such election and the first day of January next thereafter. Yearly thereafter at the joint meeting held in May one trustee shall be chosen for three years commencing on the first day of January next there-

after. Any regular or regularly called joint meeting of the township trustees and municipal council may fill vacancies occurring on the board of cemetery trustees by a majority vote of the members present, such election to be for the unexpired term.

Any member of such board of county trustees may be removed by such joint meeting on a two-thirds vote of all members entitled to sit in such joint meeting, for misfeasance or malfeasance in office, any gross neglect of duty or gross immorality, but no member shall be so removed until he shall have had at least ten days' notice in writing, together with a copy of the charges against him, and shall have had opportunity to appear and defend himself either in person or by counsel. [108 v. 1179; 106 v. 345.]

Sec. 4194. [Vote and record thereof.] In joint meetings, each member of the councils and each of the trustees shall have one vote in determining all questions. The proceedings of joint meetings shall be recorded by the clerk of the corporation having the greatest number of inhabitants. [R. S. Sec. 2542; 66 v. 213, § 386.]

Sec. 4195. [Adjoining townships may be admitted to participation.] A township adjoining one in which such union cemetery is established may, by the consent of the trustees of the latter township and of the council or councils of the corporation, be admitted to an equal participation with the inhabitants thereof in the rights and privileges in the cemetery, upon such terms as may be mutually agreed upon, but the title and control of the cemetery shall continue vested in the corporation. [R. S. Sec. 2543; 80 v. 6; 66 v. 214, § 390.]

Sec. 4196. [Municipal corporation or township may withdraw.] A municipal corporation or township united with another municipal corporation or township, or both, in the establishment or control of a union cemetery, may by a resolution of the council of the corporation or of the trustees of the township and with the consent of the council of the remaining corporation and trustees of the remaining township or townships, withdraw from the management and control of

such cemetery, and relinquish the interest of such corporation or township therein, and thereupon the cemetery shall be under the management and control of the remaining corporation and township, or corporations and townships. [R. S. Sec. 2543; 80 v. 6; 66 v. 214, § 390.]

Sec. 4197. [Public burial ground may be appropriated.] In the establishment of a union cemetery, a municipality and a township may make use of a public burial ground or cemetery ground which may be held by the municipality, or township, and may make use of any land which the municipality, or township, may have acquired by dedication, gift, or devise for burial purposes. [R. S. Sec. 2544; 66 v. 213, § 387.]

Sec. 4198. [Purchase of lands; improvements.] The council of a municipality, and the trustees of a township, may purchase of an incorporated cemetery association the lands, lots, and improvements of such cemetery association remaining unsold, for cemetery purposes, and take a conveyance thereof, but the purchase money in such cases shall be applied to the payment of the legal debts of the association, and to the embellishment and preservation of the land purchased, and such other purposes as the trustees of the cemetery may direct. [R. S. Sec. 2545; 66 v. 213, § 388.]

Sec. 4199. [Municipality or township may transfer cemetery property to cemetery association.] The council of a municipality, and the trustees of a township, may transfer to an incorporated cemetery association, the lands, lots and improvements of a cemetery, owned and controlled by the municipality or township for cemetery purposes. The cemetery association shall assume all legal debts on the cemeteries so transferred. [R. S. Sec. 2545a; 97 v. 165.]

Sec. 4200. [Rights and titles inviolate.] The rights and titles of lot owners, purchased prior to such sale and conveyance, shall not be questioned, and such lot owners shall continue to hold and occupy their lots, under such rules and regulations as shall be adopted for the government and regu-

lation of the cemetery by the authorities making the purchase. [R. S. Sec. 2546; 66 v. 214, § 389.]

Sec. 4201. [Clerk shall record plat of ground.] The clerk of the corporation shall record in a book provided for that purpose, a plat of all grounds for cemetery purposes laid out into avenues, walks, paths, and lots, and he shall execute to the purchasers of lots such conveyances as may be necessary to carry into effect the contracts of sale. The conveyance shall, at the expense of the person receiving it, be recorded in a book to be kept for that purpose, by the clerk of the corporation. [R. S. Sec. 2547; 66 v. 214, § 391.]

APPROACHES.

Sec. 4202. [How secured.] The officers having control and management of a public cemetery, acting under the provisions of this chapter may acquire property, in the judgment of a majority of them, necessary for a better approach thereto. No lot or parcel of land or part thereof upon which a dwelling house is situated shall be so appropriated. Such property may be acquired by gift, purchase, appropriation, or by exchange therefor of property of the cemetery used for an approach thereto and in the judgment of a majority of such officers rendered unnecessary by such new approach. [99 v. 522, § 1.]

Sec. 4203. [Conveyances.] The title to property so acquired shall vest in the township or corporation owning the cemetery. The officers making such exchange shall execute, in the name of the township or corporation, conveyances of the property so exchanged. No property shall be so acquired by purchase or appropriation unless the money necessary to pay for it is in the cemetery fund. No land so acquired may be used for burial purposes nor be subject to statutory restrictions against the appropriation and use of property for cemetery purposes. [99 v. 522, § 1.]

Sec. 4204. [Sale of old approach.] Land belonging to such cemetery used for an approach thereto and in the judgment

of a majority of such officers unnecessary for cemetery purposes may be sold by them at public sale to the highest bidder, after advertisement once a week for five consecutive weeks in a newspaper of general circulation within the county in which the cemetery is situated. Township or cemetery trustees making such sale shall execute in the name of the township or corporation owning the cemetery proper conveyances of the land so sold. [99 v. 522, § 2.]

Sec. 4205. [Appropriation of property.] When such officers deem it necessary to appropriate property for a new and better approach to the cemetery and have passed a resolution declaring the necessity thereof and their intention to make it, they shall make application to the court of common pleas or to a judge thereof in vacation, to the probate court or to the insolvency court in the county in which the property is located, in the manner and the proceedings therefor shall be conducted as prescribed by law for appropriation of property by municipal corporations. [99 v. 523, § 3.]

CHAPTER 10.[1]

MUNICIPAL PAWN DEPARTMENT.

Sec. 4205-1. [Municipal pawn shop; petition; vote; notice of election.] That every city of this state shall have the power to establish, manage, regulate and maintain a municipal pawn department within its corporate limits, to loan money upon personal property and to charge interest for advances made on pawns, and to acquire by purchase, lease or otherwise the necessary lands, buildings, halls or rooms for such purpose and to do everything that pertains to or has any connection with the establishment, management, regulation and maintenance of such department. "But if, within thirty days after the passage of an ordinance establishing such department, there is presented to the city council or filed with its clerk, a written petition signed by fifteen per cent. of the qualified electors of such municipality, to be determined by the highest number of votes cast for the mayor of the municipality at the last preceding municipal election, requesting such ordinance to be submitted to a vote of the electors thereof, the ordinance shall not become operative until it has been so submitted and has received a majority of the votes cast thereon.

The council by resolution shall provide that such vote be taken at the next municipal election, and shall cause a copy of such resolution to be certified to the board of deputy state supervisors of the county in which such municipal corporation is situated, which board shall thereupon prepare the ballots and make all other necessary arrangements for the submission of such question at the time fixed in the resolution. Such election shall be held at the regular place or places of voting in such municipality and shall be conducted, canvassed and certified in the same manner as the election of officers thereof.

Thirty days' notice of such submission shall be given by the mayor of the municipality in two newspapers of opposite politics printed therein, once a week for four consecutive

weeks, stating the object and purpose, and the time and place of holding such election. Those voting in favor of the proposition shall have written or printed on their ballots the words "For the establishment of a municipal pawn department," and those voting against it shall have written or printed on their ballots the words "Against the establishment of a municipal pawn department." [102 v. 65.]

(1) **Chapter number.**—While the section of the act of March 30, 1911, providing for municipal pawn department, (§§ 4205-1 to 4205-21) were renumbered by the Attorney General, and so numbered as to give them a position in Title XII, immediately after the sections relating to cemeteries, no new chapter number or heading was provided. The chapter number and heading above have been supplied by the editor.

Sec. 4205-2. [Pawn fund.] To create a municipal pawn fund out of which all municipal money loans upon personal property to pawners are paid and to receive donations and bequests of money or property for the same, in trust or otherwise. [102 v. 66.]

Sec. 4205-3. [Tax levy.] The council of each city shall for the purpose of creating and maintaining the said municipal pawn fund, have the power to levy and collect a tax not exceeding one-fifth of one mill on each dollar of the taxable property within the municipality, annually, and until said municipal pawn department becomes self-supporting. The municipal pawn fund so created and the moneys in the future from all sources received by said department for the said fund shall be turned over to the city treasurer, who, upon giving bond, as required by the city council, shall be the custodian and disburser of the same as of all other funds and public moneys. But he shall not honor any voucher presented to him for payment from said fund unless the same is properly approved by the head of such municipal pawn department. [102 v. 66.]

Sec. 4205-4. Every municipal pawn department of a city in this state shall be a sub-department of the department of public service and under the general management and supervision of the director of public service. [102 v. 66.]

Sec. 4205-5. [Appointment; removal.] The mayor of every city, where a municipal pawn department is established, shall appoint and have the power to remove the head of such department, who shall be called the superintendent of the municipal pawn department. [102 v. 66.]

Sec. 4205-6. [Assistants.] The director of public service shall have the exclusive right, to appoint as many assistant superintendents, pawn inspectors, clerks and pawn custodians in the municipal pawn department as shall be necessary for the administration of its affairs and shall likewise have sole power to remove or suspend any such assistant superintendent, pawn inspector, clerk and pawn custodian, but in making such appointments and removals he shall be subject to the same limitations which govern him in the appointments and removals of any other appointees of the same grade in the department of public service; and he shall make rules and regulations for the administration of the affairs in the said municipal pawn department. [102 v. 66.]

Sec. 4205-7. [Appraisement; record.] The superintendent of the municipal pawn department shall organize and superintend the whole department and give all the orders and directions to the appointees thereof. The assistant superintendents shall assist the superintendent in all his work as ordered by him and shall perform all his duties and exercise all his powers in case of his absence, disability or disqualification. The pawn inspectors shall examine and appraise every article offered as a pawn. The clerks shall make all the entries in the municipal pawn books and perform all the clerical work in the municipal pawn department. The pawn custodians shall place all pawns accepted by the department in a systematic order, take proper care of them as long as they are in the possession of said department and do the manual work pertaining to and connected with the same. And all the said appointees shall be subject to all the orders and directions of the superintendent and do or perform all the work assigned to them by him and make and keep a record of all their respective work. [102 v. 66.]

Sec. 4205-8. [Civil service; classified service.] The position of the superintendent of the municipal pawn department shall be included in the unclassified service of the civil service mention in section 4479 of the General Code; the classified service referred to in the same section shall comprise all other positions in said sub-department not included in the unclassified service, or as the civil service commission appointed according to section 4478 of the General Code may, by rule, determine.

All applicants for admission into the classified service and all assistant superintendents, pawn inspectors, clerks and pawn custodians, whose positions are included in the classified service in the municipal pawn department, shall be governed by the same laws and regulations, which apply to such other applicants and appointees of the same grade in the department of public service. [102 v. 67.]

Sec. 4205-9. [Term, salaries, bond fixed by ordinance or resolution.] Council shall by ordinance or resolution fix the term of the appointment and the respective salaries and compensation of the superintendent, of the assistant superintendents, pawn inspectors, clerks and pawn custodians in the municipal pawn department, and determine the amount of the bond to be given by each of them, if any be required, and said bond shall be given by such appointees with surety subject to the approval of the mayor of the city. [102 v. 67.]

Sec. 4205-10. [How loans shall be made; loans limited; loss or damage; oath of applicant.] When such municipal pawn department has disposable funds it shall make advances on all goods and chattels offered, embraced within its rules and regulations, in the order in which they are offered; with the exception that it shall discriminate in favor of small loans to the indigent, but in no case shall the amount loaned to any one person exceed the sum of one hundred fifty dollars. It shall loan not to exceed one-half of the appraised value of gold and silver plate and ware and not to exceed one-third of such value, on all other goods and chattels, and shall carry insurance against loss or damage by fire, in a

sum equal to the appraised value of the pledged property. In case of loss or damage by fire said department shall be liable to the pawners thereby affected in an amount not to exceed the appraised value thereof, which value shall be ascertained by the pawn inspector, at the time of making the loan; but before paying anything to the pawner for such loss of or damage to his said pledged property, said department shall after receiving and accepting full payment for such loss or damage from the insurance company, deduct therefrom the principal, interest, and the storage and insurance charges due thereon.

And before making any loan, said department shall inquire about and ascertain from the applicant or applicants for a loan, under oath:

1st. Their full name, age, residence and postoffice address.

2nd. The real ownership of the property offered as a pledge.

3rd. Whether the same is mortgaged or in any way or manner incumbered.

4th. How, from whom, and when it was acquired.

5th. Its purchase price or original value, and make such other inquiry in that behalf, as it may deem fit or necessary.

Said applicants shall sign the inquiry blank after the same is properly filled out and sworn to by them and it shall be filed and recorded in the office of the municipal pawn department. Wilful false swearings in such examination, shall be perjury and punishable as such.

The superintendent and assistant superintendents and the pawn inspectors, in said department shall have the power to administer oaths when they make such inquiries or perform any such duty pertaining to their department. If required by the superintendent or any assistant superintendent of said department, the police department of the city shall assist same in the investigation of such applicant for a loan and of matters pertaining to the property offered by him as a pawn. [102 v. 67.]

Sec. 4205-11. [Rate of interest.] No municipal pawn department in this state shall charge more than six per cent. per annum to any pawner as compensation for the money ad-

vanced upon such pawn, nor more than four per cent. per annum additional for storage and insurance. [102 v. 68.]

Sec. 4205-12. [Redemption; sale; publication; surplus.] If the pledged property, consisting of dry goods or clothing of any kind, is not redeemed within the time fixed and agreed upon, the same shall, after three months from the expiration of the time of the pledge, or after six months from the expiration of the time of the pledge, in case it consists of other articles, be sold in the city at public auction without redemption under the direction of said municipal pawn department, and not elsewhere or otherwise, to the highest bidder for cash, after ten days' notice of the time and place of sale and the kind of goods, first given in a public newspaper having general circulation in the said city. And the surplus money, if any arising from the said sale, after deducting the amount of the loan, the interest and the storage and insurance charges then due on the same, and the expenses of the advertisement and sale, shall be paid to the pawner or his legal representative or assigns, on demand at any time within two years after such sale, but if neither the pawner, nor his legal representative or assigns, apply for said surplus money within said time, the same shall be added to the municipal pawn fund and become the undisputed property of the city.

On the application of the pawners, their legal representative or assigns, the pledged property shall during the period that intervenes between the date of the expiration of the time of the pledge and the last day of the notice, hereinbefore given, be delivered to them at any time during the regular business hours of said department: Provided, such applicants shall pay the sum originally loaned, with interest, the expenses for the publication of said notice and the storage and insurance charges that may have accrued thereon and surrender the duplicate card in the manner hereinafter mentioned. [102 v. 68.]

Sec. 4205-13. [Renewal.] The loans on pawns may be renewed from time to time, but in no case longer than for one year from the date of the original loan. [102 v. 69.]

Sec. 4205-14. [Number, description, address, etc.; open records.] The said municipal pawn department shall at the time when it accepts the application for a loan, number the loan and number and describe the property pledged therefor and keep a correct account of all money loaned on pawns, the rate of the interest charged, the storage and insurance charges, the description of said property and the name and address of the borrower; and write plainly on a card, the name and address of the borrower, and also name or state thereon the property pledged, its appraised value and pawn number, the amount loaned and the number of the loan, the date when loaned, and the length of time for which loaned, the rate of interest charged, the storage and insurance charges, and the numbers and pages of the municipal pawn book or books in which the same is recorded. Said card shall be attached to all the property pledged, and every pawner shall receive from the said municipal pawn department a duplicate of said card. And said department shall at the time when the borrower pays back the amount loaned, with the interest, storage and insurance charges due thereon, deliver to him the property pledged, after he acknowledges the receipt thereof on said duplicate card and surrenders the same to the municipal pawn department.

The said records shall be at all times open to the full and free inspection of the owners of the articles or of any person demanding the same: Provided, such person, shall produce an order to make such inspection, signed by the superintendent of said department or by the chief of police of the city; and in all cases where the description of the property pledged is alleged to correspond with any goods lost or stolen it shall be exhibited when demanded by the person authorized as above to inspect said book. [102 v. 69.]

Sec. 4205-15. [Lost or stolen article.] If any goods, articles or things which shall be advertised in any public newspaper of the city, as having been lost or stolen and which goods, articles or things shall thereafter come in to the possession of any municipal pawn department, it shall, on actual notice thereof, immediately thereafter give information in writing to the police department of the city, that certain

goods, articles or things, answering the description of said advertised goods, articles or things, are in its possession, and shall also state from whom the same were or was received. [102 v. 69.]

Sec. 4205-16. [Limitation.] No municipal pawn department created under this act shall do business in any other city than the one in which it is established and its patrons must be settled legal residents of the city. [102 v. 70.]

Sec. 4205-17. [How money applied.] The moneys received as charges for advances on pawns shall be applied to the maintenance, enlargement and the extension of the municipal pawn department, and to the extinguishment of any indebtedness created therefor. [102 v. 70.]

Sec. 4205-18. [Report.] The superintendent of the municipal pawn department shall, on the first day of every month, file with the director of public service of the city a full report of the business transacted in said department during the previous month, which said statement shall be under oath. [102 v. 70.]

Sec. 4205-19. [Examination.] The mayor may at any time, and if advisable or necessary more than once a year, appoint competent disinterested persons not exceeding three in number, not more than two of whom shall be of the same political party, to examine without notice the affairs of the municipal pawn department, superintendent, assistant superintendents, pawn inspectors, clerks and pawn custodians in said department, and to examine and audit their accounts or any matters pertaining to or connected with their department for the purpose of ascertaining facts; in connection with such examination, the mayor or such appointees shall have the power to compel the attendance and testimony of witnesses, to administer oaths and to examine such persons as they shall deem necessary, and to compel the production of books and papers and the result of such examination shall be transmitted in writing to the mayor and recorded in his office and shall

also be sent by him to the council and to the city solicitor without delay, and the latter shall proceed forthwith as the facts of the case may warrant. The council shall allow said examiners reasonable compensation for their service. [102 v. 70.]

Sec. 4205-20. [No banking power.] No municipal pawn department created under this act shall have any banking power, whether of issue, deposit or discount and shall not receive deposits of money or negotiable security, nor loan money on commercial paper, notes, checks, drafts, or other negotiable commercial instruments. [102 v. 70.]

Sec. 4205-21. [Excess charge, effect of; penalty.] If any municipal pawn department created under this act shall as a condition of redemption, or for making a loan or otherwise, in any way or for any purpose, charge the pawner of any pawn in excess of the amount authorized to be charged by such department it shall thereby forfeit all claims to, or lien upon such pawn and deliver the same on demand to the pawner, his legal representative or assigns, and in default of so doing such pawner or his legal representative or assigns, may recover the possession of such pawn by an action in replevin.

Any superintendent, assistant superintendent, pawn inspector, clerk or pawn custodian of any such department who shall charge, take or collect or receive any compensation on a loan beyond or in excess of the charges allowed, shall be guilty of a misdemeanor and be fined not to exceed one hundred dollars, or be imprisoned in the county jail for not more than six months, or both, and if such compensation on any one loan beyond or in excess of the charges allowed, amounts to thirty-five dollars or more, he shall be guilty of a felony and be imprisoned in the penitentiary not more than five years nor less than one year, and he and his sureties shall be liable for the loss, cost, and damages occasioned by the forfeiture above provided for, to be collected by civil action. [102 v. 70.]

DIVISION V.

ORGANIZATION.

Subdivision I. Legislative.

CHAPTER 1.

COUNCIL.

CITIES.

Organization.

Sec. 4206. [Number city councilmen; how elected.][1] The legislative power of each city shall be vested in, and exercised by a council, composed of not less than seven members, four of whom shall be elected by wards and three of whom shall be elected by electors of the city at large. For the first twenty thousand inhabitants in any city, in addition to the original five thousand, there shall be two additional members of council, elected by wards, and for every fifteen thousand inhabitants thereafter there shall be one additional member similarly elected, provided that the total number of members of such council shall not exceed thirty-two. When the total number of members of council is fifteen or more, one member of every five shall be elected at large, and the remainder from wards.[2] [102 v. 77; 96 v. 57, § 116.]

(1) **Old sections.**—Compare old §§ 1655, 1655*a*, 1658, 1661, 1672, 1672*b*, 1673 R. S., all repealed.

(2) **Interpretation of provisions.**—In Zumstein v. Mullen, 67 O. S. 382, where was under consideration the number of members of council fixed for Cincinnati, having a population of 325,902, this section, as originally enacted, was construed as follows:

" . . . At least 5,000 inhabitants are required to constitute a city, and by the above section a city of 5,000 and under 25,000 inhabitants will have seven members of council; no more and no less. Where there are 20,000 inhabitants in addition to the original 5,000, two more are allowed, making nine for a city of 25,000, and under 40,000 inhabitants. After passing the 25,000 mark, it is provided that for every 15,000 inhabitants, one additional member shall be elected. Take said first 25,000 from the total population of the city of 325,902 and there will remain 300,902. This di-

vided by 15,000, gives twenty members to be elected by reason of said 300,902 inhabitants. The first 25,000 gave nine members, which added to the twenty, makes twenty-nine in all as the total for the whole city.

"Now as to the manner of election. The first 25,000 inhabitants gives nine members, six to be elected from wards and three in the city at large. For every 15,000 after the first 25,000 one member is added, to be elected from a ward; but whenever the total number of members reaches fifteen or more, four out of every five are to be elected from wards, and one at large, so that only three would be elected at large so long as the number of members is under twenty, but at twenty, four would be elected at large, and at twenty-five members, five would be elected at large, and it would stand at five until the number of members would reach thirty, but as the total number in Cincinnati is only twenty-nine, only five can be elected at large, and the remainder, twenty-four, from wards."

The only material change in the section since the decision in Zumstein v. Mullen, is the addition of words "provided that the total number of members of such council shall not exceed thirty-two."

TABLE OF COUNCILMEN IN CITIES.

(Adopted in Zumstein v. Mullen, 48 B. 177; 67 O. S. 382.)

Pop.	Total Council	By Wards.	At Large.
5,000	7	4	3
25,000	9	6	3
40,000	10	7	3
55,000	11	8	3
70,000	12	9	3
85,000	13	10	3
100,000	14	11	3
115,000	15	12	3
130,000	16	13	3
145,000	17	14	3
160,000	18	15	3
175,000	19	16	3
190,000	20	16	4
205,000	21	17	4
220,000	22	18	4
235,000	23	19	4
250,000	24	20	4
265,000	25	20	5
280,000	26	21	5
295,000	27	22	5
310,000	28	23	5
325,000	29	24	5
340,000	30	24	6
355,000	31	25	6
370,000	32	26	6

Sec. 4207. [Qualifications.][1] Councilmen at large shall have resided in their respective cities, and councilmen from wards shall have resided in their respective wards, for at least one year next preceding their election. Each member of council shall be an elector of the city, shall not hold any other public office or employment,[2] except that of notary public or member of the state militia, and shall not be interested in any contract with the city.[3] A member who ceases to possess any of the qualifications herein required, or removes from his ward, if elected from a ward, or from the city, if elected from the city at large, shall forthwith forfeit his office.[4] [96 v. 59, § 120.]

(1) **Old section.**—Compare old § 1680 R. S., repealed (members must be residents); § 1681 R. S., repealed (must not hold other municipal office); § 1715 R. S., repealed (removal of officer from corporation, a resignation); § 1655*a* R. S., repealed (member of board of legislation not to be interested in contract); § 1717 R. S., repealed (councilmen ineligible to any other office).

(2) **Holding other office.**—*Construction*—The inhibition against holding other public office is not limited to office in or employment by the municipality, but extends to all public offices and employments. State, *ex rel.* v. Gard, 29 C. C. 426, 8 C. C. (N. S.) 599, (aff'd, 75 O. S. 606). For construction of language of former § 1717 R. S. (repealed), see State, *ex rel.* v. Kinney, 20 C. C. 325; State, *ex rel.* v. Brown, 60 O. S. 499; State, *ex rel.* v. Keeler, 19 C. C. 149; State, *ex rel.* v. McMillan, 15 C. C. 163; Commissioners v. Cambridge, 7 C. C. 72; State, *ex rel.* v. Kearns, 47 O. S. 566.

See, also, Op. Atty. Gen. (1918), p. 636.

Councilman has been held ineligible to appointment as member of board of health. (State *ex rel.* v. Craig, 69 O. S. 236); as member of city decennial board of equalization. (State, *ex rel.* v. Kearns, 47 O. S. 566); county school examiner and teacher has been held ineligible to election as councilman. State, ex *rel.* v. Gard, 29 C. C. 426, 8 C. C. (N. S.) 599; so, workhouse director ineligible to council. Commissioners v. Cambridge, 7 C. C. 72.

Offices of mayor and member of congress may be held by same person. State, *ex rel.* v. Gebert, 12 C. C. (N. S.) 274; 31 C. C. 355.

A member of a council may at same time be a Central Committeeman. Op. Atty. Gen. (1916), p. 950.

Effect of holding other office.—The appointment of member of council to an office he is ineligible to fill does not work an abandonment of his office as councilman. The appointment to the second office is simply void. State, *ex rel.* v. Kearns, 47 O. S. 566; State v. Newark, 6 N. P. 523; State, *ex rel.* v. Craig, 69 O. S. 236, 244. So the election to council of one already holding an office which would make him in-

eligible to be a councilman would not work an abandonment of the first office, but the election to council would be void. Commissioners v. Cambridge, 7 C. C. 72.

When councilman elected is ineligible and election therefore void, council may proceed to fill the vacancy without any proceedings to oust the person so elected, and without notice to him. State, *ex rel.* v. Gard, 29 C. C. 426; 8 C. C. (N. S.) 599, (aff'd, 75 O. S. 606). See also, State, *ex rel.* v. Craig, 69 O. S. 236.

Whether appointments made by officers illegally holding their offices are void, *quere*. State, *ex rel.* v. Craig, 69 O. S. 236, 244.

(3) **Interested in contract.**—Compare provisions in § 3808, *ante*, and see note thereunder.

(4) **Change of boundary.**—Effect of change of ward boundaries, see State v. Choate, 11 O. 511; Scoville v. Cleveland, 1 O. S. 126.

Effect of removal.—When member has removed from the ward, the office is vacant and the number of members of council is reduced accordingly. State, *ex rel.* v. Orr, 61 O. S. 384. In such case, a majority of members elected to council will consist of a majority of those remaining qualified. *Ib.*

Marriage to a woman who continues to reside outside the municipality does not warrant the removal of a councilman on the ground of nonresidence. State, ex rel. v. Merril, 16 C. C. (N. S.), 339.

Where a councilman removes outside the state to accept employment, without any fixed intent either to stay or return, the office which he has held does not thereby become vacant. State, ex rel. v. Hathaway, 22 C. C. (N. S.), 314; 28 C. D. 481.

Sec. 4208. [Election and term.][1] One member of the council from each ward and such number of members thereof at large as is provided by law shall be chosen in each odd numbered year. Members of council shall serve for a term of two years commencing on the first day of January next after their election, and until their successors are elected and qualified.[2] [96 v. 57, § 116; 98 v. 195, § 117; 96 v. 57, § 117.]

(1) **Old section.**—See old § 1658 R. S., repealed.

(2) **Holding until successor qualifies.**—See § 8 G. C. in Part II, providing that any person holding an office of public trust shall continue until his successor is elected or appointed and qualifies, unless otherwise provided by constitution or laws.

Membership in council was held to be an "office" within the meaning of such section. State, *ex rel.* v. Kearns, 47 O. S. 566, 568.

Where a statute provides that an officer shall serve until his successor is elected and qualified, a failure to elect a successor does not create a vacancy to be filled by appointment under a general authority to fill vacancies, but the incumbent holds over. State, *ex rel.* v. Wright, 56 O. S. 540, 556; and the incumbent continues not as a mere

de facto officer, but as the rightful possessor of the office. State v. Howe, 25 O. S. 588, 596.

Sec. 4209. [Compensation.][1] The compensation of members of council, if any is fixed, shall be in accordance with the time actually consumed in the discharge of their official duties, but shall not exceed one hundred and fifty dollars per year each, in cities having a population according to the last preceding federal census, of twenty-five thousand or less. For every thirty thousand additional inhabitants so determined, such compensation may be, but shall not exceed, an additional one hundred dollars per year, each, but the salary shall not exceed twelve hundred dollars per annum, and shall be paid semi-monthly. A proportionate reduction in his salary shall be made for the non-attendance of any member upon any regular or special meeting of council; provided, however, that two-thirds of the members elected to council may excuse any member from attendance at any regular or special meeting, and when so excused no reduction in his salary shall be made for such non-attendance. [106 v. 114; 96 v. 61, § 126.]

(1) **Old sections.**—Compare old §§ 1683, 1683*a*, 1655*a* R. S., repealed.

Sec. 4210. [Officers of council.][1] Within ten days from the commencement of their term, the members of council shall elect[2] a president pro tem, a clerk,[3] and such other employes of council as may be necessary, and fix their duties, bonds and compensation.[4] The officers and employes of council shall serve for two years, but may be removed at any time for cause, at a regular meeting by a vote of two-thirds of the members elected to council. [96 v. 59, § 118.]

(1) **Old sections.**—Compare old §§ 1655*a*, 1662 and 1676 R. S., repealed.

(2) **Mode of election.**—Where no mode of voting in the organization of council is prescribed, any mode which insures a right to vote to each member and by which the majority can be fairly ascertained, may be adopted, if not forbidden by law. State *ex rel.* v. Green, 37 O. S. 227. Thus, election may be made by motion. *Ib.*

Refusal to vote by members present when election is being held and when their names are called, can not defeat the election. *Ib.*

A plurality of votes cast was held sufficient to elect. State, *ex rel.* v. Anderson, 45 O. S. 196; State v. Miller, 62 O. S. 436.

When the choice has been made

by such vote it is not necessary to complete the election, that the presiding officer announce the vote. State v. Miller, 62 O. S. 436.

After the choice has thus been made no member of council can change the result by changing his vote. *Ib.*

(3) **Clerk,** chosen as here, holds office by election and not by appointment. State v. Squire, 39 O. S. 197; State, *ex rel.* v. Witt, 72 O. S. 584.

Duties as to journal.—Under former § 1755 R. S. (repealed), providing the duties of clerk, it was held that the clerk has no power to correct the journal of council after the council has passed upon the record of its proceedings and mandamus will not lie to compel the clerk to do so. McClain v. McKisson, 15 C. C. 517.

City clerk.—Section 118 of the municipal code (of which the above section is a revision), provided that the clerk of council should perform the duties of city clerk unless otherwise specified in the act. The words "who shall also perform the duties of city clerk," are omitted from the above § 4210, and the clerk of council therefore, has not now conferred upon him the duties belonging to the city clerk. Such duties generally are now imposed upon the city auditor.

Appointments.—As to power of city clerk, under former statutes, in the matter of appointments, see Lillard v. Ampt, 4 N. P. 272.

(4) Clerk of council; compensation for special notices, etc. See Op. Atty. Gen. (1918), p. 775.

Council of a city has authority to employ a person to obtain waivers of special assessment limitations from owners of property abutting upon an improvement and may fix his compensation. Op. Atty. Gen. (1918), p. 1645.

Powers.

Sec. 4211. [Powers of council shall be legislative.][1] The powers of council shall be legislative only, and it shall perform no administrative duties whatever and it shall neither appoint nor confirm any officer or employe in the city government except those of its own body, except as is otherwise provided in this title.[2] All contracts requiring the authority of council for their execution shall be entered into and conducted to performance by the board or officers having charge of the matters to which they relate, and after authority to make such contracts has been given and the necessary appropriation made, council shall take no further action thereon.[3] [98 v. 88, § 123; 96 v. 60, § 123.]

(1) **Old section.**—Compare old § 1655*a* R. S., repealed.

(2) **Purpose of restriction.**—Under former statutes, containing the prohibition that council should exercise no appointing power, it was

said that the statutory prohibition "was, doubtless, intended, as it is certainly well calculated, to relieve the municipal legislature from the distracting and corrupting influences almost necessarily issuing from the dispensation of official and pecuniary patronage; and places the municipal legislature, in respect to the appointing power, in a position substantially similar to that in which the General Assembly of the State is placed by the Constitution of the State." Bellows v. Cincinnati, 11 O. S. 544, 547. Such a restriction is intended to "emphasize the purpose that the respective executive, legislative and administrative functions of the city government should be distinct and independent of one another." Lillard v. Ampt, 4 N. P. 305.

Construction.—As to question under former statutes, of what would be considered an exercise of appointing power, within the meaning of such a restriction, see Lillard v. Ampt, 4 N. P. 305 and Bellows v. Cincinnati, 11 O. S. 544.

Mandamus to enforce performance by municipal council of ministerial duties, but not legislative. See Op. Atty. Gen. (1920), p. 292.

Liability of councilmen.—The members of a municipal council, when acting in good faith are exempt from individual liability for the exercise of their legislative discretion in voting for or against any proposed legislation. Hickville v. Blackeslee, 103 O. S. 508.

The fact that the proposed legislation is prohibited by law, does not make it any the less legislative in its nature. Ib.

(3) **Proper officers must execute** municipal contracts and the power to make public contracts cannot be delegated by one board or office to another. Knauss v. Columbus, 13 Dec. 200.

Street improvements.—After council has made appropriation for street improvement it is without further authority in the matter. The letting of the contract, the supervision and control of the work, are with the Department of Public Service. State, *ex rel.* v. Roebuck, 15 Dec. 400.

The council, under Section 3825 G. C., is the proper authority to determine the kind of material to be used in a municipal improvement. Op. Atty. Gen. (1915), p. 890.

Procedure in making contracts.—In case of contracts requiring the authority of council, the appropriation and approval by council may be made before bids are received and the contract entered into and it is not necessary that the particular contract made by the director within the appropriation and the authority, be approved by council. Akron v. Dobson, 81 O. S. 66.

Contracts for legal printing, how made, see McCormick v. Niles, 81 O. S. 246.

Sec. 4212. [Council to divide city into wards.][1] After each recurring federal census, and within three months after the issuance of the proclamation, by the secretary of state of the population of such city, and when there is annexed thereto

any territory containing, by the last federal census, such number of inhabitants as will entitle the city to an additional member of the council, the council shall subdivide the city into wards, equal in number to the members of the council therein to be elected from wards.[2] If the council fails to make such subdivision into wards within the time herein required, on the application of the president of the council, it shall be made by the director of public service. All wards shall be bounded, as far as practicable, by county lines, streets, alleys, avenues, public grounds, canals, water courses, corporation lines, center lines of platted streets, or railroads, and shall be composed of adjacent and compact territory, and as nearly equal in population as practicable. [98 v. 195, § 117; 96 v. 57, § 117.]

(1) **Old sections.**—Old §§ 1628 to 1632 R. S., repealed.

(2) **Redistricting ordinance** after new Federal census or upon annexation of new territory, see form given below. As to construction of such ordinance under a former law, see State v. Cincinnati, 3 N. P. 127.

Election of additional councilmen. See Op. Atty. Gen. (1922), p. 72.

FORM OF ORDINANCE TO REDISTRICT CITY AFTER NEW FEDERAL CENSUS OR ANNEXATION OF TERRITORY.

Ordinance No. .....

To subdivide the city of ..... into wards.

Whereas, according to the last federal census, as shown by the proclamation of the secretary of state, the city of ..... has a population of .....; and whereas this council is authorized and directed by law to re-district said city and subdivide the same into wards, now therefore:

(*Or, if by council after annexation of territory:* "Whereas, there has been annexed to the city of ..... in the manner provided by law, territory bounded and described as follows (here describe new territory annexed); and whereas, the territory so annexed contained according to the last federal census ..... inhabitants; and whereas by the annexation of said territory the city of ..... is entitled to ..... additional members of council; and whereas, by reason of said annexation, this council is authorized and directed by law to redistrict said city and subdivide the same into wards, now therefore:")

Be it ordained by the council of the city of ....., State of Ohio:

Sec. 1. That the city of ..... be and it is hereby subdivided into ..... wards, which are equal in number to the members of council who are hereafter to be elected from wards according to law, and said ..... wards are hereby created and established in this city, and the boundaries thereof shall be such as are hereinafter set forth,

which boundaries are so fixed as that each ward shall contain as nearly as practicable an equal number of inhabitants.

Sec. 2. That the boundaries of the wards shall be as follows:

First Ward. The first ward shall contain all that territory bounded and described as follows: .....

Second Ward. Etc.

Sec. 3. That all ordinances or parts of ordinances inconsistent herewith are hereby repealed, and this ordinance shall take effect and be in force from and after the earliest period allowed by law.

Passed ....., 19....

....., President of Council.

Attest:

.....
Clerk.

Sec. 4213. [Salaries shall not be changed during term.][1] The salary of any officer, clerk or employe shall not be increased or diminished during the term for which he was elected or appointed,[2] and, except as otherwise provided in this title, all fees pertaining to any office shall be paid into the city treasury.[3] [96 v. 61, § 126.]

(1) **Old section.**—Compare old § 1717 R. S. (repealed).

(2) **Increase or reduction during term.**—Former § 1717 R. S. (repealed), on this subject, was held to relate only to officers of a municipal corporation proper. State, *ex rel.* v. Bd. Ed., 21 C. C. 785.

It did not apply to board of examiners for schools. *Ib.*

Compare Constitutional provision (Art. II, § 20 of Constitution). Under this provision it was held that if the effect of a statute, whatever its terms, was to increase an officer's salary during his term, it was void. State, *ex rel.* v. Raine, 49 O. S. 580. The Constitutional provision was held not to forbid legislation reducing fees or percentages; salary was held to mean periodical payment. Thompson, Relator, v. Phillips, 12 O. S. 617; so increase in *per diem* compensation was held not an increase in salary. Gobrecht v. Cincinnati, 51 O. S. 68. The Constitutional rule was held not to apply to an officer holding over until his successor is elected and qualified. Woehler v. Toledo, 6 B. 282; nor to a law reducing compensation of officer after election, but before his term began. State, *ex rel.* v. Capeller, 3 B. 853. The Constitutional provision does not refer to municipal officers. State, *ex rel.* v. Bd. of Ed., 21 C. C. 785.

Safety director has no fixed "term of office." Op. Atty. Gen. (1918), p. 364.

The salary of an appointee to a vacancy in a public office is controlled by the law in effect at the time his appointment was made, and not by the law in effect at the time his predecessor

was elected for the term which he is to complete. State, ex rel. v. Tanner, 27 O. C. A. 385.

Salary of clerk of city council may not be increased or diminished during the term of his employment, such clerk by section 486-8 G. C. being placed in unclassified list. Op. Atty. Gen. (1919), p. 1160.

Where council merges duties of Clerk of Council with duties of City Auditor, no increase can be made in compensation during current term. However, assistants may be added. Op. Atty. Gen. (1916), p. 597.

See, further, as to application of such a prohibition, State, *ex rel.* v. Carlisle, 16 Dec. 263; 3 N. P. (N. S.) 544.

Policemen.—A policeman is an officer within the meaning of this section and his compensation cannot be increased or diminished during his term, which is during good behavior. State, *ex rel.* v. Painesville, 32 C. C. 123; 13 C. C. (N. S.) 577.

Contra, State, *ex rel.* v. Bish, 12 N. P. (N. S.), 369; Stage v. Coughlin, 12 N. P. (N. S.), 419. And see Op. Atty. Gen. (1915), p. 74.

(3) **Fees of mayor** in cities must be paid into city treasury except as otherwise provided. This refers to municipal fees only. In state cases the mayor is allowed by § 4550 (formerly § 1745 R. S.) the same fees as justices of the peace, and such fees are not turned into city treasury. Piqua v. Cron, 14 Dec. 500; 2 N. P. (N. S.) 165; Portsmouth v. Milstead, 28 C. C. 384; 8 C. C. (N. S.) 114, (aff'd, 76 O. S. 597).

But the mayor of a city is not entitled to fees in prosecutions for violation of penal ordinances. Smallwood v. Cambridge, 75 O. S. 339. As to such fees this section was held to be inconsistent with and to supersede §§ 1744, 1745, 1843 and 1751 R. S. (now §§ 4548, 4549, 4556, and 4388 G. C.). See also Bellefontaine v. Haviland, 3 N. P. (N. S.) 99; 15 Dec. 482; Cambridge v. Smallwood, 27 C. C. 302; 6 C. C. (N. S.), 230. And see Op. Atty. Gen. (1919), p. 372.

Upon the failure of the mayor to pay fees collected into city treasury he may be compelled to do so in an action brought for that purpose by the city. Cambridge v. Smallwood, 27 C. C. 302; 6 C. C. (N. S.) 230.

Chief of police was held not entitled to fees for service of process issued by mayor in state cases, and such fees collected and paid into the treasury were held not recoverable by him. Delaware v. Matthews, 32 C. C. 408; 13 C. C. (N. S.) 539, (aff'd, 82 O. S. 423). But see § 4534, *post.*

Sec. 4214. [Power of council as to salaries and bonds.] Except as otherwise provided in this title,[1] council, by ordinance or resolution, shall determine the number[2] of officers, clerks and employes in each department of the city government, and shall fix by ordinance or resolution their respective salaries and compensation,[3] and the amount of bond to be given for each officer, clerk or employe in each department of

the government, if any be required. Such bond shall be made by such officer, clerk or employe, with surety subject to the approval of the mayor. [99 v. 567, § 227; 96 v. 95, § 227.]

(1) **Exceptions.**—As to board of health, see § 4412, *post;* university directors, §§ 4001 and 7902; library trustees, § 4005, *ante.*

As to department of public service, see § 4327, *post,* and notes.

(2) **Reduction of number of employes.**—The authority to fix the number of employes, etc., was held to give council power to reduce the number fixed by a previous ordinance; and an ordinance reducing the number of patrolmen in department of public safety was held valid. State v. Searcy, 31 C. C. 83; 11 C. C. (N. S.) 521 (aff'd, 80 O. S. 740).

(3) **Character of salary.**—Salary is not a property right of an officer and injunction will not lie to protect it. Reeves v. Griffin, 29 B. 281.

Liability for salaries of employes, fixed by an ordinance does not attach to the municipality unless services are actually performed, and this even though they are permitted to report for duty and are not discharged or removed. State v. Philbrick, 13 Dec. 158.

Officer suspended is not entitled to salary during time of suspension. Steubenville v. Culp, 38 O. S. 18.

Officer not qualifying.—An officer who has not qualified is not entitled to salary. State, *ex rel.* v. Eshelby, 2 C. C. 468.

De facto officer is not entitled to maintain an action for the salary of the office for the period of his service. Ermston v. Cincinnati, 7 N. P. 635; Knorr v. Bd. of Ed., 9 B. 182. But see Cincinnati v. Green, 2 C. S. C. R. 278.

But if a municipality has already paid a *de facto* officer the salary for the time he served, it cannot be compelled to pay a *de jure* officer, who ousts the incumbent, for the same period. State v. Eshelby, 2 C. C. 468.

Where no salary fixed.—There are no fees or salaries attached to an office except such as are prescribed by statute or ordinance. If no fees or salary have been fixed, the person filling the office cannot claim compensation, even though his services were rendered at the request of a superior. Halpin v. Cincinnati, 2 Gaz. 386. Lease's Claim, 4 C. C. 3; Strawn v. Commissioners, 47 O. S. 404, 408; Clark v. Commissioners, 58 O. S. 107; Butler Co. v. Welliver, 12 C. C. 440; Clark v. Lucas Co., 14 C. C. 349; Tuall v. Lucas Co., 3 N. P. 112.

Provisions for compensation of public officials are strictly construed and compensation is allowed only when clearly expressed. State, *ex rel.* v. Culbertson, 18 Dec. 527; Richardson v. State, 66 O. S. 108.

Nor is officer entitled to any allowance for assistants and deputies, unless expressly authorized. *In re* County Commissioners, 18 Dec. 559.

And if paid for services where no compensation is provided for the office, the money paid may be recovered back. Swartz v. Wayne Co., 35 B. 275; Jones v. Commissioners, 57 O. S. 189.

Retroactive increase of salaries is in violation of Sec. 29, Art. II,

of the constitution, and void. Op. Atty. Gen. (1919), p. 66.

Extra compensation.—Where salaries and fees are regulated, officer cannot charge for other services or claim any fees by implication. Debolt v. Cincinnati Township, 7 O. S. 237; see also Thornilly v. State, 81 O. S. 117.

Expenses to conventions.—In absence of statute, building inspector can not recover expenses of attendance on a convention of Building Inspectors under orders of his superior officer. State v. Wright, 17 C. C. (N. S.), 396. And see Op. Atty. Gen. (1919), p. 143.

Ordinance determining number of positions in department and fixing salary and bond is of a general nature and cannot be passed with regular semi-annual appropriation ordinance. Op. Atty. Gen. (1917), p. 127.

Council may fix compensation of city engineer upon basis of percentage of cost of improvement; when fixed per diem cannot be changed to percentage basis after improvement begun. When paid a salary it cannot be charged against fund of bond issue. Op. Atty. Gen. (1918), p. 364.

Amount of bond of sanitary police and plumbing inspectors fixed by council. Op. Atty. Gen. (1918), p. 549.

Council may fix a graduated scale of compensation. Op. Atty. Gen. (1918), p. 632.

Eight-hour day established by council. See Op. Atty. Gen. (1922), p. 1053.

Council has power to create offices and fix terms in departments, when. See Op. Atty. Gen. (1918), p. 1193.

Council, in fixing compensation of employes, may fix same at so much for one month and lesser amount thereafter. Op. Atty. Gen. (1918), p. 1490.

Recovery of overpayment.—Right to recover overcharges and excessive fees allowed officers; see Ridenour v. State, 14 C. C. 393, 400; Jones v. County Commissioners, 57 O. S. 189, 220; State v. Brown, 20 C. C. 57; State v. Kelly, 32 O. S. 421, 431; Cricket v. State, 18 O. S. 9. 24; State *ex rel.* v. Taylor, 3 N. P. (N. S.) 505, 16 Dec. 66, (aff'd, 77 O. S. 597); Swartz v. County Commissioners, 12 C. D. 590, (aff'd, 54 O. S. 669); Iddings Reports (Dayton), vol. 1, pp. 77, 78; Gobrecht v. Cincinnati, 51 O. S. 68, 73; Weaver v. State, 32 C. C. 151, (aff'd, 83 O. S. 508); Walker v. Dillonvale, 30 C. C. 623; 11 C. C. (N. S.) 385.

Construction of ordinance.—For construction of ordinances fixing salaries under previous laws, see Hatch v. Cincinnati, 17 O. S. 48.

FORM OF GENERAL ORDINANCE FIXING SALARIES AND BONDS OF OFFICERS AND ORGANIZING DEPARTMENTS.

Ordinance No. .....

To fix the salaries and bonds of certain officers, to determine the number of assistants, clerks and employes in certain departments and to fix their salaries and bonds.

Be it ordained by the council of the city of....., State of Ohio:

Sec. 1. (Mayor's office.) That the salary of the mayor shall be..... dollars per annum, payable ....., and he shall give bond in the sum of ..... dollars. In the office of the mayor there shall be one secretary, one clerk, one stenographer and one messenger, who shall be appointed by the mayor, and perform such appropriate duties relating to the mayor's office as shall from time to time be assigned by him. They shall receive the following salaries, payable .....

Secretary ..... dollars per annum.

Etc., etc.

Sec. 2. (Auditor's office.)

(Add sections for other departments desired to be provided for.)

Sec. 3. That all ordinances or parts of ordinances inconsistent herewith be repealed and this ordinance take effect from and after the earliest period allowed by law.

Passed ....., 19.....

.....
President of Council.

Attest:

.....
Clerk.

NOTE: The above form of ordinance may be used in fixing salaries and bonds and in organizing all departments of the city service for which council is authorized to provide. The number of employes in the department of public service and the number of employes and salaries in the departments of health, university and library are within the exclusive control of the officers in charge thereof. See §§ 4001, 4005, 4327, 4361, 4412 and 7902.

Changes made in salaries already fixed will not go into effect until the expiration of existing terms of the officers affected. (§ 4213.)

VILLAGES.

Organization.

Sec. 4215. [Number of members; election.][1] The legislative power of each village shall be vested in, and exercised by, a council, composed of six members, who shall be elected by the electors of the village at large, for terms of two years and shall serve until their successors are elected and qualified.[2] [96 v. 82, § 193.]

(1) **Old section.**—Compare old § 1672 R. S., repealed.

(2) See note (2) under § 4208, *ante.*

Failure to elect officers does not dissolve a municipal corporation. Op. Atty. Gen. (1918), p. 130.

Sec. 4216. [President pro tem. of council; employes.] At the first meeting in January of each year, the council shall immediately proceed to elect[1] a president pro tem from their own number, who shall serve until the first meeting of the council in January next after his election. From time to time the council may provide such employes for the village as they may determine, and such employes may be removed at any regular meeting by a majority of the members elected to council. When the mayor is absent from the village or is unable for any cause to perform his duties, the president pro tem of council becomes acting mayor, and shall have the same powers and perform the same duties as the mayor. [99 v. 246, § 195; 96 v. 82, § 195.]

(1) Compare § 4210 and see notes thereunder.

Sec. 4217. [Vacancy when president pro tem. becomes mayor.] When the president pro tem of council becomes the mayor, the vacancy thus created in council shall be filled as other vacancies therein, and the council shall elect another president pro tem from their own number, who shall have the same rights, powers and duties as his predecessor. [96 v. 83, § 200.]

Sec. 4218. [Qualifications; vacancies.] Each member of council shall have resided in the village one year next preceding his election, and shall be an elector thereof. No member of the council shall hold any other public office or employment, except that of notary public or member of the state militia, or be interested in any contract with the village.[1] Any member who ceases to possess any of the qualifications herein required or removes from the village shall forfeit his office. [96 v. 82, § 196.]

(1) Compare § 4207, *ante*, and see notes thereunder.

Powers.

Sec. 4219. [Compensation and bonds of officers, clerks and employes.] Council shall fix the compensation and bonds of all officers, clerks and employes in the village government,

except as otherwise provided by law.[1] All bonds shall be made with sureties subject to the approval of the mayor. The compensation so fixed shall not be increased or diminished during the term for which any officer, clerk or employe may have been elected or appointed.[2] Members of council may receive as compensation the sum of two dollars for each meeting, not to exceed twenty-four meetings in any one year.[3] [97 v. 118, § 197; 96 v. 82, § 197.]

(1) **Form of ordinance** fixing compensation and bonds of officers and employes, see that given under § 4214, *ante.*

Compensation. — See generally notes to § 4214.

Exceptions.—See note (1) under code § 4214.

(2) See note (2) to § 4213, *ante.*

This section does not apply to compensation of a hold-over officer. Op. Atty. Gen. (1920), p. 482.

(3) **No ordinance necessary.**— The statute fixes the compensation of members of council of the village and it is not necessary that it should be fixed by ordinance prior to commencement of terms of office. But council may authorize payment by resolution passed after services have been rendered. Walker v. Dillonvale, 82 O. S. 137.

Salary of Council members.— When council fails to make appropriation for salary of its members, the succeeding council cannot do so. Op. Atty. Gen. (1916), p. 167.

Special meetings; entitled to compensation for, when held on different days. Op. Atty. Gen. (1915), p. 1021.

Sec. 4220. [Legal counsel for villages.] When it deems it necessary, the village council may provide legal counsel for the village, or any department or official thereof, for a period not to exceed two years, and provide compensation therefor.[1] [96 v. 83, § 199.]

(1) **Village solicitor** may be employed for a period not exceeding two years, either by a direct resolution of council designating the name of the attorney chosen and the terms of his employment; or by ordinance for the selection by it of a solicitor and stated periods of not exceeding two years; or by resolution directly employing an attorney for any department or officer of the corporation, for some specific legal work, or for a specially designated period not exceeding two years. Certificate that money is in the treasury is not required before contract can be made for employment of legal counsel. See § 3908, *ante.*

A Prosecuting Attorney of a county cannot accept employment from a village council, when. Op. Atty. Gen. (1916), p. 1919.

FORM OF ORDINANCE PROVIDING FOR VILLAGE SOLICITOR.

Ordinance No. .....

Providing for the employment of a Village Solicitor.

Be it ordained by the council of the village of ....., State of Ohio:

Sec. 1. That legal counsel shall be provided for this village, and the person employed as such counsel shall be known as the "Solicitor of the Village of ....." Such solicitor shall be employed by council for a period not exceeding two years.

Sec. 2. The salary of the solicitor shall be ..... dollars during the period of his service, payable.....

Sec. 3. The solicitor shall be an attorney at law, admitted to practice in the courts of Ohio. It shall be the duty of said solicitor to act as attorney and counsel for the village and the officers thereof in their official capacity, and, as such attorney, to prosecute and defend all actions by or against the village or any department or officer thereof during the term of his employment; and to render legal opinions to the council and to any department or officer of the village upon request in writing.

Sec. 4. This ordinance shall take effect and be in force from and after the earliest period allowed by law.

Passed ....., 19.....

.....,
President.

Attest:

.....,
Clerk.

Contracts.

Sec. 4221. [How contracts shall be let; bids.] All contracts made by the council of a village shall be executed in the name of the village and signed on behalf of the village by the mayor and clerk. When any expenditure other than the compensation of persons employed therein, exceeds five hundred dollars, such contracts shall be in writing and made with the lowest and best bidder after advertising for not less than two nor more than four consecutive weeks in a newspaper of general circulation within the village. The bids shall be opened at twelve o'clock noon on the last day for filing them, by the clerk of the village and publicly read by him.[1] [96 v. 83, § 198.]

(1) **Making of contracts.**—See notes under § 4328, *post.*

Where an alleged contract between a village council and a

property owner is denied by the latter, a recital in the minutes or records of council that it has such a contract and legislation enacted in respect thereto are not sufficient to establish existence of such contract. Carrothers v. Cincinnati, 12 Oh. App. 69.

Improvement of streets with "force fund"; cost of labor not included in the $500 limitation. Op. Atty. Gen. (1915), p. 1126.

Forms of advertisement, bids, etc.—See forms given under § 4328, *post.*

Sec. 4222. [Bids and proceedings thereon.] Each such bid shall contain the full name of every person or company interested in it and shall be accompanied by a sufficient bond or certified check on a solvent bank that, if the bid is accepted, a contract will be entered into and the performance of it properly secured. If the work bid for embraces both labor and material, they shall be separately stated, with the price thereof. The council may reject any and all bids. The contract shall be between the corporation and the bidder, and the corporation shall pay the contract price in cash.[1] When a bonus is offered for completion of contract prior to a specified date, the council may exact a prorated penalty in like sum for each day of delay beyond the specified date. When there is reason to believe there is collusion or combination among bidders, the bids of those concerned therein shall be rejected.[2] [96 v. 83, § 198.]

(1) Municipality without power to require contractor to accept improvement bonds in lieu of cash. See Op. Atty. Gen. (1921), p. 424.

(2) See notes under § 4329, *post.*

Sec. 4223. [Alterations or modifications of contract.] When it becomes necessary in the opinion of council, in the prosecution of any work under contract, to make alterations or modifications in such contract, such alterations or modifications shall be made only by council by resolution, but such resolution shall be of no effect until the price to be paid for the work and material or both under the altered or modified contract has been agreed upon in writing and signed by the contractor, and by the mayor on behalf of the corporation. No contractor shall be allowed to recover anything for work or material caused by any alteration or modification, unless such contract is made in such manner, nor shall he in any

case be allowed to recover for such work or material or either, more than the agreed price.[1] The provisions of law relating to requiring bids and the awarding of contracts for public buildings, so far as they apply, shall remain in full force and effect.[2] A duplicate copy of each contract shall be filed in the office of the village treasurer.[2] [96 v. 83, § 198; 99 v. 563, § 144.]

(1) See notes under § 4331, *post.*

Failure by a contractor to comply with the conditions of a contract entered into by him with a village, which conditions were waived by council, is not, in the absence of fraud or misconduct on their part, a cause for injunction against performance of the contract, especially where such failure does not result in prejudice to the community. Moore v. Village of Elmore, 13 N. P. (N. S.), 651.

(2) See notes under § 4332, *post.*

CITIES AND VILLAGES.

Ordinances.

Sec. 4224. [Ordinances and resolutions; how adopted.][1] The action of council shall be by ordinance or resolution,[2] and on the passage of each ordinance or resolution the vote shall be taken by "yeas" and "nays" and entered upon the journal,[3] but this shall not apply to the ordering of an election, or direction by council to any board or officer to furnish council with information as to the affairs of any department or office. No by-law, ordinance or resolution of a general or permanent nature,[4] or granting a franchise, or creating a right, or involving the expenditure of money,[5] or the levying of a tax, or for the purchase, lease, sale, or transfer of property,[6] shall be passed, unless it has been fully and distinctly read on three different days,[7] and with respect to any such by-law, ordinance or resolution, there shall be no authority to dispense with this rule, except by a three-fourths vote of all members elected thereto, taken by yeas and nays, on each by-law, resolution or ordinance, and entered on the journal. No ordinance shall be passed by council without the concurrence of a majority of all members elected thereto.[8] [R. S. Sec. 1694; 96 v. 60, § 122; 96 v. 82, § 196; 90 v. 136; 87 v. 36; 66 v. 166.]

(1) **Old section.**—See old § 1693 R. S., repealed, and compare old § 1655*a* R. S., repealed.

Provisions mandatory.—The provisions of this section are mandatory and must be strictly followed. Vinton v. James, 108 O. S. 220.

Where these provisions have been complied with but the village clerk has failed to record the action of council and the plaintiff has acquiesced in the construction of a side walk in front of his property at public expense, which specially benefits his property he is not entitled to an injunction against the assessment. Ib.

(2) **Cannot act separately.**—Corporate acts cannot be performed by individual members of a board acting separately. State, *ex rel.* v. Liberty Twp., 22 O. S. 144; McCortle v. Bates, 29 O. S. 419.

Character of ordinances.—Ordinances are binding on strangers coming into the municipality. Marietta v. Fering, 4 O. 427.

An ordinance making a contract gives parties to it vested rights which cannot be impaired by a repeal of the ordinance. Lima Gas Co. v. Lima, 4 C. C. 22.

To impose liability on the municipality because of its ordinance the statute as to passage, etc., must be followed. Wellston v. Morgan, 65 O. S. 219.

Oral evidence that ordinance was passed, was held admissible to prove it, if the records did not show its passage. Drott v. Riverside, 4 C. C. 312.

Limitations on power of council.—Council has only the powers granted, and no others; its proceedings must be within the powers conferred and in substantial conformity to the statutes regulating them. Gas and Water Co. v. Elyria, 57 O. S. 374.

See further, notes under § 3616, *ante*.

Power granted to council, other than mere ministerial power, cannot be delegated. Hengst v. Cincinnati, 7 N. P. 1; Ampt v. Cincinnati, 3 N. P. 223.

Ministerial duties, but not legislative duties of council, may be enforced by mandamus. Op. Atty. Gen. (1920), No. 1075.

Ordinances do not determine civil rights between individuals. Municipal ordinances declaring certain acts to be nuisances, or permitting nuisances to exist, do not create or protect from, civil liability between individuals. Chambers v. Ins. Co., 1 Disney, 327, 336; Vandyke v. Cincinnati, 1 Disney, 532; Veigel v. Lunkenheimer, 10 B. 293; Clark v. Fry, 8 O. S. 358. Ordinances regulating speed of steam or street railway cars in the streets do not determine civil liability between individuals, but may go to jury on question of negligence. Meek v. Pennsylvania Ry. Co., 38 O. S. 632; Ry. Co. v. Herrick, 49 O. S. 25, 32; Becker v. St. Ry. Co., 1 N. P. 359. But violation of a speed ordinance is not negligence *per se*. Meek v. Pennsylvania Railway Company, 38 O. S. 632; Bell v. Pistorius, 18 C. C. 73. See further Green v. Dayton St. Ry. Co., 11 N. P. (N. S.) 220; 21 Dec. 190; see also Hoppe v. Parmalee, 20 C. C. 303; L. S. & M. S. R. R. Co. v. Ehlert, 19 C. C. 177; Ulrich v. Toledo Consol. St. Ry. Co., 10 C. C. 635; C. H. & D. Ry. Co. v Murphy, 17 C. C. 223; Watson v. Erie R. R., 8 N. P. 18; Ry. Co. v.

Trainer, 18 C. C. 716; East Cleveland R. R. v. Rosecrans, 24 B. 220; Hart v. Devereux, 41 O. S. 565.

Ordinance regulating location of electric light poles and insulation of wires, does not create liability between individuals. Borck v. Gas & Electric Co., 16 N. P. 507; 5 N. P. (N. S.) 526.

Distinction between ordinance and resolution.—An act required to be done by ordinance, is sufficiently done by legislation amounting to an ordinance, though called a resolution. Kerlin Bros. v. Toledo, 20 C. C. 603. So an ordinance may be valid as a resolution, where resolution is required. *Ib.*

Action of council, though in the form of an ordinance may have the effect of a resolution, without the signature of the presiding officer. Blanchard v. Bissell, 11 O. S. 96, 101.

When the action of council could have been taken by a motion or order, the mere fact that its action has taken the form of a resolution does not require all the formalities incident to a resolution to make it valid. Kerlin Bros. v. Toledo, 20 C. C. 603.

When required.—Waiver of performance of a contract was held, under former laws, not to require an ordinance or resolution. Hubbard v. Norton, 28 O. S. 116. Appointment of committee to effect a compromise of a suit need not be by resolution or ordinance. Commissioners v. Cambridge, 7 C. C. 72. Where action of council extends over a long period and consists of a number of steps, the intent may be gathered from the whole proceedings, and it is not absolutely essential that each step be formally taken. *Ib.*

Construction.—Ordinances are to be construed so as to carry out the intention. Cleveland v. Lenze, 27 O. S. 383, 390. The same rules that govern the construction of statutes are to be applied. Lowden v. Cincinnati, 2 Disney, 203, 207.

Resolution directing lot owners to fill lots, will be construed to require filling in such way as will prevent recurrence of the nuisance. Bliss v. Kraus, 16 O. S. 54.

Practical construction by conduct of parties.—An ambiguous grant is not necessarily to be construed most strongly against the one claiming the franchise, and construction by conduct, as by later ordinances, may apply. R. R. Co. v. Cincinanti, 16 B. 367. Where the terms of an ordinance granting a franchise are unambiguous, there is no room for construction by conduct of the parties; nor does the rule of construction by practice apply when the acts relied upon are not those of the officers making the contract, but of subsequent or other officers or agents of the municipality. Cincinnati v. Cin. St. Ry. Co., 6 N. P. 140; 8 N. P. 80; Cincinnati v. Gas Light and Coke Co., 53 O. S. 278.

Validity. — *In general.* — Presumption is in favor of the validity of ordinances. Moerder v. Fremont, 19 C. C. 394. Fraud and malice are not to be imputed to council, but the immunity from impeachment for fraudulent motives does not attach to all acts of council which may assume the form of an ordinance. State v. Gas Co., 18 O. S. 262, 301.

Unless there is a clear and palpable abuse of power, a court will not substitute its judgment for legislative discretion. Local au-

thorities are presumed to be familiar with local conditions, and to know the needs of the community. Allion v. Toledo, 99 O. S. 416; affirming Toledo v. Allion, 11 Oh. App. 1; 30 O. C. A. 487.

The provision of the Constitution vesting legislative power in the legislature is not violated by granting to councils of municipalities the power to pass ordinances. Markle v. Akron, 14 O. 586.

Stating penalty in different section from that describing offenses, does not invalidate. Brown v. Toledo, 7 N. P. 435.

Misnomer of the municipality is not fatal if the meaning is clear. McCrea v. Washington, 18 B. 66.

A court may correct error in punctuation. Chittenden v. Columbus, 26 C. C. 531; 5 C. C. (N. S.) 84.

An ordinance is not void for uncertainty because the boundaries of streets of the district mentioned in it do not meet and that it gives one of the boundaries as a river without mentioning what river. Chittenden v. Columbus, 26 C. C. 531.

An ordinance is not invalid because it incorporates by reference a previous ordinance not properly passed. Such new ordinance is not amendatory of first ordinance. Columbus v. Federal Gas. & Fuel Co., 14 Dec. 261 (aff'd, 72 O. S. 632).

Reconsideration of ordinances and resolutions, see Adkins v. Toledo, 27 C. C. 417; 6 C. C. (N. S.) 433.

Ordinance partly void.—An ordinance may be partly void, and the rest valid, if the rest is separable. Piqua v. Zimmerlin, 35 O. S. 507; Weaver v. Mt. Vernon, 7 N. P. 374; Steuer v. McConnell, 8 N. P. 205; Chittenden v. Columbus, 26 C. C. 531; 5 C. C. (N. S.) 84; Sterling v. Bowling Green, 26 C. C. 581; 5 C. C. (N. S.) 217; Toledo v. Winters, 21 Dec. 171.

Where an ordinance contains some provisions in excess of the power granted to municipalities with reference thereto, there is ample opportunity in a court or elsewhere to invoke relief without resort to so drastic a remedy as a decree declaring the whole measure void. Yee Bow v. Cleveland et al., 28 O. C. A. 561.

But if the valid part depends on and is practically inseparable from the void part, the whole will be void. Cincinnati St. Ry. v. Smith, 29 O. S. 291; Hengst v. Cincinnati, 7 N. P. 1.

Ordinance granting franchise for longer than legal period may be valid for legal time. Sommers v. Cincinnati, 8 Rec. 612.

Ordinance indefinite.—An ordinance forbidding "dense" smoke is void. Cin. v. Neff, 29 B. 364. But an ordinance merely requiring lot owners to "fill lots" is not void for uncertainty, because it does not prescribe the method of filling. Bliss v. Kraus, 16 O. S. 54.

An ordinance is not void because hard to comply with, if compliance is possible. Cincinnati v. Miller, 29 B. 364.

Inconsistent with constitution or statute.—Ordinances repugnant to the policy and spirit of the Constitution or general statutes are void. Canton v. Nist, 9 O. S. 439; Cincinnati v. Rice, 15 O. 225; Thompson v. Mt. Vernon, 11 O. S. 688.

Statute on same subject.—An ordinance is not invalid because

there is a statute covering the same subject. State v. Ulm, 7 N. P. 659. But the ordinance must contain the exceptions in the statute. Akerman v. Lima, 7 N. P. 92; Canton v. Nist. 9 O. S. 439. But where direct statutory authority for ordinance in question, and exceptions in other statutes, see Edis v. Butler, 8 N. P. 183 (aff'd, 68 O. S. 645). See also Wellsville v. O'Connor, 24 C. C. 689; I. C. C. (N. S.) 253.

Judicial review.—In the absence of bad faith or fraud, the discretion of council in passing ordinance will not be interfered with by the courts. Iron R. R. v. Ironton, 19 O. S. 299, 304; Sims v. Street R. R. Co., 37 O. S. 556; R. R. Co. v. Dayton, 23 O. S. 510; Carpenter v. Traction Co., 13 N. P. (N. S.), 81.

But if council has acted in bad faith and this is clearly averred, the court may inquire into the motives. State v. Cincinnati Gas, etc., Co., 18 O. S. 262; State, *ex rel.* v. Gas Co.. 37 O. S. 45.

And when the action of council depends for its validity on a condition precedent imposed by statute, its decision that such condition has been observed is not conclusive against direct attack. Roberts v. Easton, 19 O. S. 78, 86.

But when council has acted, the presumption is, in the absence of evidence to the contrary, that it has acted lawfully, and all prerequisites to its action were complied with. Dalrymple v. State, 26 C. C. 562; 5 C. C. (N. S.) 185; Reynolds v. Schweinefus, 27 O. S. 311; see also Coombs v. Lane, 4 O. S. 112; Ward v. Barrows, 2 O. S. 241; but see *In re* Huntsville Local Option Election, 25 C. C. 535.

The right of a de facto member of a municipal council to the office cannot be raised collaterally in an attack upon an ordinance, the passage of which depended upon the vote of such de facto officer. Powelsland v. Toledo, 15 Oh. App. 198.

Res adjudicata.—In an action involving the validity of an ordinance, the defense of *res adjudicata* is not available where based on the claim that a former ordinance on the same subject was held constitutional, notwithstanding the general similarity of the present ordinance to the old one is admitted. Stern v. Columbus, 16 N. P. (N. S.), 353.

(3) **Yea and nay vote.**—Several ordinances cannot be passed on one call for votes. Sullivan v. Pausch, 5 C. C. 196; Campbell v. Cincinnati, 49 O. S. 463.

Appointment of committee to effect a settlement of litigation need not be made by yea and nay vote. Commissioners v. Cambridge, 7 C. C. 72.

Whether action in the organization of council requires a yea and nay vote, *quere.* See State, *ex rel.* v. Green, 37 O. S. 227, 230.

"Yeas" and "nays" required on resolution confirming appointments of mayor. Op. Atty. Gen. (1920), p. 485.

Where journal shows resolution adopted by number of votes and this number corresponds with the number of those present, it will be presumed that all present voted yes, and such vote and record are sufficient. Blair v. Cary, 24 C. C. 560.

Where record shows the number of votes "yea" and this corresponds to the number present, the record is sufficient. McMaken v.

Hayes, 29 C. C. 535; 10 C. C. (N. S.) 38 (aff'd, 78 O. S. 412).

Passage how proved.—If record does not show passage of ordinance, oral evidence may be introduced. Drott v. Riverside, 4 C. C. 312.

(4) **What is ordinance of a general or permanent nature.**—Ordinance to condemn property for street purposes or to improve a street was held to be an ordinance of a general or permanent nature requiring three readings. Campbell v. Cincinnati, 49 O. S. 463.

So was a resolution to issue bonds to procure water works and submit the question to popular vote. Gas and Water Co. v. Elyria, 57 O. S. 374.

So was a resolution requiring a sidewalk in front of a single piece of property. Thatcher v. Toledo, 19 C. C. 311; Cincinnati v. Johnson, 18 C. C. 611; McGuire v. East Cleveland, 1 C. C. (N. S.) 435, 438; 25 C. C. 497.

As to resolution declaring necessity of street improvement, see Campbell v. Cincinnati, 49 O. S. 463; Thatcher v. Toledo, 19 C. C. 311, 315; Upington v. Oviatt, 24 O. S. 232.

A resolution awarding a contract for the improvement was held not of a general or permanent nature. Cincinnati v. Bickett, 26 O. S. 49.

Nor authorizing a committee to effect a settlement of litigation. Commissioners v. Cambridge, 7 C. C. 72.

Nor an ordinance for lighting streets and assessing the costs. Federer v. Dayton, 1 Dayton, 142.

Nor a preliminary resolution amounting to a mere order or direction to the clerk to advertise for bids for sale of part of a natural gas plant. Kerlin Bros. v. Toledo, 20 C. C. 603.

Nor an ordinance extending the time of a street railway grant. State *ex rel.*, v. Oakwood St. Ry. Co., 30 C. C. 632; 11 C. C. (N. S.) 263, (aff'd, 81 O. S. 502).

A resolution to be one of a general or permanent nature must be a necessary resolution, that is, it must be not only a necessary step toward the ultimate object but it must be a step which cannot be otherwise taken. Kerlin Bros. v. Toledo, 20 C. C. 603.

(5) **Ordinance "granting a franchise."**—For consideration of the meaning of this phrase, see State, *ex rel.* v. Henderson, 38 O. S. 647; Morrow County v. Mt. Gilead, 8 N. P. 669.

A preliminary ordinance designating a route for a proposed street railway and providing for advertisement for bids was held not to be an ordinance granting a franchise. *Ib.;* see also Aydelott v. Cincinnati, 11 C. C. 11, 17.

Ordinance "creating a right."—For full discussion, see State v. Barr, 5 N. P. 435. See also *In re* Euclid Ave. Assessment, 6 N. P. 160.

Ordinance "involving expenditure."—It is not every ordinance that may *result* in the expenditure of money, that is intended to be included, but only such as directly involve such expenditure. State, *ex rel* v. Henderson, 38 O. S. 644.

So a preliminary ordinance providing for bids for street railway route was held not an ordinance "involving expenditure of money." *Ib.*

Ordinance increasing the number of police officers and fixing their

salaries, held to be one involving expenditure of money. State v. Barr, 5 N. P. 435.

So held as to ordinances creating police and fire departments for a village which has been advanced to the grade of a city. Postna v. Lakewood, 12 N. P. (N. S.), 513.

(6) **Sale or lease of property.** —§§ 3698 to 3713, *ante.*

(7) **Requirement mandatory.** —The requirement that certain ordinances shall have three readings, unless dispensed with by three-fourths vote is mandatory. Campbell v. Cincinnati, 49 O. S. 463; Weaver v. Mt. Vernon, 7 N. P. 374; Bloom v. Xenia, 32 O. S. 461.

A vote on the passage of an ordinance not read on three different days or the rule dispensed with as required by law, when the ordinance is one of a general or permanent nature, is simply a nullity. Smith v. Railroad Co., 8 N. P. 1.

So a vote against an ordinance before the three readings had been completed or properly dispensed with, is a nullity and does not prevent passage after three readings. Smith v. Columbus, etc., Ry. Co., 8 N. P. 1.

When readings may be had.—An ordinance twice read may go on the third reading after an election which brings new members into council. Smith v. Columbus, etc., Railway, 8 N. P. 1.

But a second reading will not be valid where it was at a special meeting for which notice had not been properly served. Shaw v. Jones, 4 N. P. 372.

Suspension of rules.—More than one ordinance cannot be passed under a single suspension of rules. Bloom v. Xenia, 32 O. S. 461; Campbell v. Cincinnati, 49 O. S. 463; Sullivan v. Pausch, 5 C. C. 196.

But the rule need not be suspended before each reading. A single suspension of the rules before first reading is sufficient. Purcell v. Riverside, 1 C. C. 12.

A suspension of the rules allows passage on one day and one reading. Shroder v. Overmann, 5 N. P. 392.

Suspension of rules may be had at an adjourned meeting and the ordinance put on its passage when suspension of rules was not had at the regular meeting. Madden v. Smeltz, 2 C. C. 168.

Amendments made during the passage of an ordinance which do not materially change its provisions are not within the rule requiring three readings. Weaver v. Mt. Vernon, 7 N. P. 374; Mohn v. Collins, 32 B. 77; Chillicothe v. Gas & Fuel Co., 8 N. P. 88.

(8) **Majority.** — When legally elected members are less than total number of which council might consist, whether a majority of such members is a majority of council, *quere.* Commr's v. Cambridge, 7 C. C. 72.

When there is a vacancy in council (as where a member removes from his ward and is therefore deemed to have resigned his office), a quorum will consist of all the members elected and remaining qualified. State *ex rel* v. Orr, 61 O. S. 384.

There need not be a majority of members elected to appoint committee to effect compromise of suit. Commr's v. Cambridge, 7 C. C. 72.

Sec. 4225. [Style of ordinances.] The style of all ordinances shall be, "Be it ordained by the council of the city (or village, as the case may be) of ....., state of Ohio." (filling the blank with the name of the city or village.) [96 v. 61, § 125; 96 v. 82, § 196.]

Sec. 4226. [Subject and amendment of by-laws, ordinances and resolutions.] No ordinance, resolution or by-law shall contain more than one subject, which shall be clearly expressed in its title.[1] No by-law or ordinance, or section thereof, shall be revived or amended, unless the new by-law or ordinance contains the entire by-law or ordinance, or section revived or amended, and the by-law or ordinance, section or sections so amended shall be repealed.[2] Each such by-law, resolution and ordinance shall be adopted or passed by a separate vote of the council and the yeas and nays shall be entered upon the journal. [R. S. Sec. 1694; 96 v. 82, § 196; 90 v. 136; 87 v. 36; 66 v. 166.]

(1) **More than one subject.**— Provision mandatory. Heffner v. Toledo, 75 O. S. 413.

Purpose of the requirement is to prevent the uniting in one ordinance of diverse subjects or measures and effecting its passage by uniting in its support all those in favor of any, and to prevent the adoption of ordinances by the votes of councilmen ignorant of their contents. *Ib.*

Whether an ordinance violates statutory requirement is to be determined not by its form but in the light of the mischief the statute was intended to prevent. *Ib.*

If one of two subjects is separable, the whole ordinance will not be invalid. McCrea v. Washington, 18 B. 66.

Ordinance does not violate this section because it both regulates the price to be charged for electricity and the payment therefor, for these constitute but one subject. Van Wert v. Public Service Co., 11 N. P. (N. S.) 91.

Provision is not violated by an ordinance defining fifteen offenses against municipality, but all relating to the one subject of punishment of offenses against the municipality. Wellsville v. O'Conner, 24 C. C. 689; 1 C. C. (N. S.) 253. Nor by resolution to increase capacity of water works and to construct electric light plant in connection therewith, submitting the question to popular vote. Ryan v. Orbinson, 7 C. C. 30. Nor by a resolution to appropriate property for "parks and public purposes." Pansing v. Miamisburg, 31 C. C. 130; 11 C. C. (N. S.) 511, (aff'd 79 O. S. 430). Nor by an ordinance entitled an ordinance to provide for bonds for city's part of cost of improving sundry streets and alleys by paving, etc., and constructing sewers and to pay city's part of cost of sewers, and

providing for bonds for 32 street and sewer improvements. Heffner v. Toledo, 75 O. S. 413.

An ordinance entitled "An ordinance regulating the operation of motor busses, providing for certain annual payments and providing for the licensing thereof," the ordinance itself making full provision for issuing licenses, payment of fees, execution of bonds, revocation of licenses, regulation of operation, appeal, inspection of busses and penalty for violation of the provisions of the ordinance, contains no more than one subject which is clearly stated in the title. Powelsland v. Toledo, 15 Oh. App. 198.

An ordinance granting a franchise to use the streets for electric light and power purposes and also making a contract for lighting the streets of the city, contains more than one subject. Morrow Co. etc., v. Mt. Gilead, 8 N. P. 669.

So does a resolution for issuing bonds "for purchasing or constructing" gas wells. Hensly v. Hamilton, 3 C. C. 201.

So does a resolution providing for the purchase of water works and also the erection of new ones. Gas and Water Co. v. Elyria, 57 O. S. 374.

So does an ordinance "to regulate speed of railway locomotives," providing maximum speed and also ringing of bell while passing through municipality. Caskey v. Belle Centre, 8 N. P. (N. S.) 153.

An ordinance relating to a separation of grades at a crossing of a street over railway tracks will be deemed to contain but one subject, notwithstanding many matters of detail may be involved therein. Stock Yards Co. v. Cincinnati, 20 C. C. (N. S.), 458; 1 Oh. App. 452; affirming 14 N. P. (N. S.), 529.

An ordinance providing for the improvement of a street, which includes as a part of such improvement the construction of a sanitary sewer, under § 3812 G. C., contains but one subject, viz.: that of a "street improvement". Albrecht v. Cincinnati, 104 O. S. 266.

(2) **Repeals by implication.**— A similar provision in the constitution that "the section so amended shall be repealed" was held directory and not to abrogate the rule as to repeals by implication. Lehman v. McBride, 15 O. S. 573.

A resolution declaring the necessity of constructing water works will be repealed by implication by resolution declaring the necessity for purchase of water works already constructed. Johnson v. Elyria, 6 N. P. 372.

An ordinance intended to repeal a prior one but referring to it merely by its caption will repeal the entire prior ordinance, although the caption is not the same as the language used in the body of the ordinance. Cincinnati Street Ry. Co. v. Lewis, 23 C. C. 127; 3 C. C. (N. S.) 115.

An ordinance which council has power to pass may be passed contrary to the provisions of a previous ordinance, thus ignoring the previous ordinance and repealing it by implication. Aydelott v. Cincinnati, 11 C. C. 11.

Sec. 4227. [Authentication and recording; when to take effect.] Ordinances, resolutions and by-laws shall be authenti-

cated by the signature of the presiding officer and clerk of the council.[1] Ordinances of a general nature, or providing for improvements shall be published as hereinafter provided before going into operation.[2] No ordinance shall take effect until the expiration of ten days after the first publication of such notice.[3] As soon as a by-law, resolution or ordinance is passed and signed, it shall be recorded by the clerk in a book to be furnished by the council for the purpose.[4] [R. S. Sec. 1695; 96 v. 82, § 196; 80 v. 26; 67 v. 68.]

(1) **Signature of presiding officer** was held not necessary to the validity of an ordinance. Toledo, etc., Railway v. Toledo, etc., Railway, 6 C. C. 362 (affirmed on other grounds, 50 O. S. 603); Blanchard v. Bissell, 11 O. S. 96.

(2) **Length of publication.**—See §§ 4228 and 4229, *post*, and notes.

Franchise ordinance.—An ordinance granting a franchise need not be published, and when accepted by grantee cannot be withdrawn by the repeal of the ordinance. State v. Orgill, 17 C. C. (N. S.), 260.

An ordinance fixing or altering salary of a municipal officer is general and comes under this section. If it does not go into effect until officer begins term, effect. Op. Atty. Gen. (1915), p. 2005.

Compensation of clerk of council. See Op. Atty. Gen. (1918), p. 775.

Publication in general.—Not invalid because made in a newspaper published only on Sunday. Hastings v. Columbus, 42 O. S. 585.

Publication is not necessary of the action of council not required to be done by resolution or ordinance. Kerlin Bros. v. Toledo, 20 C. C. 603.

When publication required to be made in "some newspaper," a discretion is given and publication may be made in more than one paper. Cincinnati v. Davis, 58 O. S. 225, 237. See also Wasem v. Cincinnati, 2 C. S. C. R. 84.

Street improvements.—Ordinance providing for both assessment and bond issue must be published. Op. Atty. Gen. (1918), p. 1079; *contra*, as to assessment ordinance alone, *Ib.* (1912), p. 1693.

(3) **When ordinances take effect.**—An action authorized by the ordinance cannot be taken on the tenth day, but only after the tenth day. Fath v. Clifton, 7 N. P. 534.

If the ordinance requires a notice for a certain length of time, that length of time must expire in addition to the ten days before action can be taken. Hensly v. Hamilton, 3 C. C. 201.

Council may provide, subject to the statutory provision, when an ordinance shall take effect, whether it be an ordinance of a general nature or not. Hensly v. Hamilton, 3 C. C. 201.

(4) **Record in separate book** is not essential to validity of ordinance. This provision is directory only. Upington v. Oviatt, 24 O. S. 232.

Sec. 4227-1. [Ordinances and measures may be proposed by initiative petition; percentum.] Ordinances and other measures providing for the exercise of any and all powers of government granted by the constitution or now delegated or hereafter delegated to any municipal corporation, by the general assembly, may be proposed by initiative petition.[1] Such initiative petition must contain the signatures of not less than ten percentum of the electors of such municipal corporation.

When there shall have been filed with the city auditor if it be a city, or village clerk if it be a village, a petition signed by the aforestated required number of electors proposing an ordinance or other measure, said city auditor or village clerk shall, after ten days, certify the petition to the board of deputy state supervisors of elections of the county wherein such municipality is located. Said board shall submit such proposed ordinance or measure for the approval or rejection of the electors of such municipal corporation at the next succeeding regular or general election, in any year, occurring subsequent to forty days after the filing of such initiative petition. No ordinance or other measure proposed by initiative petition and approved by a majority of the electors voting upon the same in such municipal corporation shall be subject to the veto of the mayor. [104 v. 238; 103 v. 211; 102 v. 521.]

(1) **Constitutional provisions.**—For provisions of the constitution relative to initiative and referendum, see Art. II, Sec. 1-f.

Other statutory provisions.—See § 5018-7 *et seq.* G. C., under title "Miscellaneous Statutes", Part II.

Ordinance by initiative providing for bond issue.—Such ordinance may provide for issue of bonds in excess of the limitations of Secs. 3940 and 3941, and if approved by a majority of the electors voting upon the question, no other or further ordinance, resolution or measure is required to authorize the issue of such bonds. Heffner v. Krinn, 98 O. S. 1; but see page 12 of the opinion, where it is stated that the question whether the *majority* vote required by § 4227-1 is sufficient in view of § 3947 requiring *two-thirds*, is not presented in the record.

Requirements of petition.—See notes to § 4227-2.

Repeal of initiated ordinance. See Op. Atty. Gen. (1923), No. 593.

Sec. 4227-2. [Ordinances and measures subject to referendum; percentum.][1] Any ordinance, or other measure passed by the council of any municipal corporation shall be subject to the referendum except as hereinafter provided. No ordinance or other measure shall go into effect until thirty days after it shall have been filed with the mayor of a city or passed by the council in a village, except as hereinafter provided.

When a petition signed by ten per cent. of the electors of any municipal corporation shall have been filed with the city auditor or village clerk in such municipal corporation, within thirty days after any ordinance, or other measure shall have been filed with the mayor, or passed by the council of a village, ordering that such ordinance or measure be submitted to the electors of such municipal corporation for their approval or rejection, such city auditor or village clerk shall, after ten days, certify[2] the petition to the board of deputy supervisors of elections of the county wherein such municipality is situated and said board shall cause to be submitted to the electors of such municipal corporation for their approval or rejection, such ordinance, or measure at the next succeeding regular or general election, in any year, occurring subsequent to forty days after the filing of such petition.

No such ordinance or measure shall go into effect until approved by the majority of those voting upon the same. Nothing in this act shall prevent a municipality after the passage of any ordinance, or other measure from proceeding at once, to give any notice, or make any publication, required by such ordinance or other measure. [104 v. 238; 103 v. 211; 102 v. 521.]

(1) **Petition; signature, etc.**— The constitutional provision that the names of all signers of petitions shall be written in ink, is substantially complied with by the use of an indelible pencil, and an objection to the sufficiency of such signatures on the ground that they are written with an indelible pencil does not lie. In re Referendum Petition, 18 N. P. (N. S.), 140.

The requirement that the name of a signer of a petition be written by himself is absolute; the date of signing and the residence of the signer are material, but may be filled in by another. *Ib.*

If the date of signing and residence of the person purporting to

sign a petition do not appear on the petition, or if the residence cannot be definitely ascertained from the petition, objection lies thereto. *Ib.*

An elector signing such petition may withdraw his name before official action has been taken. State, ex rel. v. Ruppert, 99 O. S. 17.

Time of filing petition.—The above section is complied with where such petition is filed with the auditor within thirty days from the original passage of the resolution by council and also within thirty days after the resolution has been passed by council over the mayor's veto. Hamilton v. Greevey, 9 Oh. App. 221.

(2) **Failure to certify petition; remedy.**—Upon failure of the clerk or auditor to certify petition to the board of elections within reasonable time after the expiration of ten days, he may be compelled by mandamus. State, ex rel. v. Ruppert, 99 O. S. 17.

Sec. 4227-3. [To what ordinance or measure act applies.] Whenever the council of any municipal corporation is by law required to pass more than one ordinance or other measure to complete the legislation necessary to make and pay for any public improvement, the provisions of this act shall apply only to the first ordinance or other measure[1] required to be passed and not to any subsequent ordinances and other measures relating thereto. Ordinances or other measures providing for appropriations for the current expenses of any municipal corporation, or for street improvements petitioned for by the owners of a majority of the feet front of the property benefited and to be especially assessed for the cost thereof as provided by statute, and emergency ordinances[2] or measures necessary for the immediate preservation of the public peace, health or safety in such municipal corporation, shall go into immediate effect. Such emergency ordinances or measures must, upon a yea and nay vote, receive the vote of two-thirds of all the members elected to the council or other body corresponding to the council of such municipal corporation, and the reasons for such necessity shall be set forth in one section of the ordinance or other measure. The provisions of this act shall apply to pending legislation providing for any public improvement. [103 v. 211; 102 v. 522.]

(1) **First measure; bond issue.**—In case of a bond issue submitted to vote of the electors pursuant to §§ 3942 and 3943, the preliminary resolution required by § 3943 is the first "measure re-

quired to be passed'' within the meaning of this section. Heffner v. Krinn, 98 O. S. 1.

In proceedings for appropriation of land, the ordinance and not the preliminary resolution is the measure on which a referendum may be had. McFarlan v. Norwood, 28 C. D. 323; 26 C. C. (N. S.) 33.

(2) **Validity.**—The provision for emergency acts held valid and constitutional. Shryock v. Zanesville, 92 O. S. 375.

Emergency ordinance.—An ordinance introduced as an emergency ordinance, but failing to receive the votes of two-thirds of the members of council, does not thereafter become a valid general ordinance upon expiration of thirty days after its passage, but is and remains without force or effect. Newark v. Richter, 27 O. C. A. 328; 7 Oh. App. 390; 39 O. C. C. 219.

The emergency feature of an ordinance cannot be attacked after the referendum period has expired. Kearney v. Cincinnati, 22 N. P. (N. S.), 255.

An ordinance increasing salaries of city employes may be declared an emergency ordinance when an emergency actually exists. Op. Atty. Gen. (1919), p. 1109.

Sec. 4227-4. [Petitions may be presented in separate parts; signing; affidavit; how number of petitioners determined.] Any initiative or referendum petition may be presented in separate parts but each part of any initiative petition shall contain a full and correct copy of the title and text of the proposed ordinance or other measure and each part of any referendum petition shall contain the number and a full and correct copy of the title of the ordinance or other measure sought to be referred. Each signer of any such initiative or referendum petition must be an elector of the municipal corporation in which the election, upon the ordinance or measure proposed by such initiative petition or the ordinance or measure referred by such referendum petition, is to be held, and shall place on such petition, after his name, the date of signing,[1] his place of residence including street and number, if any, and the ward and precinct. Each part of such petition shall contain the affidavit[2] of the person soliciting the signatures to the same, which affidavits shall contain a statement of the number of signers of such part of such petition and shall state that to the best of his knowledge and belief each of the signatures contained on such part is the genuine signature of the person whose name it purports to be, and believes that such persons are electors of the municipal cor-

poration and that they signed such petition with knowledge of the contents thereof.

The petitions and signatures upon such petitions shall be prima facie presumed to be in all respects sufficient. No ordinance or other measure submitted to the electors of any municipal corporation and receiving an affirmative majority of the votes cast thereon, shall be held ineffective or void on account of the insufficiency of the petitions by which such submission of the same shall have been procured, nor shall the rejection by a majority of the votes cast thereon, of any ordinance or other measure, submitted to the electors of such municipal corporation, be held invalid for such insufficiency. The basis upon which the required number of petitioners in any case shall be determined shall be the total number of votes cast for the office of mayor at the last preceding election therefor. [103 v. 211; 102 v. 522.]

(1) **Date of signing.**—This section does not require that signatures should be on any particular date, and such signatures are valid if made at any time after the original passage of a resolution declaring the necessity of a street improvement, and before the filing of a petition. Hamilton v. Greevey, 9 Oh. App. 221.

Requirements of petition.—See Cincinnati v. Hillenbrand, 103 O. S. 286.

(2) The provision of § § 4227-4, 5, 6, requiring each part of a petition for a municipal referendum to contain an affidavit that the petitioning electors signed such petition with knowledge of the contents thereof is mandatory. Railway Co. v. Haggerty, 32 O. C. A. 145; 14 Oh. App. 398.

Sec. 4227-5. [When ordinance or measure shall be submitted at special election.] Repealed, 110 v. 130.

Sec. 4227-6. [Copy of proposed ordinance or measure filed with auditor or clerk.][1] Whoever seeks to propose an ordinance or measure in a municipality by initiative petition or file a referendum petition against any ordinance or measure shall before circulating such petition file a duly verified copy of the proposed ordinance or measure with the city auditor, if it be a city, or with the village clerk, if it be a village. [104 v. 238, 240.]

(1) This provision is mandatory. Op. Atty. Gen. (1919), p. 945.

Sec. 4227-7. [Words which shall be printed in red.] At the top of each part of the petition the following words shall be printed in red.

NOTICE.

Whoever knowingly signs this petition more than once, signs a name other than his own, or signs when not a legal voter is liable to prosecution. [104 v. 238, 240.]

Sec. 4227-8. [Designation of committee as filing petition. When ordinance or measure shall not be submitted.] The petitioners may designate in any initiative or referendum petition a committee of not less than three of their number, who shall be regarded as filing the petition. After a petition has been filed with the city auditor or village clerk it shall be kept open for public inspection for ten days. If, after a petition proposing an ordinance or other measure has been duly filed with the city auditor or village clerk as the case may be, the proposed ordinance or other measure, or a substitute for the proposed ordinance or measure approved by the committee herein mentioned, is passed by the legislative body of the municipality, the majority of the committee shall notify the board of deputy state supervisors of elections in writing and such proposed ordinance or measure shall not be submitted to a vote of the electors.

If, after a duly verified referendum petition has been filed against any ordinance or measure, the legislative body of the municipality repeals such ordinance or measure, or such ordinance or measure is held to be invalid, the board of elections shall not submit such ordinance or measure to a vote of the electors. [104 v. 238, 240.]

Sec. 4227-9. [Sworn itemized statement by circulator.] (1) The circulator of an initiative and referendum petition, or his agent, shall within five days after such petition is filed with the city auditor or village clerk, file a sworn itemized statement showing in detail:

(a) All moneys or things of value paid, given or promised for circulating such petition.

(b) Full names and addresses of all persons to whom such payments or promises were made.

(c) Full names and addresses of all persons who contributed anything of value to be used in circulating such petitions.

(d) Time spent and salaries earned while circulating or soliciting signatures to petitions by persons who were regular salaried employes of some person and whom said employer authorized to solicit signatures for or circulate said petition as a part of their regular duties.

(2) The statement provided for in this section shall not be required from persons who take no other part in circulating a petition than making affidavits to parts of the petition and soliciting signatures to the same.

(3) Such statement shall be open to public inspection for a period of one year. [104 v. 238, 240.]

Sec. 4227-10. [Practices prohibited in circulating I. & R. petitions.] Whoever directly or indirectly:

(1) Wilfully misrepresents the contents of any initiative or referendum petition; or

(2) Pays or offers to pay any elector anything of value for signing an initiative or referendum petition; or

(3) Promises to help another to obtain appointment to any office provided for by the constitution or laws of Ohio or by the ordinances of any municipality, position or employment in the services of the state or any political subdivision thereof as a consideration for obtaining signatures to an initiative or referendum petition; or

(4) Obtains signatures to any initiative or referendum petition as a consideration for the assistance or promise of assistance, of another person in securing an appointment to any office or position provided for by the constitution or laws of Ohio or by the ordinance of any municipality therein; or employment in the service of the state or any subdivision thereof;

(5) Alters or adds to or erases any signatures or names, on the parts of a petition after such parts have been filed with the auditor or village clerk; or

(6) Fails to file the sworn itemized statement required

in section 4227-9 of the General Code, shall upon conviction be fined not less than one hundred dollars nor more than five hundred dollars. [106 v. 443, 444; 104 v. 238, 241.]

Sec. 4227-11. [Practices prohibited in the signing of I. & R. petitions; penalty.] (1) Whoever knowingly signs an initiative or referendum petition more than once, signs a name other than his own, or signs when not a legal voter, shall, upon conviction be fined not more than one hundred dollars.

(2) Whoever accepts anything of value for signing an initiative or referendum petition shall upon conviction be fined not to exceed twenty-five dollars.

(3) Whoever sells, purchases, steals, attempts to steal, or wilfully destroys or mutilates an initiative or referendum petition which is being or has been lawfully circulated shall upon conviction be fined not more than five hundred dollars or imprisoned in the penitentiary for not more than five years.

(4) Whoever directly or indirectly, by intimidation or threats, influences or seeks to influence any person to sign or abstain from signing, or to solicit signatures to or abstain from soliciting signatures to an initiative or referendum petition shall, upon conviction, be fined not more than one hundred dollars. [104 v. 238, 241.]

Sec. 4227-12. [Provisions do not apply to municipality adopting charter.] The provisions of sections 4227-1 to 4227-13 inclusive shall not apply to any municipality that has or may hereafter adopt its own charter which contains an initiative and referendum provision for its own ordinances and other legislative measures. [104 v. 238, 241.]

Sec. 4227-13. [Punishment.] Corrupt practices as defined in this act shall be punished as provided in section 13323-1 of the General Code. [104 v. 238, 242.]

Sec. 4228. [Publication of ordinances, resolutions, etc., in municipalities; proof.][1] Unless otherwise specifically directed by statute, all municipal ordinances, resolutions, statements, orders, proclamations, notices and reports, required by law

or ordinance to be published, shall be published as follows: In two English newspapers of opposite politics[2] printed and of general circulation in such municipality, if there be such newspapers; if two English newspapers of opposite politics are not printed and of general circulation in such municipality, then in one such political newspaper and one other English newspaper printed and of general circulation therein; if no English newspaper is printed and of general circulation[3] in such municipality, then in any English newspaper of general circulation therein or by posting as provided in section forty-two hundred thirty-two of the General Code; at the option of council. Proof of the place of printing and required circulation[4] of any newspaper used as a medium of publication hereunder shall be made by affidavit of the proprietor of either of such newspapers, and shall be filed with the clerk of council. [109 v. 229; 108 v. 43; 106 v. 492; 96 v. 60, § 124; 96 v. 82, § 196.]

(1) **Contract for publication, how made.** — Publication made without any action of council directing publication or authorizing the clerk to contract for the same does not make the municipality liable. Council may authorize by resolution or ordinance the department of public service to contract for the public printing and may give the clerk of council authority to make such contracts. McCormick v. Niles, 81 O. S. 246, 254.

Mere designation by council of newspaper in which publication is to be made but not directing any officers to contract, is not sufficient to constitute a contract on which municipality's liability for publication may be based. Opinion Attorney-General, 56 B. 29.

When but one newspaper is published in a municipality the fact that an officer of municipality is connected with such newspaper does not disqualify it to make such publication. Op. Atty. Gen. (1916), p. 5.

Charter cities may, by charter provisions, regulate publication of ordinances, etc.; such provisions will take precedence of the provisions of this section. See Op. Atty. Gen. (1920), p. 655.

Liability for publication.— The liability of a municipality to pay for publication of ordinances, etc., required by law to be published, must rest on express contract and not upon a mere account for the rendition of such services. McCormick v. Niles, 81 O. S. 246.

(2) **Papers of opposite politics.**—Under such a provision as this, it has been held that an independent paper, though generally supporting a political party, does not satisfy the requirement. Ohio State Journal v. Brown, 19 C. C. 325; Columbus v. Barr, 27 C. C. 264; 6 C. C. (N. S.) 151. See also

McCormick v. Niles, 81 O. S. 246, 255.

"Opposite politics".—For discussion of meaning of this phrase see Reefy v. Elyria, 30 O. C. A., 273.

English newspapers.—In the absence of requirements to the contrary, publication in newspapers means English newspapers. Cincinnati v. Bickett, 26 O. S. 49.

Designation of papers.—Council has authority to designate the papers in which publication shall be made, subject to statutory requirements. Davis v. Davis, 6 N. P. (N. S.) 281; 18 Dec. 313.

Where only one newspaper is published in a municipality, publication of ordinances, the publication of which is required, should be made in that paper, which is sufficient. Elmwood Place v. Schanzle, 91 O. S. 354.

(3) **Required circulation.**—Council has discretion to decide which newspapers having the requirements shall be used, but court may prevent use of paper not having general circulation, as required. Doster v. Cleveland, 20 Dec. 548.

Paper having circulation of one hundred copies does not comply with requirements, as applied to Cleveland. *Ib.*

Determination by council that a paper is of general circulation creates no more than a presumption of the fact which may be inquired into by the court. Toledo v. Babcock, 14 C. C. (N. S.), 401.

(4) **The term "paid circulation"** was used in former Section 4228, in contradistinction from gratuitous circulation. It does not mean that each subscriber shall have made satisfaction in money of his obligation to pay for the paper, but it means that he is to pay for the same and not receive it as a gratuity. State, ex rel. v. Lorain, 12 N. P. (N. S.), 636.

Notices of contracts.—Section 4328 requires advertisement for bids within the department of public service for "not less than two nor more than four consecutive weeks in a newspaper of general circulation," etc. See also § 4232, *post.*

Sale of bonds.—Section 3924 requires advertisement for sale of bonds for thirty days in at least two newspapers of general circulation, etc. See also § 4232, *post.*

Sec. 4229. [Times of publication required][1] The publication required in section forty-two hundred and twenty-eight of the General Code, shall be for the following times: Ordinances, resolutions and proclamations of elections, once a week for two consecutive weeks; notices not less than two nor more than four consecutive weeks; all other matters shall be published once. [106 v. 492; 96 v. 82, § 196; 96 v. 60, § 124.]

(1) **Length of publication.**—As to meaning of "once a week for two consecutive weeks," see Early v. Doe, 16 How. (U. S.) 610; Cincinnati v. Fenner, 8 N. P. 342.

Where the statute provides for

the number of publications, publications in excess of the limit fixed are unauthorized, and payment for the same is illegal. Printing Co. v. State, 68 O. S. 362; *contra*, Wassem v. Cincinnati, 2 C. S. C. R. 84. But a claim for such excessive publications having been allowed and payment made, money cannot be recovered back in absence of fraud or mistake of fact. Printing Co. v. State, 68 O. S. 362.

But excessive publication does not invalidate the ordinance. *Ib.*, Cincinnati v. Davis, 58 O. S. 225, 237.

The publication is legal although the newspaper is printed only on Sunday. Hastings v. Columbus, 42 O. S. 585.

Notice of sale of bonds, see § 3924, *ante*.

Sec. 4230. [When publication in book form sufficient.] When ordinances are revised, codified, rearranged and published in book form and certified as correct by the clerk of council and the mayor, such publication shall be a sufficient publication, and the ordinance or several ordinances so published in book form, under appropriate titles, chapters and sections, shall be held the same in law as though they had been published in a newspaper or newspapers. A new ordinance[1] so published in book form, which has not been published according to law, and which contains entirely new matter shall be published as heretofore required by law. Such revision and codification may be made under appropriate titles, chapters and sections and in one ordinance containing one or more subjects. [R. S. Sec. 1695; 97 v. 321, § 124a; 96 v. 82, § 196; 80 v. 26; 67 v. 68.]

(1) **Definition** as to what is a revision and what is a new ordinance. See Op. Atty. Gen. (1919), p. 382.

Sec. 4231. [Certificate of clerk as to publication.] Immediately after the expiration of the period of such publication, the clerk shall enter on the record of ordinances, in a blank to be left for such purpose, under the recorded ordinance, a certificate stating in which newspaper and of what dates such publication was made, and sign his name thereto officially, and such certificate shall be prima facie evidence that legal publication of such ordinance has been made.[1] [R. S. Sec. 1696; 66 v. 166.]

(1) **Prima facie evidence.**— Clerk's certificate is sufficient proof of publication to put the burden on those denying publication. O'Brien v. Cleveland, 1 Clev. 100.

Compensation of clerk of council. See Op. Atty. Gen. (1918), p. 775.

FORM OF CERTIFICATE OF PUBLICATION.

I, ..., clerk of council of the city [*or* village] of ....., State of Ohio, do hereby certify that the foregoing ordinance was duly published in ..... and ....., two English newspapers of opposite politics, published and of general circulation in said city [*or* village]. Said publications were on the following dates: (here insert dates of publication in each newspaper.)

....., 19.....

.....,

Clerk of council of the city [*or* village] of .....

Sec. 4232. [Publication when no newspaper in municipalities.] In municipal corporations in which no newspaper is printed as defined in section sixty-two hundred and fifty-five of the General Code, publication of ordinances, resolutions, statements, orders, proclamations, notices and reports, required by law or ordinance to be published, shall be published in either of the following methods, to be determined by council, viz.: By posting copies thereof in not less than five of the most public places in the municipality, to be determined by council, for a period of not less than fifteen days, prior to the taking effect thereof, or, by publication thereof in any newspaper printed in Ohio and of general circulation in such municipality. Provided, however, notices to bidders for the construction of public improvements and notices of the sale of bonds shall be published in not more than two newspapers, printed in Ohio and of general circulation in such municipality, for the time prescribed in section forty-two hundred and twenty-nine of the General Code. Where such publication is by posting, the clerk shall make a certificate of such posting and the times when and the places where done, in the manner provided in section forty-two hundred and thirty-one of the General Code, and such certificate shall be prima facie evidence that the copies were posted up as required. [106 v. 492, 494; R. S. Sec. 1697; 97 v. 447; 66 v. 166.]

FORM OF CERTIFICATE OF POSTING.

I, ...clerk of council of the city [*or* village] of ....., State of Ohio, do hereby certify that there is no newspaper printed in said municipality, and that publication of the foregoing ordinance was duly made by posting true copies thereof at five of the most public places in said corporation as determined by the council, as follows: (here state places of posting) each for the period of fifteen days, commencing on the ..... day of ....., 19....

....., 19.....

.....,

Clerk of council of the city [*or* village] of .....

Sec. 4233. [Effect of not making publication.] It shall be deemed a sufficient defense to any suit or prosecution under an ordinance, to show that no such publication or posting as herein required was made.[1] [R. S. Sec. 1698; 66 v. 166.]

(1) **Premature action under ordinance.**—Any action taken under an ordinance before the completion of its publication is void. Hensly v. Hamilton, 3 C. C. 201; but see State, ex rel. v. Kellerman, 12 N. P. (N. S.), 681; (aff'd by circuit court without report; aff'd 87 O. S. 527.)

Sec. 4234. [Mayor's veto in cities.][1] Every ordinance or resolution of council shall, before it goes into effect, be presented to the mayor for approval. The mayor, if he approves it, shall sign and return it forthwith to council. If he does not approve it, he shall within ten days after its passage or adoption return it with his objections to council, or if council is not in session, to the next regular meeting thereof, which objections council shall cause to be entered upon its journal. The mayor may approve or disapprove the whole or any item of an ordinance appropriating money. If he does not return such ordinance or resolution within the time limited in this section, it shall take effect in the same manner as if he had signed it, unless council by adjournment prevents its return. When the mayor disapproves an ordinance or resolution, or any part thereof, and returns it to the council with his objections, council may, after ten days, reconsider it, and if such ordinance, resolution or item, upon such reconsideration is approved by the votes of two-thirds of all the members elected to council, it shall then take effect as if signed by the mayor.[2]

The provisions of this section shall apply only in cities. [96 v. 61, § 125; 96 v. 82, § 196.]

(1) **Old sections.**—Compare old §§ 1666, 1667 and 1668 R. S., repealed; and §§ 1655a (1666-1) and (1666-2) R. S., repealed.

(2) **Veto of part** of an ordinance by the mayor is valid. He may veto part and leave the rest good. Sanfleet v. Toledo, 10 C. C. 460.

Effect of failure to present to mayor under former laws, see Walcutt v. Columbus, 26 C. C. 238; 6 C. C. (N. S.) 271.

Signature of mayor, "per clerk," on copy sent to council is valid. State *ex rel.* v. Henderson, 8 B. 201 (reversed on other grounds, 38 O. S. 644).

Effect of financial interest of mayor in subject matter of ordinance, see Shipbaugh v. Kimball, 19 Dec. 33; 7 N. P. (N. S.) 514.

Approval by vice-mayor.—An ordinance of a municipality which the mayor thereof vetoes and returns to the council before its next session is not rendered valid by the approval of the vice-mayor and his signature to it, given in the interim on a day when the mayor is temporarily absent from the city. Pounds v. Elyria, 18 C. C. (N. S.), 131. For opinion below, see Pounds v Elyria, 9 N. P. (N. S.) 625; 20 Dec. 357.

Parol testimony is admissible to show whether mayor was absent from city and unable to perform his duties, so as to authorize acting mayor to sign. Pounds v. Elyria, 9 N. P. (N. S.) 625; 20 Dec. 357.

Sec. 4235. [How by-laws and ordinances received as evidence.] The printed copies of the by-laws or ordinances of a corporation, published under its authority, and transcripts of any by-laws, resolutions, or ordinances, or of any act or proceeding of a municipal corporation, recorded in any book, or entered on any minutes or journal, kept under the direction of such corporation, and certified by its clerk, shall be received in evidence, through the state, for any purpose for which the original books, ordinances, minutes, or journals would be received.[1] [R. S. Sec. 1699; 66 v. 166.]

(1) **Proof of ordinance** by certified transcript made by clerk is not erroneous. Ry. Co. v. Ry. Co., 12 C. C. 367.

Judicial notice of ordinances.—Municipal courts will take judicial notice of municipal ordinances, in prosecutions under such ordinances; and a reviewing court occupies same position as municipal court. Strauss v. Conneaut, 3 C. C. (N. S.) 445; 23 C. C. 320; Keck v. Cincinnati, 3 N. P. 253; Akerman v. Lima, 7 N. P. 92. State courts will not take judicial notice of municipal ordinances in the absence of a statute requiring it. Toledo v. Libbie, 19 C. C. 704, (affirmed with-

out report, 51 O. S. 562); Chittenden v. Columbus, 26 C. C. 531; 5 C. C. (N. S.) 84. See also Esch v. Elyria, 27 C. C. 446; 7 C. C. (N. S.), 9; Gates v. Cleveland, 18 C. C. (N. S.), 349.

Powers and Duties.

Sec. 4236. [Vacancy.] When the office of councilman becomes vacant, the vacancy shall be filled by election by council for the unexpired term.[1] If council fail within thirty days to fill such vacancy the mayor shall fill it by appointment. [96 v. 59, § 120; 96 v. 82, § 196.]

(1) **Filling vacancies.**—*Term of appointee.*—Under former statutes, where one section provided that an appointee to fill a vacancy in council should be appointed "for the unexpired term" and another section provided that all persons appointed to fill vacancies in municipal offices should serve "till the next annual municipal election,'' it was held that the former, being specially applicable to council, would govern as to appointments in that body, and such appointee would hold for the unexpired term. State, *ex rel.* v. Darby, 12 C. C. 235 (affirmed, 52 O. S. 611).

An officer appointed to fill the unexpired term would hold until his successor is elected and qualified. See State, *ex rel.* v. Darby, *supra*, holding that § 8 providing that all officers shall serve till successors are chosen and qualify would apply to a councilman chosen to fill an unexpired term.

A misapprehension as to the true tenure of the appointee on the part of the appointing power or on the part of the appointee cannot abridge or extend the term fixed by law for his continuance in office. State, *ex rel.* v. Darby, *supra;* State, *ex rel.* v. Slough, 12 C. C. 105, 111.

For discussion of question of applicability of § 10 G. C., containing general provisions as to term of appointees to fill vacancies, where there are special statutes for the particular office, see State, *ex rel.* v. McGregor, 44 O. S. 628; State v. Barbee, 45 O. S. 347.

When vacancy exists.—Where a member of council is ousted by *quo warranto* proceedings, on the ground that the ward he claims to represent has no legal existence, no vacancy exists. State, *ex rel.* v. Kearns, 47 O. S. 566.

The power of council to judge of election of members, does not include the power to determine whether a vacancy does, in law, exist. State, *ex rel.* v. Darby, 12 C. C. 235 (affirmed, 52 O. S. 611).

Sec. 4237. [Judge of election and qualification of members; quorum and special meetings.][1] Council shall be the judge of the election and qualification of its members.[2] A majority of all the members elected shall be a quorum to do

business,[3] but a less number may adjourn from day to day and compel attendance of absent members in such manner and under such penalties as are prescribed by ordinance. The council shall provide rules for the manner of calling special meetings.[4] [97 v. 136, § 119; 96 v. 82, § 196; 96 v. 59, § 119.]

(1) **Old sections.**—Compare old §§ 1662 and 1679 R. S., repealed.

(2) **Conclusiveness of council's determination.** — Council's determination as to election of members is conclusive and not reviewable by the courts. Stearns v. Wyoming, 53 O. S. 352; and *quo warranto* will not lie to oust a member, after council's finding. State, *ex rel.* v. Berry, 47 O. S. 232. But the exclusive right of council to judge of the election of its members does not extend to a case where a councilman is assuming to act as councilman from a ward which has no legal existence. State, *ex rel.* v. O'Brien, 47 O. S. 464; so where councilman is ineligible because not a citizen of the United States. State, *ex rel.* v. Collister, 27 C. C. 529; 6 C. C. (N. S.) 33; and *quo warranto* will lie in such cases. *Ib.*

Nor does the exclusive right of council extend to a case where the question is not simply which of two persons has been properly selected to fill a conceded vacancy, but whether a vacancy does in law exist, which is to be filled by election or appointment. State, *ex rel.* v. Darby, 12 C. C. 235 (aff'd, 52 O. S. 611).

Nor does the exclusive right of council prevent a consideration by the court of the question whether the facts upon which council has determined one of its members or one elected to the office, to be disqualified, constitute in law a ground of disqualification. State, *ex rel.* v. Egry, 79 O. S. 391. And *quo warranto* will lie to test such question. *Ib.*

Scope of power.—The requirement of § 3808 that no member of council (or other board) shall have an interest in the expenditure of money of the corporation, other than his salary, is not one of the qualifications of which council is made the judge by this section; and council is without authority to determine the fact of such disqualification and declare the member's seat vacant. State, *ex rel.* v. Egry, 79 O. S. 391.

But where in proceeding in *quo warranto* the relator, who had been ousted by council, admits the fact of such disqualification, the court will not oust the person elected to fill the vacancy and restore the relator. *Ib.*

When member in possession of office.—Where the qualifications of a newly elected member are disputed by one of the duly elected and qualified members, the member whose qualifications are disputed, cannot be held to be in possession of the office until his qualifications have been determined and he is admitted as a member. Holbrook v. Smedley, 79 O. S. 391.

Special City Charter.—The Commission provided by the charter of the City of Dayton having the legislative powers of a council, the provisions of Sec. 40 of the

charter making the commission judge of the election and qualifications of its members are in accord with this section and valid. Flotron v. Barringer, 94 O. S. 185.

(3) **Quorum.**—Where a member of council has removed from his ward and thus, under the statutes and a municipal ordinance, left a vacancy, the number of members of council may be regarded as reduced thereby, and a quorum will consist of a majority of all the members elected and remaining qualified. State, *ex rel.* v. Orr, 61 O. S. 384.

(4) **Special meetings.**—In the absence of statutory or other provisions relating to special meetings or notice thereof, action taken at a special meeting where a quorum is present and where the proper number of all members elected concur, is not invalid, because some members were not present and were not notified of the meeting. State, *ex rel.* v. Bowers, 26 C. C. 326; 4 C. C. (N. S.) 345 (aff'd, 70 O. S. 423); see also Cupp v. Commissioners, 19 O. S. 173, 180; State v. Wilkesville, 20 O. S. 288.

See, as to manner of calling special meetings, § 4239, *post.*

Sec. 4238. [Rules, journal, expulsion of members.][1] Council shall determine its own rules and keep a journal of its proceedings.[2] It may punish or expel any member for disorderly conduct or violation of its rules, and declare his seat vacant for absence without valid excuse, where such absence has continued for two months. No expulsion shall take place without the concurrence of two-thirds of all the members elected, and until the delinquent member has been notified of the charge or charges against him, and has had an opportunity to be heard.[3] [96 v. 59, § 121; 96 v. 82, § 196.]

(1) **Old sections.**—Compare old §§ 1679 and 1684 R. S., repealed.

(2) **Power of council over journal.**—In the absence of fraud or bad faith, the council has the right to determine when its journal truly sets forth its proceedings and its action in correcting the journal is final and conclusive, and not subject to review by the courts. McClain v. McKisson, 15 C. C. 517.

As to attacking record of a board collaterally, see generally, Lima v. McBride, 34 O. S. 338, 351 and cases cited; State v. Gas Co., 18 O. S. 262.

(3) **Removal from office.**—For provisions as to removal of officers by Probate Court, see §§ 4670-4675, *post;* and see Dorgan v. Columbus, 12 Dec. 121; State, *ex rel.* v. Ganson, 58 O. S. 313.

As to what is misconduct in office, see State, *ex rel.* v. Sutton, 4 B. 608; State, *ex rel.* v. Roll, 7 W. L. J. 121.

Character of charges and finding, see State v. Sullivan, 58 O. S. 504.

Sec. 4239. [Regular meetings.] The council shall not be required to hold more than one regular meeting in each week,

and the meetings may be held at such time and place as is prescribed by ordinance and shall, at all times, be open to the public. The mayor, or any three members may call special meetings upon at least twelve hours' notice to each member, served personally or left at his usual place of residence. [98 v. 88, § 123.]

Sec. 4240. [General powers.] The council shall have the management and control of the finances and property of the corporation, except as may be otherwise provided, and have such other powers and perform such other duties as may be conferred by law. [R. S. Sec. 1678; 66 v. 163.]

Sec. 4241. [Restriction as to contracts.] The council shall not enter into any contract which is not to go into full operation during the term for which all the members of such council are elected.[1] [R. S. Sec. 1691; 66 v. 261.]

(1) **Scope of restriction.**—See Kerlin Bros. v. Toledo, 20 C. C. 603, 621.

It was held that the contracts referred to are contracts "for services performed, and supplies furnished for the corporation." Logan Nat. Gas Co. v. Chillicothe, 65 O. S. 186, 207.

The restriction does not apply to contracts with gas companies for furnishing gas, that is, ordinances regulating the price of gas. *Ib.*

See further, on scope of restriction, Jonas v. City, 18 O. 318.

Sec. 4242. [Effect of failure to take oath or give bond.] The council may declare vacant the office of any person elected or appointed to an office who fails to take the required official oath or to give any bond required of him, within ten days after he has been notified of his appointment or election, or obligation to give a new or additional bond, as the case may be.[1] [R. S. Sec. 1740; 67 v. 70.]

(1) **Effect of failure to take oath, etc.**—See § 2 G. C. under OFFICERS, in Part II, providing that failure to take oath does not affect liability of sureties; and § 7 G. C. providing that failure to give bond as required shall be deemed a refusal of the office and the same shall be considered vacant.

By the above § 4242, however, the failure to take oath or give bond does not *ipso facto* vacate the office.

But see State ex rel. v. Bimler, 32 O. C. A. 225, where it was held that failure of a mayor-elect to take the oath of office, and to present his bond to council for approval must be

regarded as a refusal to accept the office.

The oath of office and bond have been held not conditions precedent to entering upon the duties of the office. State v. Findley, 10 O. 51; State, *ex rel.* v. Pollner, 18 C. C. 304.

As to time of giving bonds, see subject discussed in State, *ex rel.* v. Commr's, 61 O. S. 506; State, *ex rel.* Witham v. Nash, 65 O. S. 549.

Sec. 4243. [Notice when new bond required.] When the council declares by resolution that an officer shall give a new bond, written notice shall be served by the clerk of the council upon the officer designated, and a copy of the notice, with a statement of the time and place of service, shall be recorded in the proceedings of the council. [R. S. Sec. 1741; 74 v. 114, § 1.]

Sec. 4244. [Council may declare office vacant if new bond not given.] If the officer fails to give such new bond, with sureties, to the satisfaction of the mayor, within ten days after such service, the council shall declare the office vacant, and the vacancy shall be filled in the manner provided in this title. [R. S. Sec. 1742; 74 v. 114, § 2.]

Sec. 4245. [How sureties affected.] When the new bond is accepted or the council declares the office vacant, the sureties in the original bond shall cease to be liable for the acts of the officer done thereafter, but not for his acts then already done. [R. S. Sec. 1743; 74 v. 114, § 3.]

Sec. 4245-1. [Notice to owner to cut noxious weeds; service.][1] Upon written information that noxious weeds are growing on lands in a municipality, and are about to spread or mature seeds, the council of such municipality shall cause a written notice to be served upon the owner, lessee, agent or tenant having charge of such land notifying him that said noxious weeds are growing on such lands and that they must be cut and destroyed within five days after the service of such notice. If such owner or other person having charge of such lands is a non-resident whose address is known, such notice shall be sent to his address by registered mail; if the address of such owner is unknown, it shall be sufficient to publish

such notice once in a newspaper of general circulation in the county. [109 v. 355, § 1.]

(1) *Weeds in highways.*—See § 7146 G. C.

Sec. 4245-2. [Fees for service and return.] A marshal, or any police officer, clerk of council or clerk of a city or village, or his deputy, may make service and return of the notice provided for in the next preceding section and the fees therefor shall be the same as are allowed for service and return of summons in civil cases before a magistrate. [109 v. 355, § 2.]

Sec. 4245-3. [Procedure when owner fails to comply with notice.] If the owner, lessee, agent or tenant having charge of the lands mentioned in section one herein, fails to comply with such notice, the council of such municipality shall cause said noxious weeds to be cut and destroyed and may employ the necessary labor to carry out the provisions of this section. All expenses incurred shall, when approved by the council, be paid out of any money in the treasury of the municipality not otherwise appropriated. [109 v. 355, § 3.]

Sec. 4245-4. [Written return to county auditor; amount a lien upon property.] The council of a municipality shall make a written return to the county auditor of their county of their action under the next three preceding sections with a statement of the charges for their services, the amount paid for the performing of such labor and the fees of the officers who made the service of the notice and return and a proper description of the premises. Such amounts, when allowed, shall be entered upon the tax duplicate and be a lien upon such lands from and after the date of the entry and be collected as other taxes and returned to the municipality with the general fund. [109 v. 355, 356, § 4.]

Subdivision II. Executive.

CHAPTER 1.

THE EXECUTIVE POWER.

CITIES.

Sec. 4246. [Executive power; in whom vested.][1] The executive power and authority of cities shall be vested in a mayor, president of council, auditor, treasurer, solicitor, director of public service, director of public safety, and such other officers and departments as are provided by this title.[2] [96 v. 62, § 128.]

(1) **Old sections.**—Compare old §§ 1707, 1707b, 1707d, 1707e, 1707f, 1708a, (1545-12), (1545-99), (1545-268), and (1545-289), R. S. repealed, prescribing the officers in various cities.

(2) **Office and officer defined.**—To constitute a public office "it is essential that certain independent public duties, a part of the sovereignty of the state, should be appointed to it by law to be exercised by the incumbent, in virtue of his election or appointment to the office, thus created and defined, and not as a mere employe, subject to the direction and control of some one else." State, *ex rel.* v. Jennings, 57 O. S. 415. See also State, *ex rel.* v. McGonagle, 26 C. C. 685; 5 C. C. (N. S.) 292; Palmer v. Zeigler, 76 O. S. 210.

Emoluments and method of choice are not the tests of what is an office. State, *ex rel.* v. Anderson, 45 O. S. 196; State, *ex rel.* v. Kennon, 7 O. S. 546.

See further for discussion of definition of office and officer, Shaw v. Jones, 4 N. P. 372; State, *ex rel.* v. Hamilton Co., 5 C. C. 602; State, *ex rel.* v. Wilson, 29 O. S. 347; Walker v. Cincinnati, 21 O. S. 14; State, *ex rel.* v. Rust, 4 C. C. 329; Wood Co. v. Pargillis, 10 C. C. 376; State v. Anderson, 57 O. S. 429; Barker v. State, 69 O. S. 68; State, *ex rel.* v. Coon, 26 C. C. 241; 4 C. C. (N. S.) 560; State, *ex rel.* v. Painesville, 32 C. C. 123; 13 C. C. (N. S.) 577.

A deputy is not an officer. Warwick v. State, 25 O. S. 21; State v. Meyers, 56 O. S. 340; Theobald v. State, 30 C. C. 414; 10 C. C. (N. S.) 175.

See also as to officers, notes to § 4214, *ante*.

Discretion of legislature.—Whether an officer shall be elected or appointed is a matter within the

discretion of the legislature, and this discretion cannot be interfered with by the courts. State, *ex rel.* v. Covington, 29 O. S. 102.

Abolishment of office.—An office created by ordinance is abolished by the repeal of the ordinance and the incumbent thereby ceases to be an officer. State, *ex rel.* v. Jennings, 57 O. S. 415.

But where the new ordinance does not make any change in the office theretofore held, see State v. Baldwin, 77 O. S. 532.

Creation of office.—An act authorizing council to establish a board and fill it, creates the office, though until the council acts, it is a mere potentiality. Smith v. Lynch, 29 O. S. 261.

New boards as successors.—New boards having the same functions as old boards, are to be regarded as their successors, and powers given to the old boards and their successors may be exercised by the new. Hafer v. Cincinnati, 28 B. 131; Kirker v. Cincinnati, 48 O. S. 507.

Delegating power. — Officers cannot delegate discretionary power. Kelley v. Cincinnati, 7 N. P. 360; Moore v. Cassily, 16 C. C. 708; Bd. of Ed. v. Mills, 38 O. S. 383; Snelbaker v. Jacob, 5 B. 73; Lippleman v. Cincinnati, 4 C. C. 327. See further Ampt v. Cincinnati, 17 C. C. 516 (affirmed, 60 O. S. 621).

Municipal liability for officers' acts.—In the exercise of a public or governmental function, a municipality cannot be held liable for the torts of its officers or servants, but where it is acting in its corporate capacity, as where it is making improvements of corporate property, the liability of the municipality will be governed by the same rules as in the case of an individual. Bloom v. Newark, 16 Dec. 393; 3 N. P. (N. S.) 480.

While the preparation and adoption of plans for a public building are the exercise of governmental and judicial functions, the construction of the building is ministerial, and where it is so negligently done that the building collapses upon the property of another, the municipality is liable in damages. Etzensberger et al. v. Cleveland, 25 C. C. (N. S.), 303.

Municipality is liable for the negligence of its officers in managing public improvements. Dayton v. Pease, 4 O. S. 80; Toledo v. Cone, 41 O. S. 149; Johns v. Cincinnati, 45 O. S. 278.

Municipality is liable for tort of park custodian, acting within scope of employment. Bloom v. Newark, 16 Dec. 393; 3 N. P. (N. S.) 480.

Municipality may be bound by its properly constituted authorities whenever they have power to act in the premises. Cincinnati v. Morgan, 4 O. F. D. 50.

But the municipality is not liable for the acts of officers, not done in their official capacity, but for and between individuals. Dayton v. Pease, 4 O. S. 80; Bellaire Co. v. Findlay, 5 C. C. 418.

To charge municipality, petition must allege officers were acting in their official capacity. Shank v. St. Louisville, 17 Dec. 145; 5 N. P. (N. S.) 510.

De facto officers.—Definition and validity of acts, see notes to § 4666, *post.*

Admissions of officers, as to dangerous character of work being

done, not a part of the *res gestae*, are not admissible to prove notice of character of work on the part of the municipality. Circleville v. Throne, 1 C. C. 359.

Estoppel does not arise from acts of officers, where there is a want of power to act. Bd. of Ed. v. Sinton, 41 O. S. 504; Neil v. Barron, 7 N. P. 84.

But where officers have authority municipality may be estopped by their acts and admissions, especially if municipality is acting in its proprietary capacity. Thomas v. Railway Co., 10 O. F. D. 544.

Suits against officers in their official capacity.—See Karb v. State, 54 O. S. 383; Board of Health v. Columbus, 12 Dec. 553.

Officers' personal liability.—Officers of municipality are not personally liable, while acting within the scope of their authority and in good faith. Stewart v. Southard, 17 O. 402; Scovil v. Geddings, 7 O. (Part II) 211; Thomas v. Wilton, 40 O. S. 516; Rose v. Toledo, 24 C. C. 540; 1 C. C. (N. S.) 321.

An officer is personally liable for a publication which is libelous *per se* though issued under performance of a public duty, if, in fact, the statement published was not pertinent and material to the matter in hand. Mauk v. Brundage, 68 O. S. 89, 97.

Officer not liable for abuse of discretionary powers, unless act done was from corrupt or malicious motive. Gallagher v. Tooker, 17 Dec. 750.

Where some members of a board in such case were actuated by malice and some were not, it is proper practice to render verdict against all of the defendants for compensatory damages and exemplary damages against those guilty of malice. *Ib.*

Criminal liability of officer for embezzlement not removed because ordinance under which he received the funds was invalid. State v. Carter, 67 O. S. 422.

Liability for acts of subordinates, see Meara v. Holbrook, 20 O. S. 137, 143.

Sec. 4247. [Powers of officers as to appointments and removals.] Subject to the limitations prescribed in this subdivision such executive officers shall have exclusive right to appoint all officers, clerks and employes in their respective departments or offices,[1] and likewise, subject to the limitations herein prescribed, shall have sole power to remove or suspend any of such officers, clerks or employes.[2] [99 v. 562, § 129; 97 v. 78, § 129; 96 v. 62, § 129.]

(1) **Appointments.**—Determination of the number of officers to be appointed in each department, with certain exceptions, is left to council. See § 4214, *ante*, and notes.

Appointment and removal of city engineer. See Op. Atty. Gen. (1918), p. 1154.

For civil service provisions governing appointments, see §§ 486-1 *et seq.*, under title "Civil Service", in Part II.

(2) **Other provisions relating to removals.**—*Removal by council.*—After charges filed by mayor, § 4263, *et seq., post.*

Removal by probate court.—Section 4670, *et seq., post.*

Removal of officers and employes in the classified service.—Section 486-1 *et seq.*, under "Civil Service", Part II.

Suspension.—Of deputies, officers, etc., by chief of police and fire chief, § 4379, *post.*

Removal of directors and heads of sub-departments.—Section 4250, *post.*

As to appointees under university board.—See §§ 4003, *ante*, and 7902, under "Municipal Universities", in Part II.

As to appointees under library board.—See § 4005, *ante.*

When removal complete.—When an officer is removable at pleasure, his removal may be effected, so far as his title to the office or the power of a motion is concerned, by a declaration of removal, but it is not complete respecting the responsibility for his official acts until he has notice or knowledge of his removal. State *ex rel.* v. Roney, 82 O. S. 376.

Removal of chief of police.—Between July 31, 1909 and January 2, 1910. The appointment and removal of the chief of police of a city was at the pleasure of the mayor except that the appointee must have been an elector of the city. State *ex rel.* v. Roney, 82 O. S. 376.

Character of power.—See note under § 4263, *post.*

VILLAGES.

Sec. 4248. [Executive power; where vested.][1] The executive power and authority of villages shall be vested in a mayor, clerk, treasurer, marshal, street commissioner, and such other officers and departments thereof as are created by law.[2] [96 v. 83, § 199.]

(1) **Old section.** Section 1706 R. S. repealed.

(2) **Other officers.**—See § 4404, *post*, requiring establishment of board of health or appointment of health officer, and § 4357, *post*, requiring establishment of board of trustees of public affairs, when certain public utilities are owned by the village.

CHAPTER 2.

MAYOR.

CITIES.

Sec. 4249. [Mayor, election, term.][1] The mayor shall be elected for a term of two years, commencing on the first day of January next after his election, and shall serve until his successor is elected and qualified. He shall be an elector of the corporation. [98 v. 172, § 222; 99 v. 562, § 129; 97 v. 39; 97 v. 76; 96 v. 62, 93, §§ 129, 222.]

(1) **Old section.**—Compare old § 1723 R. S. repealed.

Sec. 4250. [General powers of mayor; merger of certain departments permitted.][1] The mayor shall be the chief conservator of peace within the corporation. He shall have power to appoint, and have power to remove, the director of public service, the director of public safety, and the heads of the sub-departments of public service and public safety,[2] and shall have such other powers and shall perform such other duties as are conferred and required by law.[3] In any city the council may by a majority vote merge the office of director of public safety with that of public service, one director to be appointed for the merged department. [109 v. 66; 108 v. 45; 106 v. 483; 99 v. 562; 97 v. 76; 96 v. 62, § 129.]

(1) **Old section.**—Section 1744 R. S. repealed.

Validity.—This section as it formerly stood, in so far as it purported to authorize cities of certain population to merge the office of director of public safety with that of public service, was in conflict with Sec. 1, Art. XVIII, of the constitution and invalid. Elyria v. Vandemark, 100 O. S. 365.

(2) **Paine law.**—The act known as the "Paine law," passed April 29, 1908, amended and supplemented §§ 129, 131, 138, 139, 140, 141, 144, 145, 146, 147, 153, 154, 157, 158, 159, 160, 161, 162, 163, 164, 165, 227 of the municipal code. The sections of the General Code embodying the amendments and supplements made by the Paine law are as follows: 4214, 4223, 4247, 4249,

4250, 4254, 4278, 4323, 4324, 4325, 4326, 4327, 4334k, 4367, 4368, 4369, 4370, 4371, 4382, 4402, 4403.

The principal changes in the Municipal Code made by the Paine law were as follows: (State, *ex rel.* v. Roney, 82 O. S. 376, 379).

"It amended more than twenty sections of the municipal code, but the changes effected may be summarized as follows: The boards of public service and of public safety were abolished and in their stead were substituted a director of public service and a director of public safety, appointed by the mayor.

The building inspector's office was transferred from the mayor's control to the department of public safety, and the workhouse and charitable institutions from the department of public service to the department of public safety. The mayor and the two directors constitute a board of control, and contracts in excess of five hundred dollars are subject to its approval. The civil service is extended and its administration transferred from the department of public safety to three civil service commissioners appointed by the presidents of the board of education, of the sinking fund commission and of the city council."

When the Paine law took effect.— In the Paine law it was provided that the act should take effect on August 1, 1909, provided that all elected officers should serve out their term, except that the provisions of certain sections relating to civil service should be in effect from and after January 1, 1910. In State, *ex rel.* v. Noble, 81 O. S. 550, and State, *ex rel.* v. Roney, 82 O. S. 376, it was held that notwithstanding that by the language of the act the provision creating the office of director of public safety was to go into effect on August 1, 1909, yet contracts in excess of $500 were to be subject to the approval of the board of control that was not to be instituted until after January 1, 1910, effect must be given to the express language of the act and that the act went into effect August 1, 1909, except as to certain civil service provisions which went into effect January 1, 1910.

Other provisions.—As to appointments by mayor, see § 4323, director of public service; § 4367, director of public safety; § 4175, cemetery trustees; § 3792, examiners of departments; § 4042, hospital commissioners; § 4004, library trustees; § 4054, park commissioners; § 4318, sealer of weights and measures; § 4004, university trustees; § 4404, board of health.

This section does not repeal by implication Sec. 4381. Karb, Mayor, v. The State, *ex rel*, 87 O. St. 197. But note that Sec. 4381 was repealed by 103 O. L. 698, 713.

(3) **Other powers** and duties, see § 4527, *et seq.*, powers and duties as magistrate in mayor's court; § 3919, signing municipal bonds; § 4667, approving official bonds; § 4550, custodian of corporate seal; § 4368, duties with reference to police and fire departments; § 4648, duties with reference to inspection of buildings; § 4402, member of board of control; §§ 4230, 4234, duties as to ordinances; § 5316, *et seq.*, § 12807, power as to calling out militia; § 4404, president of board of health; §§ 3787, 3789, reports to, by boards or officers; § 4381, powers as

to suspension of officers; § 4665, visitation of institutions; §§ 3787, 3791, duties as to annual budget.

Oath and bond.—See § 4666, *et seq., post.*

Seal.—See § 4550, *post.*

Salary, how fixed, see § 4214, *ante.*

Obstructing process.—Mayor obstructing process against city may be punished for contempt of court. State, *ex rel.* v. Holden, 12 Dec. 91.

Right to question regularity of judgment against city. *Ib.*

Sec. 4251. [Appointment of municipal officers.] The director of public service, director of public safety, directors of the university, street commissioner,[1] or any board or officer whose appointment is required herein shall be appointed not earlier than the second Monday in January and not later than the first Monday in February, and shall hold their respective offices until their successors are appointed as herein required. [97 v. 39, § 223; 96 v. 93, § 223.]

(1) **Appointment to fill vacancy; confirmation by council.**—See note to Sec. 4363, *post.*

This section applies to both cities and villages. Op. Atty. Gen. (1920), p. 482.

Sec. 4252. [Vacancies in office, how filled.][1] In case of death, resignation, removal or disability of any officer or director in any department of any municipal corporation, unless otherwise provided by law, the mayor thereof shall fill the vacancy by appointment, and such appointment shall continue for the unexpired term and until a successor is duly appointed, or duly elected and qualified, or until such disability is removed.[2] [103 v. 65; 97 v. 78, § 228; 96 v. 95, § 228.]

(1) **Old section.**—Compare old § 1713 R. S., repealed.

(2) **When vacancy occurs.**—Where the law provides that an elective officer's term continues until his successor is elected and qualified, if a successor is not regularly elected, a vacancy is not created, which can be filled by appointment, but the incumbent holds over. State *ex rel.* v. Wright, 56 O. S. 540, 554; State, *ex rel.* v. Kearns 47 O. S. 566.

And the incumbent holds over even though he was an appointee to fill a vacancy. State, *ex rel.* v. Darby, 12 C. C. 235 (aff'd, 52 O. S. 611). But see State v. Corey, 4 W. L. M. 563.

Death before beginning of term, but after election and qualifying would create a vacancy. State, *ex rel.* v. McGregor, 44 O. S. 628. But such vacancy does not begin until end of term of incumbent. State, *ex rel.* v. Dahl, 55 O. S. 195.

But death on election day, before

the polls are closed would not create a vacancy. State, *ex rel.* v. Speidel, 62 O. S. 156.

Council, though given the right to judge of the election and qualification of its own members, has not the power to decide whether there is any vacancy or office to be filled. State, *ex rel.* v. Darby, 12 C. C. 235 (aff'd, 52 O. S. 611).

When the appointment to an office is a nullity for the reason that the appointee is by statute ineligible to such office, a legal appointment to such office may be made, without first ousting such first appointee by proceedings in *quo warranto*. State, *ex rel.* v. Craig, 69 O. S. 236.

Vacancy by resignation, occurs at date of resignation, and not when resignation is accepted. Reiter v. State, 51 O. S. 74.

No vacancy where incumbent can hold over.—There is no vacancy as long as there is an incumbent who can legally hold over until his successor is elected and qualified. State, ex rel. v. McCracken, 51 O. S. 123, 129; State, ex rel. v. Thompson, 9 C. C. 161.

Term of appointee.—Compare § 10 under OFFICERS in Part II. The fact that the commission was made out for the wrong period of time, will not abridge or extend the term of the appointee to vacancy. State, *ex rel.* v. Darby, 12 C. C. 235 (aff'd, 52 O. S. 611); State, *ex rel.* v. Slough, 12 C. C. 105, 111.

Sec. 4253. [Directors of departments to meet with mayor for consultation and advice.][1] When the mayor deems necessary, the directors of the several departments of the city shall meet with him at the time and place he designates, for consultation and advice upon the affairs of the city. [96 v. 63, § 130.]

(1) **Old sections.**—Compare old § (1545-34) R. S. (Cleveland), and § (1545-121) R. S. (Columbus), repealed.

Sec. 4254. [Mayor and officers shall attend council; mayor's written recommendations.][1] The mayor, the directors and the several officers herein provided for shall attend the meetings of council when specifically requested by council so to do, and answer at such time questions put to any of them by any member of the council, relative to the affairs of the city under their respective management and control. The mayor shall make such recommendations in writing to the council for the welfare of the city as to him seems wise. [99 v. 563, § 131; 98 v. 562; 96 v. 63, § 131.]

(1) **Old sections.**—Compare old § (1545-27 R. S. (Cleveland), and § 1545-115) R. S. (Columbus), repealed.

VILLAGES.

Sec. 4255. [Election, term, qualifications, powers and duties.] The mayor shall be elected for a term of two years, commencing on the first day of January, next after his election, and shall serve until his successor is elected and qualified.[1] He shall be an elector of the corporation. He shall be the chief conservator of the peace within the corporation, and shall have the powers hereinafter conferred, perform the duties hereinafter imposed, and such other powers and duties as are provided by law. He shall be the president of the council, and shall preside at all regular and special meetings thereof, but shall have no vote except in case of a tie.[2] [96 v. 83, § 200; 98 v. 172, § 222.]

(1) **Rights of incumbent.**—A certificate of election gives a candidate *prima facie* title to the office, and the incumbent has no right to refuse to give possession because he has filed proceedings to contest the election. State *ex rel.* v. Babst, 101 O. S. 275.

(2) See generally, notes under § 4250, *ante*.

Sec. 4256. [Vacancy in office of mayor, how filled.][1] When the mayor is absent from the village, or is unable for any cause to perform his duties, the president pro tem of council shall be acting mayor.[2] In case of the death, resignation,[3] or removal of the mayor, the president pro tem of council shall become the mayor and serve for the unexpired term and until the successor is elected and qualified. [96 v. 83, § 200.]

(1) **Old sections.**—Compare §§ 1753, 1754 R. S. (repealed).

(2) **Acting mayor's powers,** in villages, which he may exercise in absence of mayor do not include judicial functions exercised by mayor. State v. Hance, 26 C. C. 273.

(3) **When resignation takes effect.**—Acceptance by council is not necessary before mayor's resignation can take effect. Reiter v. State, 51 O. S. 74.

Sec. 4257. [Compensation.][1] Repealed, 108 O. L. 1203.

(1) For provisions as to fees of mayor, see § 4556, post.

CITIES AND VILLAGES.

Sec. 4258. [General duties.] The mayor shall perform all the duties prescribed by the by-laws and ordinances of the corporation. He shall see that all ordinances, by-laws, and resolutions of the council are faithfully obeyed and enforced.[1] He shall sign all commissions, licenses, and permits granted by authority of the council, or authorized by this title, and such other instruments as by law or ordinance may require his certificate.[2] [R. S. Sec. 1746; 66 v. 169, § 116.]

(1) **Provision mandatory.**—Wheeler v. Gavin, 5 C. C. 246, 250.

The mayor cannot refuse to enforce ordinances because he may think them invalid, until the question is presented to him in a proper manner. *Ib.*

Personal liability.—Mayor is not liable personally for issuing a warrant for violation of an ordinance, because the ordinance is afterward declared invalid. Wheeler v. Gavin, 5 C. C. 246.

(2) **Corporation deeds** to be signed by mayor. Tiffin v. Shawhan, 43 O. S. 178, 186.

Sec. 4259. [Communications to council of municipal conditions.] The mayor shall communicate to council from time to time a statement of the finances of the municipality, and such other information relating thereto and to the general condition of the affairs of the municipality as he deems proper or as may be required by council. [96 v. 34, § 38.]

Sec. 4260. [Protest against excess of expenditures.] If, in the opinion of the mayor, an expenditure is authorized by the council exceeding the revenues of the corporation for the current year, it shall be his duty to protest against such expenditure, and enter such protest, and the reason therefor, on the journal of the council.[1] [R. S. Sec. 1748; 66 v. 261.]

(1) **Supervision over expenditures.**—See further §§ 3787 to 3792, *ante.*

Sec. 4261. [Mayor may cause saloons to be kept closed in case of riots.] When in any municipal corporation there is, in the opinion of the mayor thereof, a tumult, riot, mob, or body of men acting together with intent to commit a felony or to do or offer to do violence to person or property, or by force and violence to wreck property and resist the laws of this

state, or there is reasonable apprehension thereof, he shall issue his proclamation requiring the keepers of all saloons, or places where intoxicating liquors are sold at retail as a beverage, to close such places of business and to keep them closed during the continuance of such above described disturbance, when the mayor shall withdraw his proclamation. [R. S. Sec. 3096a; 97 v. 142.]

Sec. 4262. [Supervision of conduct of officers.] The mayor shall supervise the conduct of all the officers of the corporation, inquire into and examine the grounds of all reasonable complaints against any of them, and cause all their violations or neglect of duty to be promptly punished or reported to the proper authority for correction.[1] [R. S. Sec. 1747; 66 v. 169.]

(1) **Corresponding provisions** will be found in § 3792 where the mayor is given authority to appoint examiners to investigate any department of the city government.

This section does not confer the power of removal upon the mayor. State v. Heinmiller, 38 O. S. 101; State, *ex rel.* v. Bryson, 44 O. S. 469; State, *ex rel.* v. Baldwin, 77 O. S. 532.

Sec. 4263. [When mayor shall prefer charges against delinquent officers.][1] The mayor shall have general supervision over each department and the officers provided for in this title. When the mayor has reason to believe that the head of a department or such officer[2] has been guilty in the performance of his official duty of bribery, misfeasance, malfeasance, nonfeasance, misconduct in office, gross neglect of duty, gross immorality or habitual drunkenness,[3] he shall immediately file with the council, except when the removal of such head of department or officer is otherwise provided for, written charges[4] against such person, setting forth in detail a statement of such alleged guilt, and, at the same time, or as soon thereafter as possible, serve or cause to be served a true copy of such charges with the person against whom the charges are made. Such service may be in person or by leaving a copy of the charges at the office of such person, and due return thereof made to council, as is provided for the return of the service of summons in a civil action.[5] [97 v. 385, § 225; 96 v. 94, § 225.]

(1) **Old section.**—Compare old § 1685 R. S., repealed, providing for removal of officers by vote of council.

Other provisions relating to removals.—See § 4247 and note (2) thereunder.

Removals by Probate Court.—Sections 4670 to 4675, *post.*

A village council cannot try the village marshal on charges of malfeasance in office filed by the mayor of the village; procedure must be under Sec. 4670 et seq. Mastick v. Lakewood, 18 C. C. (N. S.), 407.

Legislative power to provide for removal.—The power given to the legislature to provide for the organization of municipalities carries with it, as an incident to its exercise, the power to provide a mode of removal of officers. State v. Hawkins, 44 O. S. 98, 110.

The legislature alone can determine the causes for which an elective officer may be removed. State v. Ganson, 58 O. S. 313.

Character of power.—The power to remove officers is not necessarily a judicial power, and may be conferred by the legislature upon legislative bodies and executive officers. Dorgan v. Columbus, 12 Dec. 121, 123.

The power to remove, given to a board or officer, cannot be delegated. Kelley v. Cincinnati, 7 N. P. 360.

The removal of officers and heads of departments does not affect subordinates or give the removing board power to remove such subordinates. State v. Hudson, 44 O. S. 137.

(2) **What officers.**—The phrase "head of any department or officer" does not include city councilmen. Cleveland Illuminating Co. v. Hitchens *et al.*, 15 Dec. 522; 3 N. P. (N. S.), 57, (aff'd, 16 C. C. (N. S.), 532.)

Councilmen may be removed from office in manner provided in § 4670. *Ib.*

(3) **Definitions.**—Misfeasance is doing a lawful act in an improper manner. Colburn v. Newfarth, 16 B. 54.

Malfeasance is doing a wrongful act, such as approving fraudulent bills, purchasing property for private use, etc. *Ib.*

Misconstruction of a statute, about which there might be a difference in opinion, would not be evidence of incompetency. State v. Hoglan, 64 O. S. 532.

Misconduct in office means as such officer and not otherwise. Graham v. Stein, 18 C. C. 770.

Misconduct in office, defined. State v. Bair, 50 B. 11.

Where an officer commits an offence for which he may be indicted, but which does not touch his particular character as such officer, he ought not to be removed until he has been indicted and convicted criminally. Graham v. Stein, 18 C. C. 770; State v. Chapman, 11 O. 430.

Incompetency in a legal sense means a lack of fitness to discharge the duties of the position, and official delinquency or corruption would be a disqualification rendering an officer incompetent. State v. Fire Commissioners, 26 O. S. 24.

Misconduct implies wantonness and not honest mistakes. State, *ex rel.* v. Roll, 7 W. L. J. 121.

Statutory causes and method exclusive.—Where the legislature

has prescribed by statute the causes for removal of officers and also provided the mode of procedure, to accomplish the removal, the enumeration in the statutes of the causes of removal, excludes every other cause. Dorgan v. Columbus, 12 Dec. 121.

And the method provided by the statute is exclusive. Dorgan v. Columbus, 12 Dec. 121, 123; State v. Ganson, 58 O. S. 313.

The statutory method of removal being exclusive, *quo warranto* will not lie. State v. Ganson, 58 O. S. 313.

(4) **Charges.**—Charges preferred against a public officer upon which his removal is sought, must be specific, and state facts and not mere conclusions. Kerr v. Hinkle, 12 Dec. 365.

As to definiteness of charges, see State, *ex rel.* v. Barrett, 22 C. C. 104.

When a public officer may be removed for specific causes, such facts must be stated as in judgment of law constitute the cause relied on, and an opportunity afforded the officer to be heard before he can be legally removed. State v. Hoglan, 64 O. S. 532; State v. Sullivan, 58 O. S. 504.

Incompetency charged need not have been shown by acts during the term in which the officer was removed, but may have been evidenced by acts during a previous term. State v. Fire Commissioners, 26 O. S. 24.

A charge setting out facts showing that the officer cursed the board and refused to come to order, would amount to a charge of misconduct in office. State, *ex rel.* v. Sutton, 4 B. 608.

It is not necessary that the word "incompetency" be used in the charge, when this is the ground, if acts evidencing incompetency, are shown. State v. Fire Commissioners, 26 O. S. 24.

(5) **Notice.**—Where notice is required, a removal without notice is a nullity and the effect is to leave the charges pending. State, *ex rel.* v. Sutton, 4 B. 608.

As to what is notice within reasonable time. *Ib.*

Where the officer appears before the trial board and asks investigation, he waives any notice that may be required, and gives the board jurisdiction. State, *ex rel.* v. Fire Commissioners, 26 O. S. 24.

Sec. 4264. [Hearing of charges, action of council thereon.] When so filed with council, such charges shall be for hearing at the next regular meeting thereof, unless council extends the time for such hearing, which shall be done only on the application of the accused. The accused may appear in person and by counsel, examine all witnesses, and answer all charges against him. The judgment or action of the council shall be final, but to remove such officer the votes of two-thirds of all members elected to the council shall be required.[1] [97 v. 385, § 225; 96 v. 94, § 225.]

(1) **Proceedings in trial.**—A finding "from the evidence and also from facts within personal knowledge" is not a proper exercise of power, unless the facts are shown and an opportunity to refute them given. State v. Sullivan, 58 O. S. 504, 516.

As to degree of proof necessary to establish misfeasance or malfeasance in office, see Colburn v. Neufarth, 16 B. 54.

Remedies of officer.—Where power to remove is conferred on executive officer by law, injunction will not lie at suit of party to be removed to restrain the removal. Kerr v. Hinkle, 12 Dec. 365; Littleton v. Infirmary Directors, 18 C. C. 891; but see Weber v. Bishop, 4 B. 775, 777.

Remedy by injunction may be had by the incumbent of a public office to protect his possession against the interference of an adverse claimant whose title is in dispute until the latter establish his title at law, but injunction will not lie at the suit of a claimant who is out of possession, against a claimant in possession. Reemelin v. Mosby, 47 O. S. 570; Harding v. Eichinger, 57 O. S. 371; Holbrook v. Smedley, 79 O. S. 391; see also Davies v. State, 30 C. C. 527; 11 C. C. (N. S.) 209.

Courts will not interfere by injunction to prevent removal of an officer on the ground that the officials charged with authority to hear and determine the charges and make removal, are acting from improper motives. Reeves v. Griffin, 29 B. 281.

Or, on the ground that the statute under which the trial board holds office is unconstitutional. *Ib.*

Trial cannot be enjoined on the ground of hostility of the investigating committee. Miller v. Directors, 4 B. 690.

The officer, in case of removal wrongfully has a remedy by mandamus to compel reinstatement. Reeves v. Griffin, 29 B. 281; State, *ex rel.*, v. Baldwin, 77 O. S. 352.

But the action of a board in removing an officer for incompetency, is an exercise of discretion vested in the board, and such action cannot be reviewed in a suit in mandamus to compel reinstatement. State, *ex rel.* v. Fire Commissioners, 26 O. S. 24, 27.

Relator in *quo warranto* must show *prima facie* right to office claimed, and such right cannot be based on fact that he is *de facto* officer. Scott, *ex rel.* v. Johnson, 28 C. C. 793.

An injunction may be allowed at the suit of a taxpayer to restrain council from illegally removing an officer, as such step would involve an expenditure of money and would be an abuse of corporate power. Dorgan v. Columbus, 12 Dec. 121.

Notwithstanding the statutes assume to confer exclusive power on certain boards or officers to remove other officers or employes, or to make their determination final, the courts, although they may not judge on the merits, have authority to keep such tribunals, boards or officers, within the limits of their jurisdiction. State, *ex rel.* v. Egry, 79 O. S. 391.

Courts will not pass upon the sufficiency of the facts upon which charges are made for the removal of public officers. State v. Hawkins, 44 O. S. 98; State v. Bryson, 44 O. S. 457; State v. McClain, 58 O. S. 313; State v. Sullivan, 58 O.

S. 504; State v. Hoglan, 64 O. S. 532.

Soliciting re-election does not estop officer to claim that term has not expired. State v. Brady, 42 O. S. 504.

Sec. 4265. [Suspension of accused pending hearing.] Pending any of such proceedings, such person may be suspended by a majority vote of all members elected to council, but such suspension shall not be for a longer period than fifteen days, unless the hearing of such charges is extended upon the application of the accused, and in such event the suspension shall not exceed a period of thirty days.[1] [97 v. 385, § 225; 96 v. 94, § 225.]

(1) **Power to suspend** pending proceedings in trial is not incident to the power to remove, but must be expressly given. State, *ex rel.* v. Sutton, 4 B. 608.

Sec. 4266. [Power of council as to process.] For the purpose of so investigating charges against the head of any department or officer, the council may issue subpœnas or compulsory process to compel the attendance of persons and the production of books and papers before the council and may provide by ordinance for exercising and enforcing this provision. [97 v. 385, § 225; 96 v. 94, § 225.]

Sec. 4267. [Oaths, compulsory testimony, costs.] In all cases in which the attendance of witnesses may be compelled for such investigation, any member of the council may administer the requisite oaths, and the council shall have the same power to compel the giving of testimony by the attending witnesses as is conferred upon courts of justice. In all such cases, witnesses shall be entitled to the same privileges, immunities and compensation[1] as are allowed witnesses in civil cases, and the costs of all such proceedings shall be payable from the general fund of the municipal corporation. [97 v. 385, § 225; 96 v. 94, § 225.]

(1) Compensation of witnesses at hearing before council. See Op. Atty. Gen. (1918), p. 1493.

Sec. 4268. [Removal of mayor by governor.] In case of misconduct in office, bribery, any gross neglect of duty, gross

immorality, or habitual drunkenness of any mayor, upon notice and after affording such mayor a full and fair opportunity to be heard in his defense, the governor of the state shall remove him from office. The proceedings for his removal shall be commenced by the governor putting on file in his office a written statement of the alleged causes for the mayor's removal, and he shall cause a copy of such statement to be served upon the mayor not less than ten days before the hearing of the matter. Pending such investigation by the governor, he may suspend the mayor for a period of thirty days.[1] [96 v. 95, § 226.]

(1) **Validity.**—See opinion, 50 B. 114.

Removal of mayor.—Procedure to be followed by governor in suspending or removing mayor of a non-charter city from office. See Op. Atty. Gen. (1919), p. 1352.

Discretion of governor not controlled by mandamus. See State v. Davis, 102 O. S. 216.

Sec. 4269. [Proceedings and record of removal.] The proceedings had by the governor upon such removal shall be public. A full detailed statement of the reasons of such removal shall be filed by the governor in the office of the secretary of state, and shall be made a matter of public record therein. The decision of the governor, when so filed, with the reasons therefor, shall be final. [96 v. 95, § 226.]

Sec. 4270. [Disposition of fines and other moneys.] All fines and forfeitures in ordinance cases and all fees collected by the mayor, or which in any manner comes into his hands, due such mayor or to a marshal, chief of police or other officer of the municipality and any other fees and expenses which have been advanced out of the municipal treasury, and all moneys received by such mayor for the use of the municipality, shall be by him paid into the treasury of the municipality on the first Monday of each month, provided that the council of a village may, by ordinance, authorize the mayor and marshal to retain their legal fees in addition to their salaries, but in such event a marshal shall not be entitled to his expenses. At the first regular meeting of council in each and every month, he shall submit a full statement

of all moneys received, from whom and for what purposes received and when paid into the treasury. Except as otherwise provided by law, all fines and forfeitures collected by him in state cases together with all fees and expenses collected, which have been advanced out of the county treasury, shall be by him paid over to the county treasury on the first business day of each month. [108 v. 1203, 1208; R. S. Sec. 1751.]

(1) **Fees of mayor.**—See § 4213, *ante*, and notes.

See also Cambridge v. Smallwood, 27 C. C. 302; 6 C. C. (N. S.) 230; see 75 O. S. 339; Bellefontaine v. Haviland, 15 N. P. 482; 3 N. P. (N. S.) 99.

As to local option law fines, see Mt. Vernon v. Mochwart, 75 O. S. 529.

Fees of mayor or chief of police cannot be retained by such officers, but must be paid into the municipal treasury. Op. Atty. Gen. (1920), p. 735.

Set off.—Mayor cannot, in an action by city against him to recover fines, etc., collected by him, set off uncollected costs on the mayor's docket. Deatrick v. Defiance, 1 C. C. 340. The fact that council made a settlement with the mayor allowing such set off, will not bar action for full amount of fines, etc. *Ib.*

(2) **In prosecutions in the name of the state,** fines and costs received from persons convicted of misdemeanors under statutes must be paid into the county treasury and where paid into the municipal treasury, the municipality is liable therefor to the county. Cleveland v. Jewett, 39 O. S. 271.

Sec. 4271. [Annual report to council.] At the first regular meeting in January of each year, and at such other times as he deems expedient, the mayor shall report to the council concerning the affairs of the corporation, and recommend such measures as to him seems proper. [R. S. Sec. 1750; 66 v. 179.]

CHAPTER 3.

PRESIDENT OF COUNCIL.

CITIES.

Sec. 4272. [President of council; election, terms, duties.][1] The president of council shall be elected for a term of two years, commencing on the first day of January next after his election, and shall serve until his successor is elected and qualified. He shall be an elector of the corporation, and shall preside at all regular and special meetings of council, but shall have no vote therein except in case of a tie. [96 v. 63, § 132; 98 v. 172, § 222.]

(1) **Vacancy** in presidency of council may be filled by appointment of mayor under Sec. 4252 G. C. Op. Atty. Gen. (1916), p. 286.

Sec. 4273. [Acting mayor.] When the mayor is absent from the city, or is unable for any cause to perform his duties, the president of the council shall be the acting mayor.[1] While the president of the city council is acting as mayor, he shall not serve as president of council. [96 v. 63, § 132.]

(1) **When acting mayor.—** President of council cannot, in mere temporary absence of mayor, perform acts as acting mayor in derogation of the rights of the mayor, except such as public good demands. Pounds v. Elyria, 9 N. P. (N. S.) 625. When mayor is absent from city for few hours and acting mayor signs ordinance, and mayor, upon his return, vetoes the ordinance, the veto is valid. Pounds v. Elyria, 20 Dec. 257; 9 N. P. (N. S.) 625.

Sec. 4274. [Vacancy in office of mayor.] In case of the death, resignation or removal of the mayor, the president of council shall become the mayor and serve for the unexpired term, and until the successor is elected and qualified. Thereupon the president pro tem of council shall become president thereof, and shall have the same rights, duties and powers as his predecessor.[1] The vacancy thus created in council shall be filled as other vacancies, and council shall elect another president pro tem. [96 v. 63, § 132.]

(1) Op. Atty. Gen. (1915), p. 1536.

CHAPTER 4.

AUDITOR AND CLERK.

CITIES.

Sec. 4275. [Auditor; election, term.][1] The auditor shall be elected for a term of two years, commencing on the first day of January next after his election, and shall serve until his successor is elected and qualified. He shall be an elector of the corporation. [98 v. 196, § 133; 98 v. 172, § 222; 96 v. 63, § 133.]

(1) **Old section.**—Compare old § 1765a R. S., repealed.

With what other offices the office of city auditor is incompatible. See Op. Atty. Gen. (1920), No. 1249. See also *Ib.* (1915), p. 2434.

Sec. 4276. [Books and accounts.] The auditor shall keep the books of the city, exhibit accurate statements of all moneys received and expended, and of all property owned by the city and the income derived therefrom, and of all taxes and assessments. In cities having a population of less than twenty thousand[1] the city council may, by a majority vote, merge the duties of the clerk of the waterworks, if any, clerk of the board of control and clerk of the city council with the duties of the city auditor, allowing him such additional assistants in performing such additional duties as council may determine. [106 v. 483; 98 v. 196, § 133; 96 v. 63, § 133.]

(1) **Validity.**—Sec. 4250, which undertook to make a similar classification by population was held invalid in Elyria v. Vandemark, 100 O. S. 365.

As to compensation of auditor where duties are merged under this section. See Op. Atty. Gen. (1920), p. 463.

Sec. 4276-1. [Deputy auditor in cities.] The auditor of any city, may, when authorized by council ordinance, appoint a deputy who, in the absence or disability of the auditor, shall perform the duties of the auditor. [101 v. 136.]

Sec. 4277. [Seal.] Council shall provide a seal for the auditor, in the center of which shall be the name of the city, and around the margin the words "City Auditor," an impression of which seal shall be affixed to all transcripts, orders, certificates or other papers requiring authentication.[1] [96 v. 64, § 134.]

(1) **Old section.**—Compare old § 1764 R. S., repealed.

Sec. 4278. [Duty of auditor as to receiving bids.] When bids are required to be filed for the letting of contracts by the director of public service, or public safety, it shall be the duty of the city auditor or his chief deputy to attend and assist at the opening thereof and to inspect them. [99 v. 565, § 154b.]

VILLAGES.

Sec. 4279. [Election, term, qualifications.] The clerk shall be elected for a term of two years, commencing on the first day of January next after his election, and shall serve until his successor is elected and qualified. He shall be an elector of the corporation. [96 v. 84, § 201; 98 v. 172, § 222.]

Sec. 4280. [Powers and duties.][1] The clerk shall attend all meetings of council, and keep a record of its proceedings and of all rules, by-laws, resolutions and ordinances passed or adopted, which shall be subject to the inspection of all persons interested.[2] In case of the absence of the clerk, the council shall appoint one of its members to perform his duties for the time. [96 v. 84, § 201.]

(1) **Old sections.**—Compare old §§ 1755 and 1764 R. S., repealed.

(2) **Correction of journal.**—Clerk has neither the power nor the right to correct the journal of council, after council has passed upon the record of its proceedings; and mandamus will not lie to compel the clerk to do so. McClain v. McKisson, 15 C. C. 517, aff'd, 54 O. S. 673.

Sec. 4281. [Books and accounts.] The clerk shall keep the books of the village, exhibit accurate statements of all moneys received and expended of all the property owned by the vil-

lage and the income derived therefrom and of all taxes and assessments. [96 v. 84, § 201.]

Sec. 4282. [Seal.] Council shall provide a seal for the clerk, in the center of which shall be the name of the village, and around the margin "Village Clerk," an impression of which seal shall be affixed to all transcripts, orders, certificates or other papers requiring authentication.[1] [96 v. 84, § 201.]

(1) **Seal** of clerk is not the seal of the municipality for the purpose of the signing and sealing of deeds of the corporation, and its use for this purpose will not be effectual in such deeds. Tiffin v. Shawhan, 43 O. S. 178. The corporate seal of the village is provided by council and is in the keeping of the mayor. *Ib.*

CITIES AND VILLAGES.

Sec. 4283. [Meaning of terms.] In the following provisions of this chapter, the word "city" shall include "village," and the word "auditor" shall include "clerk." [96 v. 84, § 201.]

Sec. 4284. [Auditing accounts.] At the end of each fiscal year, or oftener if required by council, the auditor shall examine and audit the accounts of all officers and departments. He shall prescribe the form of accounts and reports to be rendered to his department, and the form and method of keeping accounts by all other departments, and, subject to the powers and duties of the state bureau of inspection and supervision of public offices, shall have the inspection and revision thereof.[1] Upon the death, resignation, removal or expiration of the term of any officer, the auditor shall audit the accounts of such officer, and if such officer be found indebted to the city, he shall immediately give notice thereof to council and to the solicitor, and the latter shall proceed forthwith to collect the indebtedness. [98 v. 196, § 133; 96 v. 63, § 133.]

(1) **Uniform accounting law.**— See §§ 274, *et seq.*, under OFFICERS in Part II. And see Op. Atty. Gen. (1916), p. 1597.

Sec. 4285. [Overdrawing appropriation; proof of claims.] The auditor shall not allow the amount set aside for any

appropriation to be overdrawn, or the amount appropriated for one item of expense to be drawn upon for any other purpose, or unless sufficient funds shall actually be in the treasury to the credit of the fund[1] upon which such voucher is drawn. When any claim is presented to him, he may require evidence that such amount is due, and for this purpose may summon any agent, clerk or employe of the city, or any other person, and examine him upon oath or affirmation concerning such voucher or claim. [98 v. 196, § 133; 96 v. 63, § 133.]

(1) **Must be paid from fund certified.**—An order made on a fund due a city contractor, if accepted by the fiscal officers of the city, must be paid from that fund. Akron v. Day, 16 C. C. (N. S.), 232.

Sec. 4286. [Detailed statements; receipts.] On the first Monday of each month, detailed statements of the receipts and expenditures of the several officers and departments for the preceding month shall be made to the auditor by the heads thereof.[1] The auditor shall countersign each receipt given by the treasurer before it is delivered to the person entitled to receive it, and shall charge the treasurer with the amount thereof. If the auditor approves any voucher contrary to the provisions of this title, he and his sureties shall be individually liable for the amount thereof. [96 v. 64, § 134.]

(1) **Reports.**—Estimates to be furnished auditor by various officers, see § 3787, *ante.* Auditor's statements to be furnished mayor and council, see § 3788, *ante.*

Sec. 4287. [Detailed statement of receipts and expenditures.] On or before the third Monday in October of each year, the auditor shall make and enter in the record book of the corporation, a detailed statement of all the receipts and expenditures, the number and amount of bonds issued, and for what purpose of the corporation, for the preceding year, stating from what sources the money was received, to whom paid, for what purposes expended, and showing the exact condition of the several funds of the corporation, and all outstanding liabilities, if any, to whom due, and for what purpose. [R. S. Sec. 1756; 80 v. 65; 67 v. 71.]

Sec. 4288. [How statements to be published; penalty for neglect.] The auditor shall cause a copy of such detailed statement, which shall be approved by the mayor, to be posted at the places of holding elections for officers of the corporation, on the morning of the first Tuesday after the first Monday of November each year. If the municipality has a population of over two thousand, the auditor shall have the statement published once in a newspaper published or of general circulation in the corporation, at least five days prior to such date. Upon the order of council, the auditor, at any time, shall furnish it a detailed statement of all receipts and disbursements, for such periods as it may require. An auditor who refuses or neglects to conform to the provisions of this and the next preceding section, shall be fined by the mayor, or police court as the case may be, not more than thirty dollars or less than twenty-five dollars for the use of the corporation. The provisions of this and the preceding sections shall not apply to a municipal corporation that publishes annually a detailed statement of the receipts and expenditures in book form or in any other printed manner. [R. S. Sec. 1757; 80 v. 65; 67 v. 71.]

Sec. 4289. [Report to auditor of state.] On or before the first Monday of June, in each year, the auditor shall report to the auditor of state the aggregate expenses of the corporation for the preceding year, under the following heads: school, police, streets, bridges, fire department, lights, poor, salaries, and interest, also, the amount of the general corporation tax for all the preceding objects, and for any others not enumerated, and the special taxes levied and collected by the corporation for the same period.[1] [R. S. Sec. 1758; 67 v. 71.]

(1) **Form of reports.** — See § 277, *et seq.*, under "Officers", in Part II.

Sec. 4290. [Certificate as to election of certain officers.] The auditor shall certify to the court of common pleas of the county in which the corporation is situated, the election of every officer of the corporation having power to discharge the duties of a justice of the peace, or to take the acknowledgment of deeds, or to certify depositions or affidavits to be

used within the limits of such corporation, with the date of such election, and the time when such officer became legally qualified to discharge the duties of such office. Such certificate shall be made within ten days after such qualification. [R. S. Sec. 1759; 66 v. 171.]

FORM OF CERTIFICATE.

To the Clerk of the Court of Common Pleas, ... County, Ohio:

I, ... auditor of the city of ....., State of Ohio, hereby certify that on the ..... day of ....., 19...., ... was duly elected ..... (here insert title of office) and qualified for said office on the ..... day of ....., 19.....

IN WITNESS WHEREOF, I have hereunto set my hand and official seal this ..... day of ....., 19.....

.....,

[Seal.] Auditor of the city of .....

Sec. 4291. [Clerk of court shall record certificates.] The clerk of the court of common pleas shall record such certificates in the book in which the record of the election and qualifications of justices of the peace are kept. The same fees shall be allowed to the officers certifying and recording them as are allowed for certifying and recording the election and qualification of justices of the peace. [R. S. Sec. 1760; 66 v. 171.]

Sec. 4292. [Penalty for neglect.] Each auditor so required to make such certificate, and each clerk so required to record it when presented for record, who neglects or refuses to perform such duty, shall pay to the treasurer of the corporation for each such neglect or refusal the sum of fifteen dollars, to be recovered in a civil action, at the suit of such corporation and shall also be liable for all damages arising from such neglect or refusal. Any auditor who neglects to make report to the auditor of state as herein provided shall forfeit one hundred dollars, to be recovered in a civil action, with costs, in the name of the corporation, and for its use. [R. S. Sec. 1761; 67 v. 71; 66 v. 171.]

CHAPTER 5.

TREASURER.

CITIES AND VILLAGES.

Sec. 4293. [Treasurer; election and term.] The treasurer shall be elected for a term of two years, commencing on the first day of January next after his election and shall serve until his successor is elected and qualified. He shall be an elector of the corporation. [96 v. 84, § 202; 97 v. 270, § 135; 98 v. 172, § 222; 96 v. 64, § 135.]

Sec. 4294. [Deposit of moneys.][1] Upon giving bond as required by council, the treasurer may, by and with the consent of his bondsmen, deposit all funds and public moneys of which he has charge in such bank or banks, situated within the county, which may seem best for the protection of such funds, and such deposit shall be subject at all times to the warrants and orders of the treasurer required by law to be drawn.[2] All profits arising from such deposit or deposits shall inure to the benefit of the funds.[3] Such deposit shall in no wise release the treasurer from liability for any loss which may occur thereby.[4] [97 v. 270, § 135; 96 v. 64, § 135.]

(1) **Old section.**—Compare old § (1773-1) R. S., repealed.

(2) **Mandamus** will lie to compel a treasurer to pay an order properly drawn on him, and if he refuses wilfully and oppressively, he is liable to a personal action. Bates v. Fries, 2 Disney, 511.

(3) **Interest on public funds.**—The requirement that all profits derived from the deposit of public funds shall inure to the benefit of such funds, and this, even though the treasurer is liable for any loss occasioned by such deposit, is a legislative declaration of the principle announced in Eshelby v. Board of Education, 66 O. S. 71.

An action may be brought by a municipality for an accounting and to recover interest where public funds have been deposited without its knowledge, but with knowledge on the part of the bank as to the trust character of the deposit. Newark v. Bank, 15 C. C. (N. S.), 276; Bank v. Newark, 96 O. S. 453.

(4) **Release of treasurers** from liability for loss of funds, see § 2303, *et seq.*, under OFFICERS in Part II.

Sec. 4295. [Deposit of moneys may be provided for by ordinance; security by municipal depositary required.][1] The council may provide by ordinance for the deposit of all public moneys coming into the hands of the treasurer, in such bank or banks, situated within the municipality or county, as offer, at competitive bidding, the highest rate of interest and give a good and sufficient bond issued by a surety company authorized to do business in the state, or furnish good and sufficient surety, or secure said moneys by a deposit of bonds or other interest bearing obligations of the United States or those for the payment of principal and interest of which the faith of the United States is pledged, including bonds of the District of Columbia; bonds of the State of Ohio or of any other State of the United States; legally issued bonds of any city, village, county, township or other political subdivision of this or any other state or territory of the United States and as to which there has been no default of principal, interest or coupons, and which in the opinion of the Treasurer are good and collectible, providing the issuing body politic has not defaulted at any time since the year 1900, in the payment of the principal and interest of any of its bonds, said security to be subject to the approval of the proper municipal officers, in a sum not less than ten per cent in excess of the maximum amount at any time to be deposited.[2] And whenever any of the funds of any of the political subdivisions of the state shall be deposited under any of the depositary laws of the state, the securities herein mentioned, in addition to such other securities as are prescribed by law, may be accepted to secure such deposits. [103 v. 113; 102 v. 122; 97 v. 270, § 135; 96 v. 64, § 135.]

(1) **Former depository acts.**—See, for example, §§ (1136-14), *et seq.*, (County of Cuyahoga); (1784-1), *et seq.*, (Cleveland); (1784-21), *et seq.*, (Toledo); (1784-41), *et seq.*, (Tiffin).

(2) **Validity of provision** that council may provide for deposit of money by treasurer, upheld. State, *ex rel.* v. Bowers, 26 C. C. 326, (aff'd, 70 O. S. 423).

Duty of treasurer.—Treasurer has no discretion to refuse to obey ordinance, and mandamus will lie to compel obedience. *Ib.*

Applies to school funds.—This section applies to school funds. *Ib.*

Bond; construction of.—A bond securing deposits made by a city or village in a designated depositary, is a statutory bond into which the provisions of the stat-

ute must be read, and the surety must be held to have contracted with a view to the statutory provisions. Wyoming v. Guaranty Co., 19 N. P. (N. S.), 385 (reversed on other grounds, Wyoming v. Trust & G. Co., 9 Oh. App. 225.)

Liberty bonds as security for deposit of public funds. See Op. Atty. Gen. (1920), p. 562.

"Good and sufficient surety" means personal surety, not mortgage and note securities. Op. Atty. Gen. (1912), p. 1757; *Ib.* (1919), p. 1533.

An incorporated bank being a separate entity from its stockholders, the latter may be accepted as a surety for such bank, when selected as a depository for municipal funds. Op. Atty. Gen. (1912), p. 1640.

For discussion as to when interest on deposits by foreign checks, deposited under provisions of sections 4295 and 4296 G. C., begins to accrue, see Op. Atty. Gen. (1919), p. 623.

Duty of providing for safekeeping of securities. See Op. Atty. Gen. (1921), p. 745.

Sec. 4296. [Contents of ordinance; conduct of bidding.] In such ordinance the council may determine the method by which such bids shall be received, the authority which shall receive them, and which shall determine the sufficiency of the security offered, the time for the contracts for which deposits of public money may be made, and all details for carrying into effect the authority here given. Proceedings in connection with such competitive bidding and the deposit of money shall be conducted in such manner as to insure full publicity, and shall be open at all times to the inspection of any citizen. As to any deposits made under authority of an ordinance of the council, pursuant hereof, if the treasurer has exercised due care, neither he nor his bondsmen shall be liable for any loss occasioned thereby. [97 v. 270, § 135; 96 v. 64, § 135.]

Sec. 4297. [Accounts of treasurer.] The treasurer shall keep an accurate account of all moneys by him received, showing the amount thereof, the time when, from whom, and on what account received, and of all disbursements by him made, showing the amount thereof, the time when, to whom, and on what account paid. He shall so arrange his books that the amount received and paid on account of separate funds, or specific appropriations, shall be exhibited in separate accounts. In addition to the ordinary duties of such officer, he shall have such powers and perform such duties as may be required by ordinance of the corporation not inconsistent with

this title, and not incompatible with the nature of his office. [R. S. Sec. 1767; 66 v. 174.]

Sec. 4298. [Powers and duties of treasurer.] The treasurer shall demand and receive from the county treasurer taxes levied and assessments made and certified to the county auditor by authority of the council, and by the auditor placed on the tax-list for collection,[1] and from persons authorized to collect or required to pay them, moneys accruing to the corporation from judgments, fines, penalties, forfeitures, licenses, and costs taxed in the mayor's or police courts, and debts due the corporation, and he shall disburse them on the order of such person or persons as may be authorized by law or ordinance to issue orders therefor. [R. S. Sec. 1768; 66 v. 174.]

(1) **Taxes paid under protest.**—City treasurer may compel county treasurer to pay over moneys collected and belonging to the city, although paid under protest. Ratterman v. State, 44 O. S. 641.

Disposition of fines. See Op. Atty. Gen. (1922), p. 526.

Sec. 4299. [Quarterly account; annual report.] He shall settle and account with the council, quarterly, and also when the council may by resolution or ordinance require. At the first regular meeting thereof in January, each year he shall report to the council the condition of the finances of the corporation, the amount received by him, and the sources whence received, and the disbursements by him made, and on what account, during the year preceding. Such account shall exhibit also the balance due on each fund which may have come into his hands during the year. [R. S. Sec. 1769; 66 v. 174.]

Sec. 4300. [Corporation and school funds.] The treasurer shall receive and disburse all funds of the corporation including the school funds,[1] and such other funds as arise in or belong to any department or part of the corporation government. [96 v. 65, § 136.]

(1) **As treasurer of school funds.**—By § 4763 "in each city district the treasurer of the city funds shall be treasurer of the school funds."

As to compensation and liability of treasurer when acting as treasurer of school funds, see Knorr v. Bd. of Ed., 9 B. 182; Eshelby v. Bd. of Ed., 66 O. S. 71. As to additional

bond before acting as treasurer of school fund, see Knorr v. Bd. of Ed., *supra;* Eshelby v. Bd. of Ed., *supra.*

Sec. 4301. [Semi-annual distribution to municipalities.] On the first Monday of February and August in each year, the county treasurer shall pay over to the treasurer of the corporation, all moneys received by him up to that date, arising from taxes levied, and assessments made, belonging to the corporation. Moneys received from other sources for municipal corporations, shall be paid over by the county treasurer to the municipal corporations, on or before the 10th day of each month following the receipt or collections thereof. [109 v. 213; R. S. Sec. 1771; 66 v. 175.]

Sec. 4302. [Duty of delivering money and property.] At the expiration of his term of office, or on his resignation or removal, the treasurer shall deliver to his successor, all moneys, books, papers and other property in his possession as treasurer. In the case of the death or incapacity of such treasurer, his legal representatives shall, in like manner, pay over and deliver the money and property which were in the treasurer's hands, to the person entitled thereto. [R. S. Sec. 1773; 55 v. 92.]

CHAPTER 6.

SOLICITOR.

CITIES.

Sec. 4303. [Solicitor, election and term.] The solicitor shall be elected for a term of two years, commencing on the first day of January next after his election, and shall serve until his successor is elected and qualified. He shall be an elector of the city. [98 v. 172, § 222; 99 v. 458, § 137; 96 v. 65, § 137.]

Sec. 4304. [Who not eligible as solicitor.] No person shall be eligible to the office of solicitor of a municipal corporation who is not an attorney and counselor at law, duly admitted to practice in this state. [R. S. Sec. 1737; 92 v. 68; 66 v. 162, § 79.]

Sec. 4305. [Powers and duties.] The solicitor shall prepare[1] all contracts, bonds and other instruments in writing in which the city is concerned, and shall serve the several directors and officers mentioned in this title as legal counsel and attorney. [99 v. 458, § 137; 96 v. 65, § 137.]

(1) Council determines who shall let contracts for printing of municipal bonds, etc. Op. Atty. Gen. (1916), p. 253.

Sec. 4306. [Solicitor shall be prosecuting attorney of police or mayor's court.] The solicitor shall also be prosecuting attorney of the police or mayor's court.[1] When council allows an assistant or assistants to the solicitor, he may designate an assistant or assistants to act as prosecuting attorney or attorneys of the police or mayor's court. The persons thus designated shall be subject to the approval of the city council. [102 v. 131; 99 v. 458, § 137; 96 v. 65, § 137.]

(1) **Police Court Prosecutor.**— The designation by the Solicitor of one of his assistants to act as Police Court Prosecutor does not

terminate the tenure of the Solicitor to the office of Prosecutor, or affect his right to compensation for such office provided by statute. State, *ex rel.* v. Davies, 30 C. C. 270; 10 C. C. (N. S.), 517; (aff'd, 54 B. 54); but see *contra,* Thomas, Jr., v. Commissioners, 88 O. S. 489; and see Op. Atty. Gen. (1918), p. 1524.

Applies to municipal court.—Where a municipal court has the jurisdiction of a police or mayor's court, it is the duty of the city solicitor to act as the prosecuting attorney of such municipal court, and of the county commissioners to make a proper allowance to the city solicitor for his services in state cases before such municipal court. State, ex rel. v. Commissioners, 28 O. C. A. 527; 7 Oh. App. 97; 28 C. D. 571 (aff'd, 93 O. S. 42).

Sec. 4307. [Compensation.] The prosecuting attorney of the police or mayor's court shall prosecute all cases brought before such court, and perform the same duties, as far as they are applicable thereto, as required of the prosecuting attorney of the county. The city solicitor or the assistant or assistants whom he may designate to act as prosecuting attorney or attorneys of the police or mayor's court shall receive for this service such compensation as council may prescribe, and such additional compensation as the county commissioners shall allow.[1] [102 v. 131; R. S. § 1813; 95 v. 86; 84 v. 26; 66 v. 179.]

(1) **Provisions as to allowance mandatory.**—The amount allowed by the council and the amount allowed by the county may be determined by them, but this section makes it mandatory that each should allow something. Commissioners v. State, 93 O. S. 42.

Salary of prosecutor.—See note to § 4306.

Sec. 4308. [Duties as to suits.] When required so to do by resolution of the council, the solicitor shall prosecute or defend, as the case may be, for and in behalf of the corporation, all complaints, suits and controversies in which the corporation is a party, and such other suits, matters and controversies as he shall, by resolution or ordinance, be directed to prosecute, but shall not be required to prosecute any action before the mayor for the violation of an ordinance without first advising such action.[1] [R. S. § 1774; 90 v. 132; 85 v. 249; 66 v. 175.]

(1) **Duties of solicitor.**—The solicitor is a public officer elected by the people, and, when required to do so by resolution of council, he

shall prosecute and defend for and in behalf of corporation, except in certain cases. State, *ex rel.* v. Boyce, 43 O. S. 46, 52.

Not necessary that city solicitor sign petition. Deatrick v. City of Defiance, 1 C. C. 340, 342.

It is the duty of the solicitor to furnish vouchers in condemnation cases when required of him by city ordinance, and mandamus will lie on his failure to do so. Ryan v. Hoffman, 26 O. S. 109.

Whether solicitor can bring suit, not under power given by §§ 4311-4313, without resolution of council instructing him to do so, see State, *ex rel.* v. Boyce, 43 O. S. 46, 52; Toledo v. Toledo Ry. & Light Co., 2 C. C. (N. S.) 97.

An entry endorsed by the city solicitor, but filed subsequent to his retirement from office, no notice thereof being given to his successor, is not in compliance with the rule of court providing that when an entry is approved by counsel it shall be so endorsed and presented to the court. Wolcutt v. Columbus, 13 Dec. 561.

The word "person" as used in § 11594, applies to municipal corporation. Hence, when a municipal corporation attempts to confess judgment under the provisions of §§ 11594 and 11595, it is necessary to the validity of such proceeding that the city's legal representative appear in open court and confess judgment on behalf of the city. *Ib.*

The city solicitor, as legal adviser of the city, has, as such representative, the standing to ask a revocation of proceedings by which a judgment by default and on confession was obtained, notwithstanding that the city council itself has not applied to the court for such revocation. *Ib.*

Authority of director of public service and city solicitor to use certain funds to compromise actions and claims. Op. Atty. Gen. (1917), p. 515.

City solicitor cannot compromise claims. Op. Atty. Gen. (1918), p. 1551.

Sec. 4309. [Solicitor shall give opinions.] When an officer of the corporation entertains doubts concerning the law in any matter before him in his official capacity, and desires the opinion of the solicitor, he shall clearly state to the solicitor, in writing, the question upon which the opinion is desired, and thereupon it shall be the duty of the solicitor, within a reasonable time, to reply orally or in writing to such inquiry.[1] The right here conferred upon officers shall extend to the council, and to each board provided for in this title. [R. S. Sec. 1775; 85 v. 225.]

(1) See Yaple v. Commissioners, 2 C. C. 406.

Sec. 4310. [Payment over of moneys.] The solicitor shall pay to the treasurer all moneys which may come into his hands

belonging to the corporation, or by way of fines, forfeitures, costs, or otherwise, and take the treasurer's duplicate receipt therefor, one of which he shall file with the auditor of the corporation. [R. S. Sec. 1776; 66 v. 175, § 158.]

Sec. 4311. [When solicitor shall apply for injunction.] The solicitor shall apply in the name of the corporation,[1] to a court of competent jurisdiction for an order of injunction to restrain the misapplication of funds of the corporation, or the abuse of its corporate powers, or the execution or performance of any contract made in behalf of the corporation in contravention of the laws or ordinance governing it, or which was procured by fraud or corruption.[2] [R. S. Sec. 1777; 87 v. 122; 81 v. 188; 66 v. 175, § 159.]

(1) **Action in whose name.**— Where solicitor brings action in his own name as solicitor and taxpayer, though in behalf of the municipality, court may strike solicitor's name from title of cause and substitute name of municipality. L. S. & M. S. Ry. Co. v. Elyria, 69 O. S. 414.

(2) **Construction.** — § 4311, *et seq.*, are remedial and should receive a construction which will make the remedy a useful one. Gas and Water Co. v. Elyria, 57 O. S. 374, 383; Dorgan v. Columbus, 12 Dec. 121, 128; Rogers v. Railway Co., 12 Dec. 136; Fergus v. Columbus, 6 N. P. 82.

The solicitor may bring the suit in the name of a taxpayer with his consent, although not requested in writing to do so. Cincinnati St. Ry. v. Smith, 29 O. S. 291.

No action of council is necessary to authorize solicitor to bring suit under this section. State, *ex rel.* v. Bowers, 26 C. C. 326; 4 C. C. (N. S.) 345, (aff'd 70 O. S. 423).

There is ample authority in this section for the bringing by the city solicitor of injunction proceedings against the unreasonable occupation of a street with railway tracks, regardless of failure on the part of council to authorize him so to do. Cincinnati v. Railway, 24 C. C. (N. S.), 305.

The authority conferred by this section on the city solicitor to bring actions for the purpose of restraining the illegal payment of money from the public treasury does not give jurisdiction to a court to entertain an injunction proceeding contrary to the provisions of section 58 of the Workmen's Compensation Act. Porter v. Hopkins, 20 C. C. (N. S.), 548 (aff'd, 91 O. S. 74).

For general matters relating to actions under this and succeeding sections, see notes under § 4314.

Bond.—The solicitor need not give bond in procuring injunction under this section. Forsythe v. Winans, 44 O. S. 277.

Sec. 4312. [Specific performance.] When an obligation or contract made on behalf of the corporation granting a right or easement, or creating a public duty, is being evaded or violated, the solicitor shall likewise apply for the forfeiture or the specific performance thereof as the nature of the case requires.[1] [R. S. Sec. 1777; 87 v. 122; 81 v. 188; 66 v. 175, § 159.]

(1) See notes under § 4314.

Sec. 4313. [Mandamus.] In case an officer or board fails to perform any duty expressly enjoined by law or ordinance, the solicitor shall apply to a court of competent jurisdiction for a writ of mandamus to compel the performance of such duty.[1] [R. S. Sec. 1777; 87 v. 122; 81 v. 188; 66 v. 175, § 159.]

(1) See notes under § 4314.

Sec. 4314. [Suit by taxpayer.] In case the solicitor fails upon the written request of any taxpayer of the corporation to make any application provided for in the preceding three sections, such taxpayer may institute suit in his own name, on behalf of the corporation;[1] and any taxpayer of any municipal corporation in which there is no solicitor may bring such suit on behalf of such corporation. No such suit or proceeding shall be entertained by any court until the taxpayer shall have given security for the costs of the proceeding. [101 v. 216; R. S. Sec. 1778; 95 v. 317; 87 v. 122; 67 v. 72.]

(1) **Constitutionality** of section upheld. Horstman v. St. Ry., 13 Dec. 670; 1 N. P. (N. S.) 25.

Purpose of provisions.—The object of §§ 4311-4314 is not to subserve the personal interests or protect any individual right peculiar to the taxpayer, but to protect the municipal corporation. Knorr v. Miller, 5 C. C. 609 (affirmed, 27 B. 64); Gallagher v. Johnson, 31 B. 24; Hensly v. Hamilton, 3 C. C. 201; Peppard v. Cincinnati, 6 N. P. 57; State v. Bowers, 26 C. C. 326; 4 C. C. (N. S.) 345 (aff'd, 70 O. S. 423).

The only question in such case is whether there has been a violation of corporate rights and this is one between the municipality and its officers. The other party to an alleged illegal municipal contract cannot come into the case and ask to have his rights determined. Johnson v. Farley, 8 N. P. 498.

The taxpayer's right at common law to enjoin abuse of corporate power and misapplication of public

funds by municipal officers existed and was recognized independent of these statutes, which limit and regulate the bringing of such suits. Raynolds v. Cleveland, 13 Dec. 125 (reversed on other grounds, 24 C. C. 215); Cincinnati St. Ry. v. Smith, 29 O. S. 291.

In what cases action lies.— The abuse of corporate powers, within the meaning of § 4311, includes the unlawful exercise of powers possessed by the corporation as well as assumption of power not conferred. Gas & Water Co. v. Elyria, 57 O. S. 374.

Injunction will lie to prevent a bond issue to raise a fund to be applied for an object unauthorized and void. *Ib.*

Every contract made in violation of the law or ordinance governing the matter is an abuse of corporate power. Shaw v. Jones, 4 N. P. 372.

A taxpayer may enjoin the municipality from allowing the use of its streets for laying pneumatic tubes for carrying packages by compressed air, where the grant is unlawful. Ampt v. Cincinnati, 21 C. C. 300.

Solicitor has power to bring action for forfeiture of franchises granted to a gas company. Columbus v. Federal Gas & Fuel Co., 14 Dec. 261 (aff'd, 72 O. S. 637).

Solicitor may bring action to enjoin gas company from violating its obligations to the city, notwithstanding the company is acting under color of an ordinance which is in excess of the power of council. Springfield v. Gas Company, 31 C. C. 446, (aff'd, 81 O. S. 537; 12 C. C. (N. S.) 302 (aff'd, 81 O. S. 527).

Franchise granted to an electric light company carries with it an obligation to furnish electric light pursuant to the ordinance and an obligation to the municipality is thus inferred which may be enforced by mandatory injunction. Van Wert v. Van Wert Public Service Co., 11 N. P. (N. S.) 91.

As to injunction by taxpayer against change of grade of street, see Corry v. Cincinnati, 22 B. 194.

City may bring action against interurban company coming into municipality by virtue of § 9120 for failure of such company to comply with conditions imposed on city company. Cincinnati v. St. Ry. Co., 16 Dec. 220; 3 N. P. (N. S.) 489; see 75 O. S. 196.

Solicitor may bring mandamus to compel auditor to issue warrant for payment of salaries of employees of public service department. State, ex *rel.* v. Lothschultz, 10 N. P. (N. S.) 257; 20 Dec. 390.

Taxpayer may enjoin council from removing mayor under an invalid ordinance, as both a misapplication of funds and an abuse of corporate power. Dorgan v. Columbus, 12 Dec. 121. But see Shaw v. Jones, 4 N. P. 372.

Taxpayer may enjoin awarding municipal contract, as for a street improvement, to one not the lowest bidder. Tucker v. Newark, 19 C. C. 1, 3; Pease v. Ryan, 7 C. C. 44.

A taxpayer, upon refusal of the city solicitor to bring an action to test the validity of regulations relative to water service charges and deposits, may bring an action in his own name. Rogers v. Cincinnati, 14 N. P. (N. S.), 193.

Municipality may be enjoined from paying money to a water company in pursuance of a contract, claimed to be illegal to pay hy-

drant rentals for fire purposes, as a misappropriation of funds and performance of a contract in contravention of law. Defiance v. Council, 23 C. C. 96, (reversed on other grounds, 68 O. S. 520).

Expenditure of public funds by municipal officers in exploitation of a particular system of valuing property for taxation may be enjoined without regard to the merits of the system. Crawford v. Madigan, 13 Dec. 494.

Street railway grants.—Grant of franchise to street railway company is a contract on behalf of the city within meaning of § 4312. Cincinnati St. Ry. Co. v. Smith, 29 O. S. 291. See, as to actions by taxpayers relating to street railway grants, notes under § 3768, *ante.*

But want of consents of abutting owners will not be ground for taxpayer's injunction against street railway grant. See note 5, "Right of action for want of consents," under § 3770.

Where other remedy.—Action by taxpayer is not barred because there may be a remedy by the state by action of *quo warranto.* Horstman v. St. Ry. Co., 13 Dec. 670; Elyria v. Ry. Co., 12 Dec. 609 (69 O. S. 414).

Hardship no defense in action to enforce franchise.—In an action to compel a public service corporation to abide by a certain condition of its franchise, a defense is not stated by the averment that the company cannot carry out the condition named without serious financial loss and possible bankruptcy. Cincinnati v. Railway, 14 N. P. (N. S.), 420.

Character of action.—Solicitor may have mandatory injunction to compel gas company to charge for gas, the price required by ordinance. Gas Light Co. v. Zanesville, 47 O. S. 35.

He may have a mandatory injunction to compel a gas company to carry out its contract with the municipality. Toledo v. Gas Co., 5 C. C. 557.

Mandamus will lie to compel sinking fund trustees to pay a final judgment (not in condemnation of property cases) if they have sufficient funds. State, *ex rel.* v. Harrison, 81 O. S. 98.

One with whom the municipality has made an illegal contract may be enjoined from performance, although the municipality has fully performed. Haskins v. Cincinnati Con. St. Ry. Co., 4 B. 1126.

Legislation cannot be enjoined, but if the object of an ordinance is illegal, injunction will lie to prevent its being carried out. Moore v. Hoffman, 2 C. S. C. R. 453; Johnson v. Cincinnati, 26 B. 223.

A taxpayer cannot complain that a city's acts, under legislative authority, will violate the obligation of the city's contracts. Only the creditor can complain in such case. Cincinnati v. Dexter, 55 O. S. 93.

When sections do not apply.—These sections do not apply to actions against board of education. Youmans v. Board of Education, 13 C. C. 207. But a taxpayer might, independently of these sections, bring suit to restrain the board of education from doing an illegal act. *Ib.;* Weir v. Day, 35 O. S. 143, 146.

Contract by police commissioners which is illegal, but does not involve a use of city funds, is not enjoinable under this section as an

abuse of corporate power of the city. Fitzpatrick v. Bromwell Co., 5 N. P. 165.

Police funds, under former statutes, were held not to be city funds, within the meaning of these sections. Yaple v. Police Commissioners, 2 C. C. 406.

A taxpayer cannot maintain a suit to enjoin one railroad company from transporting the cars of another across the city streets on the ground that the contract between the two companies is *ultra vires.* Rogers v. Ry. Co., 47 B. 83.

These sections have no application to an action by owners seeking to enjoin sale of their property to pay assessments, on the ground that the ordinance for the improvement is an unreasonable one. Mills v. Norwood, 6 C. C. 305.

Nor an action by abutting property owner to enforce the proper use of the streets in front of his property. Herrick v. Cleveland, 7 C. C. 470.

The lowest bidder for a municipal contract cannot, as such, enjoin the offices from rejecting all bids, though as a taxpayer he might proceed under these sections, and then he must first apply to solicitor. Johnson v. Westside St. Ry., 10 B. 345; Johnson v. Cincinnati, 26 B. 223; but see Lake Shore Foundry v. Cleveland, 8 C. C. 671; Mathers v. Cincinnati, 3 B. 709.

An abutting owner as such cannot enjoin a contract for improvement because of defects in proceedings before any assessment has been levied against him or any work done. A taxpayer suing on behalf of the corporation might do this, under § 4314, but this is a special provision and is not to be applied to other cases than those mentioned. Wood v. Pleasant Ridge, 12 C. C. 177.

So an abutting owner cannot enjoin laying natural gas pipes in street, because question not submitted to popular vote as required by law. Only the public can sue in such case. Webb v. Ohio Gas Fuel Co., 16 B. 121.

Sections do not provide for recovery back of money unlawfully expended, but only the restraining of unlawful disbursements not yet made. Crawford v. Madigan, 13 Dec. 494; McAlexander v. School District, 19 Dec. 89; 7 N. P. (N. S.) 590.

But even without statutory authority, taxpayer, on behalf of municipality, may prosecute suit in equity to recover back money illegally paid as compensation to councilmen before any compensation fixed by ordinance. Walker v. Dillonvale, 30 C. C. 623; 11 C. C. (N. S.) 385.

Nor for recovery of money alleged to be fraudulently withheld from the municipality. Nicholson v. Maile, 15 Dec. 682; 3 N. P. (N. S.) 201; State v. Zumstein, 4 C. C. 268. Nor for recovery of a claim against the municipality. State, *ex rel.* v. Roebuck, 15 Dec. 400.

Sections do not authorize action to restrain County Commissioners from proceeding under provisions for the improvement of a county ditch partly within municipality. McCaslin v. Perrysburg, 30 C. C. 103; 10 C. C. (N. S.) 325.

When brought.—In enjoining illegal bond issue or tax levy it is not necessary to wait until the fund is raised. Gas & Water Co. v. Elyria, 57 O. S. 374, 383. In en-

joining street railway grant it is not material that franchise is not to go into effect until many years later. Horstman v. St. Ry. Co., 14 Dec. 545. An action to enjoin payment under a contract on ground of invalidity *ab initio* of contract, is barred under § 11227, in ten years from time contract was entered into. Defiance Water Co. v. Defiance, 68 O. S. 520. Where operation under illegal franchise constitutes public nuisance statute of limitations does not apply. Horstman v. St. Ry. Co., 13 Dec. 670; 1 N. P. (N. S.) 25.

Estoppel to sue.—For cases where municipality was held estopped to sue because it had permitted operation under the right or contract for many years and allowed large expenditures to be made without objection, see Ampt v. Cincinnati, 34 B. 111, 112; Pugh v. Elec. Light Co., 19 C. C. 594; Crawford v. Madigan, 13 Dec. 494; Columbus v. Federal Gas & Fuel Co., 14 Dec. 261 (aff'd, 72 O. S. 632); Columbus v. Bohl, 13 Dec. 569; 1 N. P. (N. S.) 469; Darby v. Norwood, 17 Dec. 253. But see Hertenstein v. Herrmann, 6 N. P. 93 (where suit brought only four days after work begun); Ross v. Columbus, 8 N. P. 420 (where action begun before grant of franchise). See also on the subject of estoppel, Defiance v. Council, 23 C. C. 96 (reversed other grounds, 68 O. S. 520), where making payments by city under contract held not to estop.

See also Horstman v. St. Ry. Co., 12 Dec. 756 (no estoppel where municipality without power to act).

See further note "Estoppel," under § 4328, post.

Action by one taxpayer is bar to similar action by another taxpayer, although not a resident at the time of first action. Hallock v. Columbus, 1 N. P. (N. S.) 205; 13 Dec. 488. See also Atlas Bank v. Columbia Tp., 13 Dec. 472.

Contracts made under law formerly considered constitutional.—*Effect of subsequent contra ruling.*—Where contracts have been made or obligations entered into on the faith of a certain, definite and apparently fixed construction of the constitution by the highest court, such contracts will not be invalidated nor such obligations avoided by the subsequent judgment of the court that the former construction was erroneous. Friedman v. Cincinnati, 13 Dec. 404. See Alter v. Cincinnati, 56 O. S. 47; Atlas Bank v. Columbia Tp., 13 Dec. 472; Lewis v. Symmes, 61 O. S. 475; Douglas v. Pike Co., 101 U. S. 677.

Contracts for necessary public improvements entered into under a special act, but before May 1, 1903, may be upheld and work thereunder allowed to continue, though the law may be unconstitutional under recent decisions of the Supreme Court. Columbus v. Bohl, 1 N. P., (N. S.) 469; 13 Dec. 569.

Interest of taxpayer.—The taxpayer need not have a private interest peculiar to himself, and not shared by all taxpayers, in order to proceed. Rogers v. Ry. Co., 12 Dec. 136; Knorr v. Miller, 5 C. C. 609; Doster v. Cleveland, 20 Dec. 548.

As to whether, in order to maintain the suit the taxpayer must show that by increase in taxation or otherwise expense will be put upon him. See Buning v. St. Ry. Co., 1 C. C. 323; Cincinnati v. Allison, 12 Dec. 376; Sommers v. Cin-

cinnati, 8 Rec. 612; and see Sloane v. Ry. Co., 7 C. C. 84; Knorr v. Miller, 5 C. C. 609; Landis v. Darke County (Supreme Ct. not rep.), 32 B. 313; Fergus v. Columbus, 6 N. P. 82.

Time of payment of taxes is not material in determining whether the plaintiff is a taxpayer. State, *ex rel.* v. Taylor, 16 Dec. 66.

Motive of taxpayer in bringing the suit has been held to be immaterial. Peppard v. Cincinnati, 6 N. P. 57; Raynolds v. Cleveland, 24 C. C. 215; 2 C. C. (N. S.) 139, (aff'd, 76 O. S. 619).

But see *contra*, Gallagher v. Johnson, 31 B. 24; Ampt v. Cincinnati, 2 N. P. (N. S.) 489; 15 Dec. 237. And see also Brown v. Toledo, 10 C. C. 642, 645; Johnson v. Farley, 8 N. P. 498; Fergus v. Columbus, 6 N. P. 82; Roberts v. Columbus, 15 N. P. (N. S.), 297. However, in McClain v. McKisson, 15 C. C. 517 (aff'd, 54 O. S. 673) it was held that the fact that the taxpayer was to be indemnified for his expenses by a beneficiary of the action, viz., a lower bidder, would not defeat the right to sue, the taxpayer desiring for his own part to bring the suit. But see Vadakin v. Crilly, 7 C. C. (N. S.) 341 (aff'd, 73 O. S. 380).

Nonresident taxpayer.—A taxpayer, though a nonresident, may sue under § 4314. McClain v. McKisson, 15 C. C. 517, (affirmed, 54 O. S. 673).

So may a foreign corporation which is a taxpayer. United Cigar Stores Co. v. Von Bargen, 7 N. P. (N. S.) 420.

Prosecuting error.—Taxpayer may, upon refusal of solicitor, after request, in case brought under §§ 4311-4314, prosecute error himself. The right to do so is within the spirit of these sections. Pugh v. Electric Light Co., 19 C. C. 594.

Pleading and practice.—*Character of Petition.*—The action must be brought by the taxpayer for the use of the municipal corporation and not in his own behalf as taxpayer. Hensly v. Hamilton, 3 C. C. 201; Wood v. Pleasant Ridge, 12 C. C. 177; Hallock v. Columbus, 13 Dec. 488; 1 N. P. (N. S.) 205; and this is so when the solicitor brings the suit for the taxpayer. Miller v. Pearce, 2 C. S. C. R. 44, 51.

Capacity of plaintiff to sue in a taxpayer's action must appear in the petition, and a mere allegation that he is a resident and taxpayer of the municipality without averring that the suit is brought on behalf of the corporation is bad on demurrer; but this omission may be remedied by amendment by interlineation. State v. Hinkle, 13 Dec. 165; Shaw v. Jones, 4 N. P. 372. But the caption of the petition need not show that plaintiff is a taxpayer. Ampt v. Cincinnati, 5 N. P. 98.

Where an injunction is brought to prevent the carrying out of the object of legislation on the ground that the legislation was not enacted in good faith, it is not sufficient to aver that trading of votes and persuasion of one member induced others to vote as they did. Mills v. Norwood, 26 B. 348.

A mere averment that a certain bidder for a municipal contract was the lowest and that a certain other bidder was not the lowest and that the contract was awarded to the latter, does not, standing alone, state a cause of action. Cop-

pin v. Herrmann, 7 N. P. 528, (affirmed, 63 O. S. 572).

Plaintiff in an action in mandamus to compel the performance of a public duty is not required to plead or prove more than that the defendant officer is refusing to discharge a duty imposed upon him by law. State v. Hinkle, 13 Dec. 165.

Petition asking court to restrain alleged illegal payments to a water company, when raises issue of validity of contract with such company, see Defiance v. Council, 23 C. C. 96 (reversed other grounds, 68 O. S. 520).

Demurrer to petition on ground that plaintiff has not capacity to maintain the action, raises the question as to whether the action comes within scope of sections under which it is brought. Nicholson v. Maile, 15 Dec. 682; 3 N. P. (N. S.) 201.

Where it is shown that the injury complained of is not threatened, injunction will not lie. Fritter v. Bohl, 2 N. P. (N. S.) 365.

Parties.—Two taxpayers may join in the same suit for injunction. Mathers v. Cincinnati, 3 B. 551.

The city and not council or officers should be made defendant in an action to enforce the duty of council or other boards to keep the streets free from obstruction. Herrick v. Cleveland, 7 C. C. 470.

All councilmen illegally receiving compensation may be joined in suit to recover back compensation paid. Walker v. Dillonvale, 30 C. C. 623; 11 C. C. (N. S.) 385; 82 O. S. 137.

City need not be made a party where the action is to enjoin awarding the grant of a street railway route to one not the lowest bidder. Knorr v. Miller, 25 B. 128; 27 B. 64.

A successful bidder who received the award sought to be enjoined, should be made a party defendant. Fergus v. Columbus, 6 N. P. 82.

So, a company claiming under the grant or ordinance sought to be enjoined should be made a party. Ampt v. Cincinnati, 6 N. P. 401.

Res adjudicata.—The right of a taxpayer to bring an action on behalf of the city is barred, where the question which he desires to raise is one which might properly have been raised and litigated in a previous action brought by the city solicitor and carried to a final judgment. Stock Yards Co. v. Cincinnati, 20 C. C. (N. S.), 458; 1 Oh. App. 452; affirming 14 N. P. (N. S.), 529; and see Heald v. Cleveland, 19 N. P. (N. S.), 305.

Situs.—Where a municipality is situated in two counties local actions must be brought in the county where its municipal officers and government are located. Fostoria v. Fox, 60 O. S. 340.

Request to solicitor.—Taxpayer cannot sue until he has requested the solicitor to sue and the solicitor has refused. Findlay Gas Light Co. v. Findlay, 2 C. C. 237. Request must be made, even though it would probably be futile. *Ib.* And though the suit is to enjoin an act wholly beyond the power of the municipality. *Ib.* Request by another taxpayer after suit brought, will not be sufficient. *Ib.*

The petition should show request to solicitor and his refusal, but omission may be cured by amendment. Brown v. Toledo, 10 C. C. 642.

Requirement of the section does not apply where there is no solicitor, and in such case a resident tax-

payer may enjoin illegal use of corporate funds and property, without previous request. Pierce v. Hagans, 79 O. S. 9; Hensly v. Hamilton, 3 C. C. 201; Cope v. Wellsville, 25 B. 250; Kissel v. Columbus Grove, 53 O. S. 650; Smith v. Rockford, 4 N. P. (N. S.), 513; *contra*, Sharp v. Cadiz, 18 C. C. (N. S.), 193.

As to length of time solicitor may hold request without response before it can be said he has neglected to act, see Ampt v. Cincinnati, 2 N. P. (N. S.) 489; 15 Dec. 237.

Sec. 4315. [Limitation of such action.] No such action to enjoin the performance of a contract entered into or the payment of any bonds issued by a municipal corporation, shall be brought or maintained unless commenced within one year from the date of such contract or bonds. [99 v. 458, § 137; 96 v. 65, § 137.]

Sec. 4316. [Duty of court.] If the court hearing such case is satisfied that the taxpayer had good cause to believe that his allegations were well founded, or if they are sufficient in law, it shall make such order as the equity and justice of the case demand.[1] In such case the taxpayer shall be allowed his costs, and, if judgment is finally ordered in his favor, he may be allowed as part of the costs a reasonable compensation for his attorney.[2] [R. S. Sec. 1779; 95 v. 317; 66 v. 175, § 161.]

(1) **Decree.**—Under the power to make such order as equity demands, the court cannot annex a condition to its decree, enjoining an illegal award, that the city pay for work already done. Hertenstein v. Herrmann, 6 N. P. 93, 99.

This section contemplates that the court is not to be bound by hard and fast rules, and a taxpayer is not entitled to relief where he seeks to compel the city to do what is manifestly inequitable and unjust. Friedman v. Cincinnati, 13 Dec. 404; Fergus v. Columbus, 6 N. P. 82, 93.

Injunction pendente lite not granted where exercise of power by company under ordinance will be beneficial to city and no rights will be prejudiced thereby. Ross v. Columbus, 8 N. P. 420.

(2) **Costs and fees.**—If suit was founded on defects and irregularities that might reasonably seem to justify it, court may apportion costs. Sloane v. People's Electric Ry., 7 C. C. 84, 94.

The taxpayer must show reasonable cause for suit, to claim costs. Miller v. Pearce, 2 C. S. C. R. 44.

As to whether the motive of the taxpayer affects the question of his rights to costs and attorney's fees, see Brown v. Toledo, 10 C. C. 642; Peppard v. Cincinnati, 6 N. P. 57.

Attorney's fees.—Under former § 1779, before amendment in 95 O. L. 317, the taxpayer was entitled to his costs and compensation to his attorney if he had good cause to believe his allegations were well-founded or if the same were in

fact sufficient. The taxpayer may now be allowed attorney's fees only in case final judgment is rendered in his favor. See Horstman v. Cincinnati, 17 C. C. (N. S.), 285.

Where a taxpayer brought a suit on refusal of the solicitor and subsequent thereto the issues were determined in a *quo warranto* proceeding, the court will not allow compensation to the plaintiff's attorney under this section. Oliver v. Cincinnati, 12 Oh. App. 432.

In villages where there is no village solicitor, a taxpayer under former Sections 1777-1779 R. S., was not entitled to have attorney's fees included in the costs allowed him. Kissell v. Columbus Grove, 34 B. 50; 53 O. S. 650; Brundige v. Ashley, 62 O. S. 526. But note that the provision of § 4314 authorizing a taxpayer to bring such suit in case there is no solicitor, has been added since the above decisions were rendered.

The amount of attorney's fees allowed, should be measured by what public officers receive, rather than by what an attorney in private practice would receive for the same service. Guckenberger v. Dexter, 18 C. C. 244.

Judgment for costs and attorney's fee; how paid. Op. Atty. Gen. (1917), p. 1878.

Sec. 4317. [Annual report.] At their first regular meeting in January, the solicitor shall make a report to the council, of the business of his office, and the moneys by him collected, during the year preceding, and such other matters as he deems proper to promote the good government and welfare of the corporation. [R. S. Sec. 1780; 66 v. 175, § 162.]

CHAPTER 7.

SEALER OF WEIGHTS AND MEASURES.

CITIES AND VILLAGES.

Sec. 4318. [Sealer of weights and measures; appointment and term.] The mayor may appoint a sealer of weights and measures, who shall hold office co-extensive with the term of office of the mayor who made his appointment, and until his successor is appointed and qualified, unless otherwise removed from office.[1] [R. S. Sec. 1783; 99 v. 474; 58 v. 78, § 10.]

(1) **Power of council** to regulate weighing and measuring, see § 3651, *ante*.

A city may by ordinance appoint a city weigher but cannot forbid others from following the business of a weigher. Cincinnati v. Broadwell, 3 Dec. (Re) 286.

This section leaves it optional with the mayor whether or not there shall be a sealer of weights and measures and makes his term co-extensive with that of the mayor appointing him. State, *ex rel.* v. Minshall, 10 Oh. App. 86.

This office may be discontinued by the mayor by refusing to name a successor and by removing a hold-over appointee of a previous administration, notwithstanding the fact that council has fixed the compensation and bond of such officer and that he has passed a non-competitive civil service examination. *Ib.*

As to removal of such officer when regularly appointed, see note under § 486-17, Part II, title "Civil Service".

Sec. 4319. [Qualification and compensation.] The sealer of weights and measures shall be a competent person for the position, and shall receive a salary fixed by ordinance, to be paid by the corporation, which salary shall be instead of all fees or charges otherwise allowed by law or ordinance. [R. S. Sec. 1783; 99 v. 474; 58 v. 78, § 10.]

Sec. 4320. [Oath and bond.] Before entering upon his duties, the sealer of weights and measures shall take the oath of office required by law, and give bond to the corporation in such amount as is prescribed by ordinance, with security to

the approval of the mayor, and conditioned for the faithful performance of his duties. [R. S. Sec. 1783; 99 v. 474; 58 v. 78, § 10.]

Sec. 4321. [Comparison with county standards.] At least once in three years, the sealer of weights and measures shall compare the copy of standards in his possession with those in the office of the county sealer. [R. S. Sec. 1783; 99 v. 474; 58 v. 78, § 10.]

Sec. 4322. [Comparison and test of weights and measures.] The sealer of weights and measures shall compare all weights and measures, balances, weighing and measuring devices used in the purchase and sale of commodities with the copies in his possession. Any weights and measures, balances and weighing and measuring devices having a device for indicating or registering the price as well as the weight or quantity of commodities shall be tested by him both as to correctness of weight or quantity and value indicated by them; such sealer shall seal such weights and measures, balances and weighing and measuring devices as shall be tested and found correct,[1] and, after ten days' notice in writing to the owner, shall condemn or seize such as are found to be incorrect, and shall seal such weights and measures, balances, weighing and measuring devices having a device for indicating or registering the price as well as the weight or quantity of commodities only when correct both in indications of weight or quantity and value, and shall condemn or seize such in which the graduations or indications are found to be false or inaccurately placed either as to weight or quantity or value. [102 v. 414; R. S. Sec. 1784; 58 v. 78, § 11.]

(1) **Mandamus** lies to compel the sealer to seal measures, as required by § 4322, if they are in exact accord with proper standards. Gates v. Cleveland, 21 Dec. 141; 11 N. P. (N. S.), 545; (reversed on other grounds, 18 C. C. (N. S.), 349).

The city sealer cannot be required to seal rectangular wooden boxes having exactly twice the cubic contents of the standard half bushel. State, *ex rel.* v. Burns, 18 C. C. (N. S.), 526.

CHAPTER 8.

PUBLIC SERVICE.

CITIES.

Department of Public Service.

Sec. 4323. [Director of public service; appointment.][1] In each city there shall be a department of public service which shall be administered by a director of public service. The director of public service shall be an elector of the city, shall be appointed by the mayor and shall serve until his successor is appointed and qualified. He shall make rules and regulations for the administration of the affairs under his supervision. [99 v. 563, § 138; 96 v. 66, § 138.]

(1) **Old sections.**—Compare sections relating to "city commissioners" in Code of 1852 (50 O. L. 249) and to "board of improvements" in code of 1869 (66 O. L. 233); also § 2186 R. S. *et seq.* and § (1545-35) *et seq.* R. S. (director of public works, Cleveland); § (1545-143) *et seq* R. S. (director of public works, Columbus); § (1545-240) *et seq.*, R. S. (board of public affairs, Springfield); § (1545-296) R. S. (departments of public improvements and public works, Hamilton); § 2205 *et seq.* R. S., (board of public service, Cincinnati); § 1707*d*-1 *et seq.* (board of city affairs, Dayton); § (1545-270) (board of city commissioners, Akron and Youngstown); § 1707*f*-2 *et seq.* (board of public affairs, Portsmouth); 89 O. L. 24 (board of improvements, Ravenna), and other similar acts, all repealed.

Merger of service and safety departments in certain cities. See § 4250, *ante.*

Sec. 4324. [General duties; records.] The director of public service shall manage and supervise all public works and undertakings of the city, except as otherwise provided by law, and shall have all powers and perform all duties conferred upon him by law.[1] He shall keep a record of his proceedings, a copy of which, certified by him, shall be competent evidence in all courts. [99 v. 563, §§ 139, 144; 96 v. 66, 68, §§ 139, 144.]

(1) The Director of Public Service has no authority to fix compensation of employes. This is vested in council under Section 4214 G. C. Op. Atty. Gen. (1916), p. 125.

Sec. 4325. [Supervision; powers.][1] The director of public service shall supervise the improvement and repair of streets, avenues, alleys, lands, lanes, squares, wharves, docks, landings, market houses, bridges, viaducts, aqueducts, sidewalks, play grounds, sewers, drains, ditches, culverts, ship channels, streams and water courses, the lighting, sprinkling and cleaning of public places, the construction of public improvements and public works, except those having reference to the department of public safety, or as otherwise provided in this title.[2] [99 v. 563, § 140; 96 v. 66, § 140.]

(1) **Old sections.**—See note under § 4323, and see §§ 2207 and 2187 R. S., both repealed.

(2) **Council has control** and care of the streets, while the director of public service supervises the improvement of streets. See § 3714, *ante*.

The authority to make appropriation for improving streets is vested in council, but the supervision and manner of doing the work are with the director of public service. State, *ex rel.* v. Roebuck, 15 Dec. 400.

Powers strictly construed.—The powers of such officer as this, as prescribed by the statutory provisions, are to be strictly construed. He has only such powers as are expressly conferred and such as may arise by fair implication because essential to carry out the express powers. State, *ex rel.* v. Boyden, 4 N. P. 322. See also as to construction of powers of municipal officers, Bloom v. Xenia, 32 O. S. 461; Ravenna v. Penn. Co., 45 O. S. 118; Buchanan Bridge Co. v. Campbell, 60 O. S. 406; Comstock v. Nelsonville, 61 O. S. 288; Lancaster v. Miller, 58 O. S. 558; Wellston v. Morgan, 65 O. S. 219.

Director cannot prescribe different regulations for erection of signs than those prescribed by council. Reese v. Cleveland, 5 N. P. (N. S.) 193.

Scope of authority of lighting superintendent, in making changes in system of electric light wires, see Cen. U. Tel. Co. v. Conneaut, 16 O. F. D. 259.

Sec. 4326. [Management of public utilities.][1] The director of public service shall manage municipal water,[2] lighting, heating, power, garbage and other undertakings of the city, parks,[3] baths, play grounds, market houses, cemeteries, crematories, sewage disposal plants and farms, and shall make and preserve surveys, maps, plans, drawings and estimates. He shall supervise the construction and have charge of the maintenance of public buildings and other property of the corporation not otherwise provided for in this title.[4] He shall have the management of all other matters provided by the council in con-

nection with the public service of the city. [99 v. 563, § 141; 96 v. 66, § 141.]

(1) **Old sections.**—See note to § 4323.

(2) **Water works.**—See § 3955 *ante*, and notes.

Administrative management.—Details of administrative management of water works belong to the department having charge of water works and council cannot exercise control over such matters. Hutchins v. Cleveland, 29 C. C. 697; 9 C. C. (N. S.) 226, (aff'd, 79 O. S. 478).

Water meters.—The placing of water meters in residences is within the administrative descretion of the department having charge of the water works and council cannot restrict the power by ordinance. *Ib.*

(3) **Parks.**—Scope of power, see Cincinnati v. University, 13 Dec. 284.

Discretion of director in management of parks will not be controlled by the court, but where petition alleges gross abuse of discretion in cutting trees, it is not demurrable. Allen v. Cleveland, 9 N. P. (N. S.) 598.

Authority in a director of public service to manage the public parks does not include authority to grant permission to private parties, for a stipulated rental to be paid to the city, to erect booths for the sale of refreshments and articles likely to be called for by visitors to the park. If such authority is to be granted it must be through proper legislation by council. Columbus v. Biederman, 16 N. P. (N. S.), 140.

Liability.—City not liable for condition of a bridge built by others on land used as part of boulevard and park system. Dering v. Cleveland, 102 O. S. 94.

For act providing for board of park commissioners to manage parks upon petition and vote of electors, see §§ 4053 to 4065, *ante*.

(4) **Power to rent offices.**—Director of public service has authority to enter into lease of office quarters for officers and employes of city. Ashley v. Cowell, 10 N. P. (N. S.) 310.

A director of public service may, when given control of a public hall by ordinance, refuse use of same for religious services so long as there is no discrimination against denominations. Op. Atty. Gen. (1915), p. 1342.

Sec. 4327. [Employment of superintendents, inspectors, clerks and laborers.][1] The director of public service may establish such sub-departments as may be necessary and determine the number of superintendents, deputies, inspectors, engineers, harbor masters, clerks, laborers and other persons, necessary for the execution of the work and the performance of the duties of this department.[2] [99 v. 564, § 145; 96 v. 68, § 145.]

(1) **Old section.**—Compare old § 2211 R. S., repealed.

(2) **Employes.**—Under former statutes it was held that such officer as this, having under his care property needing the services of watchmen in addition to the general police patrol, would have the power to employ such watchmen as were necessary. State, *ex rel.* v. Boyden, 4 N. P. 322.

Appointment and removal of city engineer. See Op. Atty. Gen. (1918), p. 1154; (1916), p. 375.

Certificate of auditor required.—The fact that management of public buildings and authority to employ persons in their management, are given to director of public service, does not give absolute discretion, but authority to incur a liability on the part of the city is subject to the limitation that funds to meet the liability have been appropriated and that the auditor has certified that the money is in the treasury. Pittinger v. Wellsville, 75 O. S. 508.

Power of removal.—Power of director to remove or suspend any subordinate officers or employes in his department, see § 4247, *ante.*

Delegating power.—Such officer cannot delegate his power to remove employes. Kelley v. Cincinnati, 7 N. P. 360.

Suspension of employes by subordinate officers.—Subordinate officers, such as the superintendent of the street cleaning department, who may have a large number of men under them, must have, from the necessities of the case, power to summarily dismiss for insubordination or dereliction of duty. But such suspension can last only until reported to director and acted upon by him. Kelley v. Cincinnati, *supra.*

Salaries of employes.—Director of public service has no power to fix the salaries and bonds of employes in the department, but these are fixed by council. State, *ex rel.* v. Lothschultz, 10 N. P. (N. S.) 257; 20 Dec. 390.

Public Contracts.[1]

Sec. 4328. [Advertisement of; bids.] The director of public service may make any contract or purchase supplies or material or provide labor for any work under the supervision of that department not involving more than five hundred dollars.[2] When an expenditure within the department, other than the compensation of persons employed therein, exceeds five hundred dollars, such expenditure shall first be authorized and directed by ordinance of council.[3] When so authorized and directed, the director of public service shall make a written contract[4] with the lowest and best bidder[5] after advertisement[6] for not less than two nor more than four consecutive weeks in a newspaper of general circulation within the city.[7] [96 v. 67, § 143.]

(1) **Old sections.**—Among the old sections embodying provisions similar to those in the section above, see § 2303 R. S., repealed;

and see §§ 2214 and 2215 R. S., repealed (contracts by board of public service in Cincinnati); 2224 R. S., repealed (changes in such contracts, how made); §§ (1545-73) to (1545-79), all repealed (contracts in Cleveland); §§ (1545-150) to (1545-155) R. S., and 95 O. L. 266-270, all repealed (contracts in Columbus); § 1707*d*-9 R. S., repealed (contracts by board of city affairs in Dayton); § (1545-319) R. S., repealed (contracts by board of control in Hamilton); § (1545-249) R. S., repealed (contracts by board of public affairs in Springfield); § (1545-280) R. S., repealed (contracts by board of city commissioners in Youngstown and Akron); and see old §§ 1693 R. S. and 2690*j* R. S., repealed.

Delegation of power.—The power to make public contracts cannot be delegated by one board or officer to another. Knauss v. Columbus, 13 Dec. 200.

But allowing engineer to determine engineering matters with regard to bids is not a taking away of powers from the board. The engineer in such case is acting as agent. Ampt v. Cincinnati, 17 C. C. 516 (affirmed, 60 O. S. 621).

Municipality's liability on contract.—There is no implied liability *ex contractu* of a municipality, and it can become obligated only in the manner fixed by statute. Welston v. Morgan, 65 O. S. 219; see also McCloud v. Columbus, 54 O. S. 439; Lancaster v. Miller, 58 O. S. 558; Buchanan Bridge Co. v. Campbell, 60 O. S. 406; Comstock v. Nelsonville, 61 O. S. 288; North v. Huron Co., 30 C. C. 145; 10 C. C. (N. S.), 462; Verrill v. Newark, 14 N. P. (N. S.), 565; Frisbie v. E. Cleveland, 98 O. S. 266. See further note under § 3616, *ante*.

To state a good cause of action against a municipality in matters *ex contractu* the petition must declare upon a contract, agreement, obligation or appropriation made and entered into according to statute. A petition on an account merely or *quantum meruit*, in such cases is not sufficient. Wellston v. Morgan, 65 O. S. 219; McCormick v. Niles, 81 O. S. 246, 251.

To the same effect see McGowan Co. v. Portsmouth, 106 O. S. 629.

The contract for lighting the streets of a village having expired prior to the rendition of the service for which judgment is asked, and the claim resting on *quantum meruit* only, no recovery can be had for the service rendered. Gas Co. v. Cincinnati, 18 N. P. (N. S.), 615.

Liability for compensation of emergency patrolment; subrogation.—Where a mayor of a municipality, acting pursuant to § § 4250 and 4373, appoints emergency patrolment, and represents to a bank that the municipality is without funds to either employ or pay such emergency patrolment, and procures the bank to pay the emergency patrolment upon the payroll or certificate of the city auditor of such municipality, and the sum so paid is the fair and reasonable value of such services as theretofore fixed by the municipality, the bank will be subrogated to the rights of such emergency patrolment and be entitled to recover the money from the municipality. Youngstown v. National Bank, 106 O. S. 563.

Persons dealing with a municipal corporation must ascertain at their own peril that contract is made in

accordance with statute. Wellston v. Morgan, 65 O. S. 219; State, *ex rel.* v. Board of Public Service, 81 O. S. 218, 226.

Where a bidder has received a contract awarded illegally he must be held to have assumed the risks of a decision declaring the award invalid. Hertenstein v. Herrmann, 6 N. P. 93.

Where the contract is illegal, the court has no authority to decree payment for the part performed. *Ib.*

See also Castner v. Pleasant Ridge, 18 Dec. 539; 7 N. P. (N. S.) 174, where municipality was held not liable for supplies purchased but without any advertising or contract as required by statute.

And see Verrill v. Newark, 9 N. P. (N. S.) 303, where recovery denied on contract for furnishing water, not entered into in accordance with statutory requirements.

As to municipal liability on contract made without certificate of funds on hand, see § 3806, *ante*, and notes. And see Op. Atty. Gen. (1912), p. 1900.

Contract in excess of estimate; liability.—Where the statute law does not limit or restrict the actual cost of a municipal street improvement to the estimate thereof by the engineer, the fact that the actual cost exceeds the estimated cost will not invalidate the contract. McDonald v. Hornberger, 21 N. P. (N. S.), 209.

Estoppel.—Where a municipal corporation has entered into a contract with an individual under and by virtue of a statute which is unconstitutional and the subject matter of the contract is not *ultra vires* illegal or *malum prohibitum*, and the facts are such as against the corporation as would estop an individual from setting up as a defense the unconstitutionality of the statute, the municipal corporation will also be so estopped. Mt. Vernon v. State, 71 O. S. 428.

So where the municipality has proceeded, not in accordance with the statutes governing its action, but the subject matter is within its power, it may be estopped as an individual would be estopped. McGonigale v. Defiance, 15 O. F. D. 100, 291; Raynolds v. Cleveland, 8 C. C. (N. S.) 278; 28 C. C. 463, (aff'd, 77 O. S. 631); but see Lancaster v. Miller, 58 O. S. 558.

So contract to supply municipality with water for period of thirty years without vote of the people, when statute required such vote, was held to estop municipality from denying its liability for period during which it has power to contract without a vote of the people. McGonigale v. Defiance, 15 O. F. D. 100.

Where there is want of statutory authority to act, municipality will not be estopped. Columbus v. Public Service Co., 17 Dec. 291; 4 N. P. (N. S.) 329.

Form of action.—A controversy between a municipality and an individual, parties to a contract, as to their respective rights under the contract, cannot be determined in proceedings in mandamus. Mt. Vernon v. State, 71 O. S. 428.

(2) **Contract less than $500,** for street improvement, may be let to lowest bidder, in discretion of director, but council cannot require such contract to be so let. State, *ex rel.* v. Roebuck, 15 Dec. 400.

Splitting up contract.—The director cannot split up a contract involv-

ing altogether more than $500 and let it in parts in successive awards, so as to evade the requirements of advertisements, etc. Wing v. Cleveland, 15 B. 50; Lancaster v. Miller, 58 O. S. 558; but where the director has, in good faith, elected to regard the construction of each section of an improvement as a matter distinct and independent and has proceeded to contract separately for each section, each involving an expenditure of less than five hundred dollars, advertisements for bids would not be necessary. Lancaster v. Miller, 58 O. S. 558.

(3) **Action of council.**—The requirement of authorization by council for contracts is met by the ordinance making an appropriation and stating generally the purpose for which it is made and authorizing the director to enter into contracts to effect that purpose. It is not necessary that the particular contract be approved. Akron v. Dobson, 81 O. S. 66.

An ordinance reciting that at an election duly held an issue of bonds was authorized for the purpose of meeting the expense of a designated public improvement and appropriating the proceeds from the sale of said bonds for said purpose, is the determining ordinance with reference to such improvement, and where published in accordance with law, injunction will not lie to stop the proposed work because of failure to publish a subsequent ordinance which merely ordered the director of public service to enter into a contract with the lowest and best bidder for the carrying forward and completion of said work. McCourt v. Akron, 13 N. P. (N. S.), 537.

Rescission of contract.—Power of rescission is implied from power to contract, but Council must authorize. Newark v. Fromholtz, 102 O. S. 81.

As to a supplementary contract, a like rule applies. Ib.

(4) **Extent of power in making contracts.**—The power conferred upon the director of public service is not simply to execute the contract, but to enter into it; the contract is merely authorized by council; it is made and entered into by the director of public service. Yaryan v. Toledo, 28 C. C. 259; 8 C. C. (N. S.) 1, (aff'd, 76 O. S. 584).

The director may prepare plans, estimates, etc., for a contract, and this is not the exercise of legislative power and is not conferred on council. *Ib.*

The director may properly make the contract for street improvement, though council has only designated in general terms the character of materials and the director is required to choose the particular material to be used, after bids are received. Scott v. Hamilton, 7 C. C. (N. S.) 493.

A contract for part of a system of improvements is not invalidated because the entire system will cost more than council has appropriated. Yaryan v. Toledo, 28 C. C. 259; 8 C. C. (N. S.) 1.

Construction of contract as to rights of contractor and municipality generally in action on contract; burden of proof and measure of damages.—See Worth v. Dayton, 16 O. L. R. 261.

Liable to contractor for ob-

struction to work, when. See Op. Atty. Gen. (1918), p. 1265.

Contracts for improvement in excess of estimate of city engineer. See Op. Atty. Gen. (1918), p. 951.

(5) **Discretion conferred.**—A power given the director to make a contract "with the lowest and best bidder" confers on such director a discretion to determine which is the lowest and best bidder under all the circumstances, and this discretion cannot be interfered with by the court, in the absence of fraud or gross abuse. Scott v. Hamilton, 7 C. C. (N. S.) 493; State, *ex rel.* Walton v. Herrmann, 63 O. S. 440; Coppin v. Herrmann, 7 N. P. 6 (aff'd, 63 O. S. 572); Hubbard v. Sandusky, 9 C. C. 638; McClain v. McKisson, 15 C. C. 517; Coppin v. Herrmann, 6 N. P. 452; State v. Board of Education, 6 N. P. 347; Irwin v. Greenville, 1 Dayton 140; Columbus v. Board of P. S., 14 Dec. 715; Fogarty v. Cincinnati, 17 Dec. 752; State, *ex rel.* v. Board of Public Service, 81 O. S. 218; Robinson v. Cleveland, 17 C. C. (N. S.), 519; Roberts v. Columbus, 15 N. P. (N. S.), 297.

The director is permitted under this section, to take the best proposition offered, and may take into consideration the quality, efficiency and feasibility of the thing to be furnished, the qualifications and responsibility of the bidder and the price in view of all the other considerations. Yaryan v. Toledo, 28 C. C. 259; 8 C. C. (N. S.) 1; State, *ex rel.* v. Board, 4 C. C. 76. And he may decide to accept a higher priced article than the one named in the lowest bid, where advertisement was general enough to cover different kinds of material. State, *ex rel.* v. St. Bernard, 10 C. C. 74; State, *ex rel.* v. Bd. of Ed., 20 B. 156.

The director is required to determine who is the best as well as the lowest bidder and to consider not only the financial ability, capacity, etc., of the bidder, but also the quality of the materials proposed to be supplied, and the discretion of the director will not be interfered with by the courts unless abused. U. S. Wood Preserving Co. v. Sundmaker, 186 Fed. 678.

But the discretion is a "sound discretion,"—a power to make a determination based on facts, after investigation, and not a power to make a merely arbitrary determination. Coppin v. Herrmann, 7 N. P. 528.

But with the determination by a board or officer of a question of fact as to whether a bid complies with the specifications, as, for example, whether a machine is one that has been in successful operation for two years, the court will not interfere unless the determination was so far wrong as to indicate fraud or bad faith. Columbus v. Board of Public Service, 18 Dec. 611; 5 N. P. (N. S.) 462.

To authorize a court to interfere on the ground of the insufficiency of the price received for sale of public property, the price must have been so small that the sale amounted to a reckless and improvident act. Kerlin Bros. v. Toledo, 20 C. C. 603.

Where director finds that the lowest bidder is not reliable, he may accept the next lowest bid, and court will not interfere with this discretion, although it was not correct on the facts. State, *ex rel.* v. St. Bernard, 10 C. C. 74.

But where the best bidder refuses to accept the contract, an award cannot be made to a third party, agreeing to accept it at the same price unless there is a readvertisement, etc. Franklin v. Baird, 7 N. P. 571.

Where there are two bids at the same figure, the director cannot accept each for a part of the materials to be furnished, but must accept only one. Boynton v. Elyria, 19 Dec. 762.

Acceptance of higher bid on theory that bidder will use material better than that called for by the specifications, is an abuse of discretion. Tuke v. Sundmaker, 10 N. P. (N. S.) 91.

Discretion to accept lowest and best bid does not permit acceptance of higher of two bids submitted by the same bidder. Tuke v. Sundmaker, 10 N. P. (N. S.) 91.

Public officials in considering bids for a public improvement are not debarred from determining to use material which is manufactured by only one firm, where such material is not covered by patents and in the exercise of a reasonable discretion it is accepted, all things considered, as the best offered for the purpose intended. McCourt v. Akron, 13 N. P. (N. S.), 537.

As to discretion of public officers in general, in the letting of contracts, see Boren v. Commr's, 21 O. S. 311; State v. Commr's, 36 O. S. 326; Pugh Printing Co. v. Deputy State Supervisors, etc., 22 C. C. 584; Wood Co. v. Pargillis, 10 C. C. 376; State v. Directors, 5 O. S. 234; State v. Commissioners, 18 O. S. 386, 20 O. S. 425; State v. Yeatman, 22 O. S. 546; State, *ex rel.*, v. McKenzie, 29 C. C. 115.

Former code § 143 (now § 4328, *supra*) was held to control and supersede § 794 R. S. (now § 2362 *et seq.* G. C.), in considering discretion in awarding contract to lowest and best bidder. Yaryan v. Toledo, 28 C. C. 259; 8 C. C. (N. S.) 1 (aff'd, 76 O. S. 584); and to supersede § 799 R. S. (now § 2355 G. C.), Holbrook v. Toledo, 28 C. C. 284; 8 C. C. (N. S.) 31 (aff'd, 73 O. S. 400).

When competitive bidding may be dispensed with, where the work is essentially non-competitive because of its artistic nature, see State, *ex rel.* v. McKenzie, 29 C. C. 115; 9 C. C. (N. S.) 105; State, *ex rel.* v. Cass, 32 C. C. 208; 13 C. C. (N. S.) 449; employment, without competitive bidding, of competent engineers to locate serious water waste, notwithstanding the cost thereof will exceed $500; see Alcorn v. Price, 13 N. P. (N. S.), 558.

Bids for non-competitive construction. See Op. Atty. Gen. (1923), No. 943.

Patented or exclusive articles.—Plans and specifications shall not provide for. See Sec. 3811 and notes.

Remedy of bidder.—Unsuccessful bidder cannot as such enjoin the awarding of the contract to successful bidder. His only remedy if he can show the contract has been improperly awarded is to sue as a taxpayer. Carmichael & Co. v. McCourt, 27 C. C. 775; 6 C. C. (N. S.) 591. See also Akron v. France, 24 C. C. 63.

Petition must allege that success-

ful bid was not lowest and best. Columbus v. Board, 14 Dec. 715.

Mandamus will not lie to compel award to lower bidder. U. S. Wood Preserving Co. v. Sundmaker, 186 Fed. 678.

Regularity of bids.—The bid to be valid must conform to the terms of the advertisement, and if it does not do so, no contract can be awarded on it. State, *ex rel.*, v. Cincinnati, 1 N. P. 377.

Where advertisement asked for bids for stone for a reservoir and the bid was for stone and grading, an award on such bid is illegal. Miller v. Pearce, 2 C. S. C. R. 44.

The officers would have no discretion to amend a bid for alleged mistake, unless the data for such change is apparent on the face of the bid. Beaver v. Blind Asylum, 19 O. S. 97; State, *ex rel.*, v. Betts, 4 C. C. 85; McGreevy v. Board, 20 C. C. 114; State, *ex rel.*, v. Cincinnati, 1 N. P. 377.

But defects in the form of the bid might be waived. Ross v. Board of Education, 42 O. S. 374.

Where a bid includes items not called for in the advertisement for bids, and is in a lump sum, it will be taken as a bid for the work called for and no more, and cannot be reduced by estimating the cost of items not mentioned in advertisement. Boren v. Commr's, 21 O. S. 311.

Where the advertisement calls for bids for new pipe, a bid for second-hand pipe cannot be accepted. Lake Shore Foundry v. Cleveland, 8 C. C. 671.

The bid is not good if it contains a condition. State, *ex rel.*, v. Barnes, 35 O. S. 136.

But where a bid in response to an advertisement for sale of a natural gas plant, puts a separate price on the part outside the city, the part within and both combined, it is in reality three bids and an award on the first bid will not be invalidated by a condition attached to the last bid. Kerlin Bros. v. Toledo, 20 C. C. 603.

A bid cannot be rejected because the granite offered is not from one of five certain quarries, provided the granite offered is equal in quality to the samples as called for in the specifications. State, *ex rel.*, v. Nieman, 6 N. P. 419.

If a bid fully corresponds with the specifications, the fact that the sample required to accompany it does not come up to the requirement, will not invalidate the bid, for the sample is merely the bidder's interpretation of the requirements. Many v. Cleveland, 19 C. C. 58; but see Herrman v. State, 11 C. C. 504.

The fact that a foreign corporation has not obtained a license to do business in Ohio, will not make an acceptance of the bid invalid. Fergus v. Columbus, 6 N. P. 82.

Provision requires separate statement of price of labor and material when bid embraces both, and this provision is mandatory; and custom of submitting bids otherwise, cannot override statutory requirement. Columbus v. Board of Public Service, 14 Dec. 715.

(6) **Provision mandatory.**—The requirement of a preliminary advertisement for the benefit of persons to be affected, or for the information of the public, when a public contract is to be let, is mandatory and contract without such advertisement or after advertisement for

less than statutory time is void. Welker v. Potter, 18 O. S. 85; Gas & Water Co. v. Elyria, 57 O. S. 374; Lancaster v. Miller, 58 O. S. 558; Buchanan Bridge Co. v. Campbell, 60 O. S. 406; Wing v. Cleveland, 14 B. 190; Upington v. Oviatt, 24 O. S. 232; McCloud v. Columbus, 54 O. S. 439; Mueller v. Board, 11 N. P. (N. S.) 113.

Sufficiency of advertisement.—Where advertisement omitted certain items of work, but these were given in the specifications (referred to in the advertisement) the advertisement is sufficient. Ampt v. Cincinnati, 17 C. C. 516.

Asking for bids in the alternative and providing for alterations, will not invalidate an advertisement for bids. Ampt v. Cincinnati, 17 C. C. 516.

Director need not furnish specifications to bidders in any greater detail than is required to make the matter intelligent to persons competent to do the work, where the contract is of the character involved in building an extensive waterworks plant. Yaryan v. Toledo, 28 C. C. 259; 8 C. C. (N. S.) 1 (aff'd, 76 O. S. 584).

See further as to sufficiency of advertisement for bids, Clock Co. v. Comm'rs, 31 O. S. 415; Wing v. Cleveland, 14 B. 190; Cincinnati v. Goodman, 5 Rec. 153.

What requirements legal.—A provision in an ordinance that bids shall contain a stipulation that common laborers are to receive at least $1.50 per day, and have an eight-hour work-day, was held void as violative of constitutional guaranties. State, *ex rel.*, v. Norton, 5 N. P. 183. See further, Wheeling Bridge, etc., Co. v. Gilmore, 8 C. C. 658; State v. Lake Erie Iron Co., 25 B. 101.

A statute providing that stipulations requiring an eight-hour day in work under public contracts, shall be inserted in all such contracts was held unconstitutional, as in conflict with §§ 1 and 19, Art. 1, Const. of Ohio. Cleveland v. Clements Bros. Co., 67 O. S. 197. And when stipulations are contained in a public contract they are of no effect. *Ib.*

Validity of statute relating to liens for materials and labor furnished on public works. See Stewart v. Gardner, 30 C. C. 218.

Specifications providing for appointment of inspector, held legal. State, *ex rel.* v. Miller, 18 Dec. 218; 5 N. P. (N. S.) 573; 30 C. C. 460.

The advertisement cannot legally require the bidder to specify the manufacturer whose materials he intends to use. Tucker v. Newark, 19 C. C. 1.

As to requiring a bidder to procure material from a particular place, such as stone from a particular quarry, see State, *ex rel.*, v. Amlin, 13 Dec. 335.

Where requirement in specifications is impossible of fulfillment, as where advertisement calls for wood block treated with oil free from carbon, and no such oil could be procured, the execution of a contract upon such specifications will be enjoined. Tuke v. Sundmaker, 13 C. C. (N. S.) 463.

As to advertisement calling for use of patented articles, see § 3811, *ante*. See under former statutes, Holbrook v. Toledo, 28 C. C. 284; 8 C. C. (N. S.) 31 (aff'd, 73 O. S. 400); Hastings v. Columbus, 42 O. S. 385.

See also State, *ex rel.*, v. Miller, 30 C. C. 460; 10 C. C. (N. S.) 406.

Length of advertising.—Under similar statute, see Early v. Doe, 16 How. (U. S.) 10; Wing v. Cleveland, 14 B. 190; Miller v. Pearce, 2 C. S. C. R. 44; Gilfillin v. Koke, 1 W. L. M. 704; Harmon v. Whittemore, 1 B. 109; Smith v. R. R. Co., 8 N. P. 1; Simmons v. Toledo, 5 C. C. 124.

"Not less than two weeks."—Where advertisement calling for bids for proposed work appeared on the 7th and 11th, and were opened on the 15th of the month, held insufficient notice. State, *ex rel.* v. Kehres, 29 O. C. A. 458.

Reletting after default of contractor does not require the same formalities as to advertising, etc., provided for original letting, where the contract has provided that upon default municipality may complete the work either by day labor or contract. Conneaut v. Strauss, 21 Dec. 87.

Where contract provides that upon default of contractor municipality may complete work "by day labor or by contract" municipality may adopt either or both methods. *Ib.*

(7) **Newspaper.**—See § 4228, *ante*, specifying English newspaper; and see § 4229 and notes thereunder.

The requirement of publication "in a newspaper" does not forbid additional publications in other papers. This is not a squandering of funds. Wasem v. Cincinnati, 2 C. S. C. R. 84; *contra*, where it was held that municipal officers are liable for illegal excess of advertising. Op. Atty. Gen. (1917), p. 2167.

Sec. 4329. [Proceedings on opening of bids.] The bids shall be opened at twelve o'clock noon, on the last day for filing them by the director of public service and publicly read by him. Each bid shall contain the full names of every person or company interested in it, and shall be accompanied by a sufficient bond[1] or certified check on a solvent bank, that if the bid is accepted a contract will be entered into and the performance of it properly secured. If the work bid for embraces both labor and material,[2] they shall be separately stated with the price thereof. The director may reject any and all bids.[3] Where there is reason to believe there is collusion or combination among bidders, the bids of those concerned therein shall be rejected.[4] [96 v. 67, § 143.]

(1) **Bonds.**—Bidders cannot be required to furnish a written agreement by resident freeholders that they are able to, and will become sureties on the bidder's bond. Moore v. Cincinnati, 15 B. 196.

Resident sureties may be required. Boren v. Comm'rs, 21 O. S. 311.

Bond cannot be deemed insufficient because the sureties are not on the tax duplicate for a sufficient

amount, though in fact worth many times the amount required. State *ex rel.* v. Franklin Co., 1 C. C. 194.

Where a bond is required to accompany the bid, ability and willingness to give it, if required, are not sufficient. State v. Comm'rs, 17 C. C. 370.

The surety on the bond will be presumed to have executed the bond with full knowledge of the terms of the contract and he cannot claim that it covered only a part of the work. Higgins v. Drucker, 22 C. C. 112. Measure of damages in action on bond, see Cincinnati v. Baumer, 12 C. C. (N. S.) 240.

Certified check.—Where municipality accepts bid and the contractor fails to enter into contract, the municipality is authorized to collect the amount of check accompanying bid. Pomeroy v. Ringwald, 31 O. C. A. 444.

(2) **Labor and material.**—A bid of a public contractor for a street improvement containing twenty items, one of which and a fair sample of the other items being "curbs, 5-inch granite, per lin. ft., one dollar and thirty cents ($1.30) cts.", sufficiently complied with this section requiring all bids embracing both labor and material to be separately stated with the price therefor. Warren Brothers v. Cincinnati, 17 N. P. (N. S.), 587; aff'd, 92 O. S. 514.

Estoppel where bid not separated.—Where bid which is not separated as to labor and material is accepted and contract performed, municipality is estopped to deny liability. Weise & Hanley v. Cincinanti, 17 N. P. (N. S.), 481 (aff'd by Ct. of App. without report).

(3) **Discretion to reject.**—The right to reject any and all bids confers a discretion that cannot be controlled by the courts, even though exercised arbitrarily or by mistake. State, *ex rel.*, v. Cincinnati, 3 C. C. 542. See also Strack v. Raterman, 18 C. C. 36.

Where a bidder refuses or fails to enter into the contract awarded him, officers may award it to another bidder. McClain v. McKisson, 15 C. C. 517 (affirmed, 35 B. 295).

The municipality is not bound until the written contract has been entered into, and action may be rescinded even after bid is accepted, but before notice to bidder and written contract executed. State, *ex rel.*, v. Board of Public Service, 5 N. P. (N. S.) 446; 18 Dec. 84.

After bid is received and resolution adopted finding bidder to be lowest and best and directing clerk to notify bidder, but before such notice has been given, the resolution is rescinded and an order made to again advertise for bids, such decision and order are not an abuse of discretion and such bidder is not entitled to the contract. State, *ex rel.*, v. Board of Public Service, 81 O. S. 218.

Reconsideration of rejection.—After rejection of all bids council may still reconsider the action and award contract to one of original bidders. McClain v. McKisson, 15 C. C. 517 (affirmed, 35 B. 295).

But see State, *ex rel.*, v. Cincinnati, 3 C. C. 542, where it was held that after a rejection by mistake because of supposed irregularities in ordinance and a re-enactment of the ordinance in corrected form, the award could not be made to a bid-

der under the original ordinance, on his old bid.

Rescinding contract.—Where a contract has been awarded and work done and money expended the municipality has no right unreasonably to rescind the contract. Cincinnati v. Edison Elec. Co., 6 N. P. 416.

As to ground for rescission of contract, see further State v. Niemes, 6 N. P. 419.

Where the city has unlawfully rescinded the contract it may be required by mandamus to execute the contract. State v. Niemes, 6 N. P. 419.

As to what will amount to a rescission of the contract, see Railway Co. v. Carthage, 36 O. S. 631.

Measure of damages for breach of contract due to failure of contractor to comply with specifications for building water tower and tank. See Madisonville v. Rosser, 28 C. C. 834; 8 C. C. (N. S.) 387.

Mistake.—See as to the right of a bidder to withdraw and enjoin execution of contract because of mistake made by him in measurements which would involve financial loss. Ferro Concrete Company v. Board, 11 N. P. (N. S.) 86.

When contract complete.—At the time of the acceptance of the bid and notice to the bidder the contract between the parties is complete and no additional stipulations can thereafter be inserted in the contract. Comm'rs v. Rhoades, 26 O. S. 411.

And the bidder is entitled only to a contract embracing the stipulations, etc., contained in the records up to the time of acceptance. Hughes v. Clyde, 41 O. S. 339.

The resolution finding a bidder the lowest and best and directing the clerk to notify him does not complete the contract and entitle the bidder to insist on performance if before the notice is sent council rescinds the resolution. State v. Board of Public Service, 81 O. S. 218, 222.

Proceedings of the department of public service in advertising for bids. Under former provisions conferring upon the board of public service the power now conferred upon the director, it was held that the adoption of a resolution and finding who is the lowest and best bidder was not the making of the contract but was merely preliminary to the making of the contract provided for by the statute, and such contract was the only one the board was by statute authorized to make. State, *ex rel.* v. Board of Public Service, 81 O. S. 218.

(4) **Combination among bidders.**—An agreement between a bidder who had already filed his bid and a bidder who was about to file his bid, that they should become partners in doing the work if the contract should be awarded to either of them, was held not an unlawful combination among bidders. Breslin v. Brown, 24 O. S. 565.

When a contract was obtained by a collusion among bidders it does not follow that the contractor may not recover for performance of the contract, where the city authorities have not rescinded the contract after notice of the collusion, but insisted on performance. Hubbard v Norton, 28 O. S. 116.

FORM OF ADVERTISEMENT FOR BIDS.

Legal Notice.

Sealed bids will be received by the Director of Public Service of the city of....., State of Ohio, at the office of said director until twelve o'clock noon, ..., 19...., for furnishing the necessary labor and materials for (here insert general statement of work to be done), according to plans and specifications on file in said office. Each bid must contain the full name of every person or company interested in the same, and be accompanied by a bond in the sum of $..... to the satisfaction of the director, or a certified check on some solvent bank, as a guaranty that if the bid is accepted, a contract will be entered into and its performance properly secured. Should any bid be rejected such check will be forthwith returned to the bidder, and should any bid be accepted such check will be returned upon the proper execution and securing of the contract.

(If desired add: Bidders are required to use the printed forms, which will be furnished on application.)

The right is reserved to reject any and all bids.

By order of the Director of Public Service.

.....

.....19.... Clerk

NOTE.—If such an improvement as is referred to in § 2362, *post*, in Part II, costing $10,000 or more, is to be made, the advertisement for bids must comply with the requirements of that section, and the bid and contract must be made in conformity therewith.

FORM OF BIDS.

.....19....

The undersigned proposes to furnish all the material and to do all the work necessary in the construction of.....(here state the improvement for which bid is made) according to the plans, specifications and profiles prepared by the city of..... .., State of Ohio, therefor, and in strict compliance therewith, and under the direction and to the approval of the city engineer (or other proper officer) for the prices following, for materials and labor, respectively, to-wit:

	Dollars (In words)	Cents (In words)	Dollars (In figures)	Cents (In figures)
Excavation, per yard.				
Stone, per perch, etc., etc.				

.....are the only persons or companies interested in this bid.

.....

Bidder.

FORM OF BOND ACCOMPANYING BID.

Know all men by these presents, that we....., of....., and....., of....., are held and firmly bound unto the city of....., State of Ohio, in the sum of..... dollars for the payment of which, well and truly to be made, we hereby jointly and severally bind ourselves, our heirs, successors, executors and administrators.

The condition of this obligation is such that if the bid or proposal of .....for.....(here state work); made this day to the Director of Public Service of the city of..... State of Ohio, is accepted and the contract awarded to the above named bidder, and the said bidder shall within.....days after notice of said award, enter into a contract with the city of ....., State of Ohio, for the work bid upon, and shall secure the performance of the same by bond or otherwise as may be prescribed, to the satisfaction of the director of public service of said city, then this obligation shall be null and void; otherwise to be of full force and virtue.

Signed at..... the..... day of....., 19....

.....

.....

FORM OF ORDER ACCEPTING BID.

Ordered, by the Director of Public Service of the city of....., State of Ohio: That the bid of.....for (here state the improvement or work to be done), being the lowest and best bid for said work, be accepted, and that a contract be entered into with said bidder for the same, in the name of the city, upon said bidder giving bond to the satisfaction of the director in the sum of $.....within..... days from the date of this order; and that the clerk transmit a copy hereof to said bidder.

Dated....., 19....

.....

Director of Public Service.

Attest:

.....

Clerk.

FORM OF CONTRACT.

Articles of Agreement.

Between the city of....., party of the first part, and ....., contractor, party of the second part, for..... (Here state work contracted for).

This agreement, made and entered into this ....day of..... 19...., by and between the city of....., State of Ohio,

party of the first part, and....., contractor, party of the second part:

Witnesseth, That the said party of the second part has agreed and by these presents does agree, with the said party of the first part, for the consideration hereinafter named, to furnish all the materials and do all the work of whatever kind necessary to complete, in a good, substantial and workmanlike manner, ready for use, and in strict accordance with the specifications heretofore prepared therefor, and according to the plans, profiles and drawings on file in the office of the chief engineer (or other officer) of said city, and subject to all the terms and conditions of said specifications, and to the approval of said chief engineer, at the following rates:

	Dollars (In words)	Cents (In words)	Dollars (In figures)	Cents (In figures)
Excavation, per yard.				
Stone, per perch, etc., etc.				

The foregoing rates include all labor and materials. Said party of the second part further expressly covenants and agrees to do everything required to be done by said specifications; and to refrain from everything forbidden by said specifications; that the power reserved to or conferred upon any person or body in said specifications may be exercised by such person or body, and that the right is reserved to the director of public service to order the omission of or addition to any portion of the work or materials called for by the plans and specifications or to make any alterations whatever in the nature of the work or materials called for therein, when made according to law. And said party of the second part further agrees that the amount of compensation to be paid for any additional work shall be at the prices fixed in this contract, if such additional work is of a class provided for in the bid and contract; and in case any portion of the work is omitted, to waive all claims for damages because of such omission and not to demand any pay for the portion of work so omitted.

In case the contractor, party of the second part, shall be required to do any work of a class not provided for in the bid and this contract, said party of the second part agrees that the amount to be allowed him shall be fixed by written agreement between the said contractor and the said director before said work is commenced, and in case of failure to agree, then by the chief engineer of the said city.

The said party of the second part agrees that the said director or said chief engineer may cause any work or materials not in accordance with the specifications and this contract to be taken up, removed and replaced at the expense of the contractor, party of the second part.

The party of the first part agrees and binds itself upon the completion of the work to the approval of the chief engineer of said city, to pay to the said party of the second part the amount of money due under this agreement. Full payment will be made upon the acceptance of the work or as soon thereafter as the city treasurer of said city shall place funds at the disposal of the said director.

In Witness Whereof, the said city of....., State of Ohio, party of the first part, has caused to be hereunto affixed its corporate name and seal by its Director of Public Service, in accordance with an order duly made, and the contractor, party of the second part, has hereunto subscribed his name, at....., the day and year aforesaid.

The City of.....
By .....
Director of Public Service.

[Seal.]
Attest:
.....
.....
Contractor.
Clerk, Department of Public Service.

NOTE.—Instead of full payment upon acceptance of work provision may be made for the payment of a certain percentage upon estimates and the retention of a percentage for a specified time as a guaranty of the quality of the work. Provision may also be made against claims for extras unless ordered in writing by the director at a price agreed upon in advance and against subletting the contract or assigning payments due under it. Stipulations may also be made for the dates of beginning and completing the work and power may be reserved by the city to cancel the contract upon violation by the contractor of any of its terms or conditions, and for the completion of the work by the city in such event, at the contractor's expense. Such provisions may be embodied in the specifications, and the latter made a part of the contract.

FORM OF BOND FOR COMPLETION OF CONTRACT.

Know all men by these presents: That we ....., principal, and.....and....., sureties, are held and firmly bound unto the city of....., State of Ohio, in the sum of $....., to be paid to the said city, its successors or assigns, for which payment, well and truly to be made, we hereby bind ourselves, our heirs, successors, executors and administrators, jointly and severally, firmly by these presents.

Signed by us this.....day of....., 19....

The condition of the above obligation is such that whereas the said .....has on this.....day of....., 19...., entered into a contract with said city for.....(here state work contracted for), in a manner in said contract and specifications set forth; *Now, Therefore*, if the said.....shall honestly and faithfully discharge and perform all and singular the obligations of said

contract, then this obligation shall be void; otherwise to remain in full force and virtue.

.....
.....
.....

FORM OF AFFIDAVIT OF JUSTIFICATION OF SURETY.

State of Ohio,
.....County, } ss.

.....being duly sworn deposes and says that he is a freeholder in the county of....., State of Ohio, and resides at ....., in said county, and that he is worth the sum of $....., over and above all his debts and liabilities, including his liabilities as bail, surety, or otherwise, and over and above all his property which is exempt by law from execution.

.....

Subscribed and sworn to before me this.....day of....., 19....

.....
Notary Public.

Sec. 4330. [Contract.] The contract shall be between the corporation and the bidder,[1] and the corporation shall pay the contract price in cash.[2] Where a bonus is offered for completion of contract prior to a specified date, the department may exact a prorated penalty in like sum for every day of delay beyond a specified date. [96 v. 67, § 143.]

(1) **Execution of contract,** see Burke v. Cleveland, 17 Dec. 408; 6 N. P. (N. S.) 225, (aff'd, 75 O. S. 603).

(2) **Interest on deferred payments.**—Failure of city officials to make final estimate on completed work or to take necessary steps leading up to settlement of claim of contractor within a reasonable time, creates liability on part of city for interest on the fund so withheld Warren Bros. Co. v. Cincinnati, 17 N. P. (N. S.), 587 (aff'd, 92 O. S., 514).

Contractor who is unable to secure final settlement from municipality, may have recourse to action for damages. *Ib.*

Interest on retained percentage.—Where municipality pursuant to contract retained ten percent of the cost as a guarantee for maintenance, held that interest earned on money so retained belonged to the municipality. Paving Co. v. Middletown, 15 Ohio App. 384.

Since contract price must be in cash, a director of public service cannot trade in an old automobile and pay the difference. Op. Atty. Gen. (1912), p. 190.

Where under a contract providing for a bonus and penalty, a

penalty has accrued, officers of municipality may not remit such penalty. Op. Atty. Gen. (1919), p. 909.

Sec. 4331. [Alterations or modifications in contract.] When it becomes necessary in the opinion of the director of public service, in the prosecution of any work or improvement under contract, to make alterations or modifications in such contract, such alterations or modifications shall only be made upon the order of such director, but such order shall be of no effect until the price to be paid for the work and material, or both, under the altered or modified contract, has been agreed upon in writing and signed by the contractor and the director on behalf of the corporation, and approved by the board of control, as provided by law.[1] [96 v. 67, § 143.]

(1) **Alterations.**—What changes can be made without new bidding, see McMakin v. Cincinnati, 7 N. P. 203; see also Ampt v. Cincinnati, 8 N. P. 208 (aff'd, 60 O. S. 621).

The limitation to contracts less than $500.00 applies to original contracts, but does not apply to modifications made under authority of § 4331. Burke v. Cleveland, 17 Dec. 408; 6 N. P. (N. S.) 225; (aff'd, 75 O. S. 603).

Alteration of contract price.—Where a city has entered into a contract for the purchase of a quantity of material to be paid for at a given price per unit and delivered in installments, the board of control is without authority to bind the city to pay, as to the portion of such material not yet delivered, a price in excess of that specified in the contract. Op. Atty. Gen. (1919), 746.

See Cleveland v. Wilson, 24 C. C. (N. S.), 183, where it was held that contractor could recover extra compensation for larger proportion of cement used in concrete on the order of city engineer.

The provisions of this section and 4332 have no application to a duly executed contract for the construction of a public improvement, which contract expressly provides for subsequent changes in the plans and specifications, which it is contemplated will become necessary in the progress of the work, and fixes the price to be paid therefor. Portsmouth v. Nicola Building Co., 106 O. S. 550.

Action by council not necessary.—Failure by the city council to specifically authorize a modification by ordinance will not render such a modification invalid since a municipal improvement which has been duly authorized by council and the necessary appropriation made, is left by the municipal code to the proper board or officer to be carried to completion. Lloyd v. Toledo, 20 C. C. (N. S.), 47.

Modification of contract. See Op. Atty. Gen. (1923), No. 503.

See § 4402 and notes.

Sec. 4332. [When contractor may not recover.] No contractor shall be allowed to recover anything for work or material, caused by any alteration or modification, unless the contract is made in such manner, nor shall he be allowed, or recover for such work and material, or either, more than the agreed price. The general provisions of law relating to the requiring of bids and the awarding of contracts for public buildings, and improvements, so far as they apply, shall remain in full force and effect.[1] [96 v. 67, § 143.]

(1) **Provisions referred to.**—Instead of the last sentence in the above section, former Municipal Code § 143, (of which the above section is a revision), contained the following: "All the provisions of § 794 of the Revised Statutes of Ohio, so far as the same may apply, shall remain in full force and effect." Section 794 R. S. provided in substance that any officer of the state, county, township, or municipality, authorized to contract for the erection, repair, etc., of any public building or improvement, who was required by law to advertise for proposals for furnishing materials and doing the work, should, when the costs would exceed $10,000, require separate proposals for furnishing materials or doing the work, or both, "for each separate and distinct trade, or kind of mechanical labor, employment, or business necessary to be used in making such public improvement;" and contained other provisions relative to awarding contract for doing the work belonging to each separate trade, to the best bidder therefor, etc. The provisions of § 794 R. S. have now been embodied in §§ 2362 to 2364, inclusive, G. C.

See § 2362 to 2364, G. C. in Part II, under "Officers".

See § 2365 G. C. in Part II, relative to bonds to be required of contractors.

Separate bids for each distinct part.—Separate prices for labor and material held not necessary in case of a bid for new pumping machinery. Such a bid could not be thus split up. Fergus v. Columbus, 6 N. P. 82, 91.

So of a bid for heating and ventilating systems. State v. Bd. of Education, 14 C. C. 15.

Where the contract calls for bids on a number of details of the work, the labor as well as the material to be separately priced on each, and the price of the labor and material combined to be given. the bidder whose total was the lowest is not on that account entitled to the contract for all the items. State, *ex rel.*, v. Commissioners, 36 B. 176. See further State v. Commissioners, 39 O. S. 188.

Where the proposals made in compliance with the terms of the advertisement of the officer letting the contract, contain separate bids for furnishing material and doing work for each separate trade or kind of work, though they cover the entire work to be done, are within the terms of § 2362, and are bids not for the work as a whole but for the separate items thereof, and a bidder will not be entitled to a

contract for the whole work for the reason that the total of his separate bids covering all the details of the work is less than the total of the separate bids of any other bidder. State *ex rel* v. Hanna, 13 Dec. 321.

Contract for whole work.—When could be let under former § 794. See Huston v. Franklin, 15 Dec. 231; 2 N. P. (N. S.) 582; State, *ex rel.*, v. Hanna, 13 Dec. 321.

Remedy of bidder.—See Akron v. France, 24 C. C. 63; 4 C. C. (N. S.) 496.

The provisions of this section and 4331 have no application to a duly executed contract for the construction of a public improvement, which contract expressly provides for subsequent changes in the plans and specifications which it is contemplated will become necessary in the progress of the work, and fixes the price to be paid therefor. Portsmouth v. Nicola Building Co. 106, O. S. 550.

Damages for delay.—Street contractor who was hindered and delayed by the building of a bridge and by failure of city to cause street railroad tracks to be removed, may recover damages. Delaware v. Construction Co., 21 C. C. (N. S.), 137; but not where delay was caused by street railway in moving tracks, contract providing for readjustment of tracks by company. Eberhardt v. Commissioners, 21 C. C. (N. S.), 353; 2 Oh. App. 491 (aff'd without opinion, 92 O. S. 512).

Sec. 4333. [May contract for furnishing of water power.] In a municipality in which a waterworks, an electric light plant, artificial or natural gas plant, or other similar public utility is owned by the municipality, the director of public service, with the consent of the council may enter into and contract with the owners of any power plant or of any hydraulic or other natural or artificial watercourse to furnish power for the propelling of machinery in the waterworks, electric light plant, artificial or natural gas plant or other similar public utility of such municipal corporation, or acquire by purchase or transfer from others owning such rights, such power privileges. For the purpose of carrying into effect such contracts or leases, he may enter into such contracts for any term of years, and the provisions of the preceding five sections, and of this title, requiring the auditor to first certify that the money therefor is in the treasury to the credit of the proper funds and not appropriated for any other purpose shall not apply. [107 v. 555; 97 v. 320.]

Sec. 4334. [How contracts to be made.][1] All contracts made by the director of public service shall be executed by

him in the name of the city, and a duplicate copy shall be filed in his office, and a copy with the auditor of the city. No liability shall be created against the city as to any matters under the supervision of such director except by his express authority.[2] No director of public service or officer or employe of his department shall be interested in any contract under his supervision.[3] [99 v. 563, § 144; 96 v. 68, § 144.]

(1) **Old sections.**—Compare old §§ 2209, 2216, 2217, 2218, 2221 R. S. (repealed).

(2) **Defective contract.**—Where the contract was not made in compliance with law, it is simply void and the court has no authority to make for the parties the contract that might legally be made. Chillicothe v. Gas & Fuel Co., 8 N. P. 88.

Municipal liability.—See notes under § 4328, *ante*.

(3) **Officer interested in contract.**—See note to § 3808, *ante*.

Supervision of Building.

Sec. 4335. [Erection and furnishing of city hall.] When a city has in contemplation or in process of construction or furnishing a city hall, the director of public service may employ five citizens of such city, to be named by him, not more than three of whom shall belong to the same political party, who shall constitute a commission, under his supervision and direction, for procuring the necessary land for the construction, or for the furnishing of such city hall.[1] [97 v. 517, § 216; 96 v. 88, § 216.]

(1) **Acts of City Hall Commissioners** appointed under invalid special act for City of Cleveland (93 O L. 549) may be adopted and their contracts validated by the director of public service under this section. Cudell v. Cleveland et al., 16 C. C. (N. S.), 374.

Sec. 4336. [Powers and duties.] Subject to the approval of the director of public service, such commissioners may acquire in the name of the city, by purchase or appropriation, land for city hall purposes, may employ architects and approve plans and specifications. They shall make in the name of the city all contracts necessary for the construction and furnishing of such city hall, which shall be made after advertisement and bidding,[1] as provided by law for the making of other municipal contracts, and shall be subject to the approval

of the director of public service. They shall keep a full record of their proceedings. [97 v. 517, § 216; 96 v. 88, § 216.]

(1) **The employment of an architect** under contract is not subject to preliminary advertising and bids. Cudell v. Cleveland et al., 16 C. C. (N. S.), 374.

Sec. 4337. [Organization and employes.] Such commissioners shall select from their number a president, and they may appoint a clerk and other necessary employes, and, subject to the approval of such director, fix their compensation. [97 v. 517, § 216; 96 v. 88, § 216.]

Sec. 4338. [Compensation of commissioners.] The commissioners shall each receive such compensation, not to exceed five dollars each per meeting, as the director of public service may fix, but such compensation shall not in any case exceed twelve hundred dollars per annum each, which, together with the expenses of the commissioners shall be paid in the same manner as the cost of such city hall. [97 v. 517, § 216; 96 v. 88, § 216.]

Sec. 4339. [Construction of market house.][1] When a city has in contemplation or in process of construction a market house or houses or public hall in connection therewith, the director of public service may employ three citizens of the city, to be named by him, who shall constitute a commission. [97 v. 517, § 216; 96 v. 88, § 216.]

(1) **Validity.** — **Unconstitutionality of original section continuing the Cleveland market house commission,** see Slatmyer v. Springborn, 26 C. C. 10; 5 C. C. (N. S.) 89 (aff'd, 72 O. S. 683).

Sec. 4340. [Powers and duties.] Subject to the approval of the director of public service, such commissioners may contract in the name of the city for and supervise the building and furnishing of such market house or houses, or public hall in connection therewith, and, subject to like approval, acquire the necessary lands for such purpose, either by purchase or appropriation, in the name of the city in the manner provided by law. They shall adopt plans and specifications for erecting, building and furnishing such market house or houses or

public hall in connection therewith. [97 v. 517, § 216; 96 v. 88, § 216.]

Sec. 4341. [Organization and employes.] Such commission may appoint a secretary and other necessary employes, and, subject to the approval of the director of public service, fix their compensation. [97 v. 517, § 216; 96 v. 88, § 216.]

Sec. 4342. [Compensation.] Each person so appointed shall receive such compensation, not to exceed five dollars for each meeting attended by him, as the director of public service may fix, which shall not in any case exceed twelve hundred dollars per annum. Such compensation and his expenses shall be paid in like manner as the cost of such buildings. [97 v. 517, § 216; 96 v. 88, § 216.]

Sec. 4343. [Erection of public building.] When a city, or the county in which such city is located, has in contemplation or in process of construction, buildings for public, municipal or county purposes within the boundaries of such city, the director of public service may employ three persons, to be named by him, of whom at least two shall be architects. [97 v. 517, § 216; 96 v. 88, § 216.]

Sec. 4344. [Powers and duties.] Under the supervision of the director of public service, such persons shall have control of the location of such public, municipal or county buildings to be erected on ground acquired within the limits of the city, and of the size, height, style and general appearance of such buildings. All plans and specifications for the erection thereof shall be submitted to and approved by them before adoption by the authority engaged in such construction. [97 v. 517, § 216; 96 v. 88, § 216.]

Sec. 4345. [Compensation.] Such persons shall be employed at a salary not to exceed five thousand dollars per annum each, to be fixed by the director of public service and paid by the city from the general fund. [97 v. 517, § 216; 96 v. 88, § 216.]

Sec. 4345-1. [Commission to construct, rebuild, combine, etc., public utilities; how composed; powers and duties; expenses.] When a city has in contemplation the construction or rebuilding of a public hall, municipal waterworks system, municipal electric lighting system, or the rebuilding in whole or in part, and combining of a municipal waterworks system and a municipal electric lighting system, the mayor of said city may appoint a commission consisting of the mayor, the director of public service, and three electors of the city, subject to the approval of the board of control of such city. Such commissioners may contract, in the name of the city, for and supervise the building, or rebuilding and furnishing of such city hall, or the building, rebuilding, furnishing and equipping of such municipal waterworks system, municipal electric lighting system, or the rebuilding in whole or in part, and combining of such municipal waterworks system with municipal electric lighting system as aforesaid, and, subject to like approval, may acquire the necessary lands for such purpose, either by purchase or appropriation, in the name of the city in the manner provided by law. The commission shall adopt plans and specifications for erecting, building and furnishing such public hall, or for the building, furnishing and equipping of such municipal waterworks system, municipal electric lighting system, or rebuilding the same, or for the rebuilding in whole or in part, and combining of a municipal waterworks system, with a municipal electric lighting system. Such commission may appoint a secretary and other necessary employes, and, subject to the approval of the council of the city, fix their compensation. The commission shall serve without compensation. The expenses of the commission shall be paid in like manner as the costs of such public hall, or the costs of the above named public utilities. Except as herein otherwise provided, the making of and terms of all contracts for the construction, furnishing and equipping of such public hall, municipal waterworks system, municipal electric lighting system, or the rebuilding in whole or in part and combining of any municipal waterworks system with a municipal electric lighting system,

shall be governed by the laws relating to public buildings in cities. [108 v. 1183; 103 v. 670.]

Platting Commissioner.

Sec. 4346. [Platting commissioner; plats outside of corporation.][1] The director of public service shall also be the platting commissioner of the city, who shall provide regulations governing the platting of all lands to require all streets and alleys to be the proper width and to be coterminous with adjoining streets and alleys. Whenever council shall deem it expedient to plat any portion of the territory within the corporate limits in which the necessary or convenient streets, or alleys have not already been accepted by the corporation so as to become public streets, or when any person plats any lands within three miles of the corporate limits of a city,[2] the platting commissioner shall, if they are in accordance with the rules as prescribed by him, endorse his written approval thereon and no plat of such land shall be entitled to record in the recorder's office in the county in which such city is located without such written approval so endorsed thereon; provided, that the approval of the platting commission of a city shall not be required, unless such city is the nearest to the lands sought to be allotted. [101 v. 205; 96 v. 67, § 142.]

(1) **Old section.**—Compare old § 2626 R. S., repealed.

Plats.—For provisions relating to, see §§ 3580-3614, *ante*.

(2) **Restriction.** — Where land platted within three miles of a city is nearer a village, city platting commissioner must approve plat. Op. Atty. Gen. (1915), p. 1210.

Approval of the County Commissioners to such plat is not required. See Op. Atty. Gen. (1920), p. 566.

Sec. 4347. [May employ engineer and assistants.] When acting as the platting commissioner, the director of public service may employ an engineer, and such assistants as he finds necessary, and fix their salaries within limits to be prescribed by council. [R. S. Sec. 2629; 96 v. 67, § 142; 68 v. 36, § 1.]

Sec. 4348. [Powers and duties.] Such commissioner shall cause to be made a plat of the territory which he is ordered to lay out, as soon as it can be conveniently done, showing the

location of the streets and alleys already dedicated, and those proposed. For the purpose of making the necessary surveys, he may enter upon all property within the limits of the corporation. [R. S. Sec. 2630; 71 v. 116; 68 v. 36, § 1.]

Sec. 4349. [Notice of completion of plans to be published and plans exhibited.] When the whole plan, or any portion thereof, is completed, or when the location of any avenue, street, roadway, or alley has been finally determined upon by the commissioner, a plat of the plan, avenue, street, roadway, or alley shall be placed in the office of the city civil engineer, for the inspection of persons interested, and notice that it is ready for inspection shall be published in one or more newspapers of general circulation within such municipal corporation, for six consecutive weeks.[1] [R. S. Sec. 2631; 71 v. 116; 68 v. 36, § 1.]

(1) **Publication.**—See § 4229, *ante*, and notes.

Sec. 4350. [Objections to plans; alterations.] During such six weeks, at least once each week, at the time and place stated in the advertisement, and at such other times and places he deems proper, the commissioner shall hear any objections that may be urged against any portion of the plat, or the location of any avenue, street, roadway, or alley, and such alterations may be made as he deems proper. [R. S. Sec. 2632; 71 v. 116; 68 v. 36, § 1.]

Sec. 4351. [When copies of plans to be deposited.] At the end of such time, the commissioner shall cause copies of the plat as finally adopted to be prepared and such monuments or marks as he thinks proper to be placed on the grounds. He shall deposit one copy certified to by him in the office of the county recorder, and another in the office of the city engineer, and such plan shall be deemed and taken to be the regularly adopted plan for streets and alleys in such territory. [R. S. Sec. 2633; 71 v. 116; 68 v. 36, § 1.]

Sec. 4352. [Effect of such platting.] No streets or alleys, except those laid down on such plan, shall subsequently be in any way accepted as public streets or alleys by the municipal corporation, nor shall any of the public funds be expended in

the improvement or repair of streets or alleys subsequently laid out, and not on such plat, but any municipal corporation may exercise the power of condemnation in any of the cases where it is authorized to condemn and appropriate property to public use, although it is not shown as a street on such plat. [R. S. Sec. 2633; 71 v. 116; 68 v. 36, § 1.]

Sec. 4353. [Acceptance of plan by owner; dedication of streets.][1] By a declaration of their intention so to do, properly acknowledged and recorded in the county recorder's office, the owners of any portion of the ground so platted may at any time, accept such plan so far as it concerns their property. Such acceptance, or the selling of lots referring to the plan, or the streets and alleys therein laid out, shall be a statutory dedication of the streets and alleys in the property described in the acceptance, or of the streets or alleys called for in the description of the lots so sold, so far as the grantor has a right to dedicate them. [R. S. Sec. 2634; 68 v. 37, § 2.]

(1) **Common law and statutory dedication.**—See notes to § 3723, *ante.*

Sec. 4354. [Joint commission by adjoining municipal corporations.] When municipal corporations adjoin each other, the councils thereof may agree, in any manner they determine, upon the appointment of a joint commission for the purposes of this chapter. Such commission, when appointed, shall have all the power over the territory of the municipal corporations described in the resolution of the councils, that is hereby given to a commissioner appointed by a single council. [R. S. Sec. 2635; 68 v. 37, § 3.]

Sec. 4355. [Amendment of plans.] Plans may be amended after adoption, by like proceedings by which they were originally adopted. [R. S. Sec. 2636; 68 v. 37, § 5.]

VILLAGES.

Public Institutions.

Sec. 4356. [Care, supervision and management of public institutions.] The council shall provide by resolution or ordinance for the care, supervision, and management of all public

parks, baths, libraries, market houses, crematories, sewage disposal plants, houses of refuge and correction, workhouses, infirmaries, hospitals, pest houses, or any of such institutions owned, maintained or established by the village. When the council determines to plat any of the streets as authorized by law, it shall provide for the platting thereof. [96 v. 85, § 204.]

Board of Trustees of Public Affairs.

Sec. 4357. [When board shall be established.][1] In each village in which water works, an electric light plant, artificial or natural gas plant, or other similar public utility is situated, or when council orders water works, an electric light plant, natural or artificial gas plant, or other similar public utility, to be constructed, or to be leased or purchased from any individual, company or corporation, or when the council shall have determined to establish a schedule of rates or charges of rents for use of the sewerage system and sewage pumping, treatment and disposal works of the village, council shall establish at such time a board of trustees of public affairs for the village, which shall consist of three members, residents of the village, who shall be each elected for a term of two years.[2] [110 v. 370, 372; 98 v. 252, § 205; 96 v. 85, § 205.]

(1) **Old sections.**—Compare old §§ 2408 R. S. and 2487 R. S., repealed.

Powers and duties of board.—See Op. Atty. Gen. (1911-12), p. 872.

(2) **Power to establish and maintain** waterworks, lighting, power, heating and natural gas plants is given to all municipalities in §§ 3618, 3619.

As to when a village that is supplied with water by a municipality has a waterworks system within section 4357 G. C. Op. Atty. Gen. (1914), p. 832.

FORM OF ORDINANCE ESTABLISHING BOARD OF TRUSTEES OF PUBLIC AFFAIRS.

Ordinance No.....

To establish a Board of Trustees of Public Affairs for the Village of .....

Be it ordained by the council of the village of....., State of Ohio:

Sec. 1. That a board of trustees of public affairs for the village of .....consisting of three members, residents of said village, be, and hereby is, established as provided in § 4357 of the General

Code of Ohio, and that the members of said board shall be elected in accordance with, and shall be subject to, all the provisions of the said code.

Sec. 2. That the members of said board shall each receive $..... per annum, payable..... and shall each give bond in the sum of $.....in the manner provided by law.

Sec. 3. This ordinance shall take effect and be in force from and after the earliest period allowed by law.

Passed.....19....

.....
President.

Attest:

.....
Clerk.

Sec. 4358. [Appointment of members until regular election.] When the council, in accordance with the provisions of this chapter, establishes a board of trustees of public affairs, the mayor of the village shall appoint the members thereof, subject to the confirmation of the council. Such appointees shall hold their respective offices until their successors have been elected according to law and such successors shall be elected at the next regular election of municipal officers held in such village. [98 v. 252, § 205; 96 v. 85, § 205.]

Sec. 4359. [Vacancies.] In case of vacancy in such board from death, resignation or otherwise, it shall be filled for the unexpired term by appointment by the mayor, subject to confirmation by the council. [98 v. 252, § 205; 96 v. 85, § 205.]

Sec. 4360. [Organization of board.] The board of trustees of public affairs shall organize by electing one of its members president. It may elect a clerk, who shall be known as the clerk of the board of trustees of public affairs. [98 v. 252, § 205; 96 v. 85, § 205.]

Sec. 4361. [General powers and duties.][1] The board of trustees of public affairs shall manage, conduct and control the water works, electric light plants, artificial or natural gas plants, or other similar public utilities, furnish supplies of water, electricity or gas, collect all water, electrical and gas rents, and appoint necessary officers, employes and agents.

The board of trustees of public affairs may make such by-laws and regulations as it may deem necessary for the safe, economical and efficient management and protection of such works, plants and public utilities. Such by-laws and regulations when not repugnant to the ordinances, to the constitution or to the laws of the state, shall have the same validity as ordinances. For the purpose of paying the expenses of conducting and managing such waterworks, plants and public utilities, of making necessary additions thereto and extensions thereof, and of making necessary repairs thereon, such trustees may assess a water, light, power, gas or utility rent, of sufficient amount, in such manner as they deem most equitable, upon all tenements and premises supplied with water, light, power, or gas, and, when such rents are not paid, such trustees may certify the same over to the auditor of the county in which such village is located to be placed on the duplicate and collect as other village taxes or may collect the same by actions at law in the name of the village. The board of trustees of public affairs shall have the same powers and perform the same duties as are possessed by, and are incumbent upon, the director of public service as provided in sections 3955, 3959, 3960, 3961, 3964, 3965, 3974, 3981, 4328, 4329, 4330, 4331, 4332, 4333 and 4334 of the General Code, and all powers and duties relating to waterworks in any of these sections shall extend to and include electric light, power and gas plants and such other similar public utilities, and such boards shall have such other duties as may be prescribed by law or ordinance not inconsistent herewith. [103 v. 561; 98 v. 252; 96 v. 85, § 205.]

(1) **Requirements for contract.** —In the absence of an ordinance authorizing such a contract, the board of trustees of public affairs of a village are without authority to enter into a contract with an electrical company to pump the village water supply for a period of ten years for the consideration of $2,400 a year, payable monthly, and injunction does not lie for the enforcement of such a contract. Such contract is subject to the provisions of Sec. 4328. Millersburg v. Wurdack, 22 N. P. (N. S.), 49.

Contract in excess of $500 requires action of council. See Op. Atty. Gen. (1923), No. 231.

Sec. 4362. [Special tax for municipal plant.] When waterworks and electric light plants or either of them are owned and operated by a village which receives its street lighting and fire protection therefrom and the proceeds from the operation of such plant or plants is insufficient to pay the expenses[1] of operating such plants or either of them, the council may levy a tax not to exceed five mills on each dollar valuation of the taxable property listed for taxation in such village, real and personal, to pay the running expenses and extensions made thereto after applying the proceeds therefrom, which tax shall be in addition to all other taxes authorized by law. [98 v. 46, § 1.]

(1) How expenses of municipal light plant may be paid; discretionary with council. Op. Atty. Gen. (1917), p. 308.

Street Commissioner.

Sec. 4363. [Appointment, term, qualification, vacancies.][1] The street commissioner shall be appointed by the mayor and confirmed by council for a term of one year, and shall serve until his successor is appointed and qualified. He shall be an elector of the corporation. Vacancies in the office of street commissioner shall be filled by the mayor for the unexpired term. In any village the marshal shall be eligible to appointment as street commissioner. [96 v. 84, § 203.]

(1) **Old section.**—See old § 1706 R. S., repealed.

Appointment to fill vacancy; confirmation.—An appointment of street commissioner to fill a vacancy requires confirmation by the village council the same as an appointment for the full term as prescribed by this section. State, ex rel. v. Burk, 20 C. C. (N. S.), 399.

Sec. 4364. [General Duties.] Under the direction of council, the street commissioner, or an engineer, when one is so provided by council, shall supervise the improvement and repair of streets, avenues, alleys, lands, lanes, squares, wards, landings, market houses, bridges, viaducts, sidewalks, sewers, drains, ditches, culverts, ship channels, streams, and water courses. Such commissioner or engineer shall also supervise the lighting, sprinkling and cleaning of all public places, and

shall perform such other duties consistent with the nature of his office as council may require.[1] [96 v. 84, § 203.]

(1) See notes under §§ 4325 and 4326, *ante*.

City's liability for negligence of engineer.—Where a contract for the construction of a sewer provides that it shall be carried out at such times and at such places and in such manner as should be prescribed by the engineer or inspector, the city is liable for injuries from negligence on theory of respondeat superior. Morrissey v. Cincinnati, 14 C. C. (N. S.), 19 (aff'd, without report, 87 O. S. 525).

Sec. 4365. [Assistants.] Such street commissioner or engineer shall have such assistants as council may provide, who shall be employed by the street commissioner and shall serve for such time and for such compensation as is fixed by council. [96 v. 84, § 203.]

CITIES AND VILLAGES.

Sec. 4366. [Duties of various officers; compensation.] In each municipal corporation having a fire engineer, civil engineer or superintendent of markets such officers shall each perform the duties prescribed by this title and such other duties not incompatible with the nature of his office as the council by ordinance requires, and shall receive for his services such compensation by fees, salary or both as is provided by ordinance. [R. S. Sec. 1782; 66 v. 176, §§ 164, 165.]

Sec. 4366-1. [City planning commission may be established.] The council of each city having a board of park commissioners may establish a city planning commission consisting of seven members, the mayor, the service director, the president of the board of park commissioners[1] and four citizens of the municipality, who shall serve without compensation and who shall be appointed by the mayor, terms of six years each, excepting that the term of two of the members of the first commission shall be for three years.

The council of each city without a board of park commissioners may establish a city planning commission consisting of five members, the mayor, service director and three citizens of the municipality who shall serve without

compensation and who shall be appointed by the mayor for a term of six years, except that the term of one of the members of the first commission shall be for four years and one for two years.

[City planning commission for commission plan of government.] The commission of each city with a commission plan of government adopted as provided in sections 3515-1 to 3515-18 of the General Code of Ohio may establish a city planning commission consisting of five members, the chairman of the commission and four citizens of the city to be appointed by the commission for terms of six years each, except that the term of two of the members of the first commission shall be four years and two for two years; all members to serve without compensation.

[City manager form of government.] The council of each city with a city manager plan of government adopted as provided in sections 3515-1 to 3515-6 and 3515-19 to 3515-28 of the General Code of Ohio may establish a city planning commission consisting of five members, the chairman of council, the city manager and three citizens of the city who shall serve without compensation and who shall be appointed by the city manager for terms of six years each, except that the term of one of the members of the first commission shall be for four years and one for two years.

[Council of each village may establish city planning commission.] The council of each village may establish a city planning commission consisting of five members, the mayor, one member of council, to be selected by the council for the remainder of his term as a member of council, and three citizens of the municipality to be appointed by the mayor for terms of six years each, except that the term of one of the members of the first commission shall be for four years and one for two years, all such members to serve without compensation.

[Powers of the commission.] Whenever such a commission is appointed, it shall have all the powers conferred in section 4344 of the General Code. Except as otherwise pro-

vided in its charter, the city planning commission of a charter municipality created in the manner and as provided in or by virtue of authority granted by its charter, shall have the powers and the plan or plans made by it shall have the effect of a planning commission or a city plan created and made under and by virtue of the authority of this chapter. [110 v. 275; 110 v. 80; 106 v. 455.]

(1) **Planning Commission.**—Personnel of such commission when no Board of Park Commissioners. Op. Atty. Gen. (1916), p. 1150.

Sec. 4366-2. [Powers and duties of commission.] The powers and duties of the commission shall be to make plans and maps of the whole or any portion of such municipality, and of any land outside of the municipality, which in the opinion of the commission bears relation to the planning of the municipality, and to make changes in such plans or maps when it deems same advisable. Such maps or plans shall show the commission's recommendations for new streets, alleys, ways, viaducts, bridges, subways, parkways, parks, playgrounds, or any other public grounds or public improvements; and the removal, relocation, widening or extension of such public works then existing. With a view to the systematic planning of the municipalities, the commission may make recommendations to the mayor, council and department heads concerning the location of streets, transportation and communication facilities, public buildings and grounds. The commission shall have the power to control, preserve and care for historical land marks; to control in the manner provided by ordinance the design and location of statuary and other works of art, which are or may become the property of the municipality; and the removal, relocation and alteration of any such works belonging to the municipality; and the design of harbors, bridges, viaducts, street fixtures and other public structures and appurtenances. Whenever the commission shall have made a plan of the municipality, or any portion thereof, no public building, street, boulevard, parkway, park, playground, public ground, canal, river front, harbor, dock, wharf, bridge, viaduct, tunnel, utility (whether publicly or privately owned) or part thereof shall be constructed or authorized to be constructed in the munici-

pality of said planned portion of the municipality until and unless the location thereof shall be approved by the commission; provided that in case of disapproval the commission shall communicate its reasons for disapproval to council, and the department head of the department which has control of the construction of the proposed improvement or utility; and council, by a vote of not less than two-thirds of its members and such department head shall together have the power to overrule such disapproval. The narrowing, ornamentation, vacation or change in the use of streets and other public ways, grounds and places shall be subject to similar approval, and disapproval may be similarly overruled. The commission may make recommendations to any public authorities or to any corporations or individuals in such municipality or the territory contiguous thereto, concerning the location of any buildings, structures or works to be erected or constructed by them. [106 v. 455.]

Sec. 4366-3. [Planning commission shall be platting commission.] The municipal planning commission shall be the platting commission of the municipality, and all the powers and duties provided by law for platting commissioner or commissioners of municipalities shall upon the appointment of a municipal planning commission under this act, be deemed transferred to such commission. [106 v. 455.]

Sec. 4366-4. [Control as to buildings.] Council may authorize the commission to control the height, design and location of buildings. [106 v. 455.]

Sec. 4366-5. [Employment of architects and engineers.] The commission shall have power to control, appoint or employ such architects, engineers and other professional service, and to appoint such clerks, draughtsmen and other subordinates as it shall deem necessary for the performance of its functions; the expenditures for such service and employments to be within the amounts appropriated for such persons by the council of the municipality; and council shall provide for the expenses and accommodations necessary for the work of the commission. [106 v. 455.]

Sec. 4366-7. [Division of municipality, into zones; appointment of planning commission.][1] The city planning commission of any municipality shall have the power to frame and adopt a plan or plans for dividing the municipality or any portion thereof into zones or districts, representing the recommendations of the commission, in the interest of the public health, safety, convenience, comfort, prosperity or general welfare, for the limitations and regulation of the height, the bulk and location (including percentage of lot occupancy, set back building lines, and area and dimensions of yards, courts and other open spaces), and the uses of buildings and other structures and of premises in such zones or districts. The council of any village is hereby empowered to create and appoint a planning commission with the powers set forth in this act. [108 v. 1175.]

(1) See notes to § 4366-11, post.

Sec. 4366-8. [Restriction in location of buildings and structures; regulations may be imposed.] Whenever the city planning commission of any municipality or any board or officer with city planning powers, whether such commission, board or officer is created under state statute or municipal charter, or the planning commission of any village appointed under the provisions of section 4366-7, certifies to the council or other legislative body of the municipality any such plan for the districting or zoning of the municipality according to the uses of buildings and other structures and of premises, then said council or other legislative body, in the interest of the promotion of the public health, safety, convenience, comfort, prosperity or general welfare, may regulate and restrict the location of buildings and other structures and of premises to be used for trade, industry, residence or other specified uses, and for said purposes divide the municipality into districts of such number, shape and area as may be deemed best suited to carry out the purposes of this section. For each of such districts regulations may be imposed designating the kinds or classes of trades, industries, residences or other purposes for which buildings or other structures or premises may be permitted to be erected, altered or used subject to special regulations. [108 v. 1175.]

Sec. 4366-9. [When council may regulate and limit height of buildings and structures.] Whenever any such planning commission, board or officer certifies to such council or other legislative body any such plan for the districting or zoning of the municpality according to the height of buildings and other structures, then such council or other legislative body, in the interest of the promotion of the public health, safety, convenience, comfort, prosperity or general welfare, may regulate and limit the height of buildings and other structures thereafter erected or altered and for said purpose divide the municipality into districts of such number, shape and area as may be deemed best suited to carry out the purposes of this section. Any such regulation imposing a lower height limitation than may be provided by state statute shall, within the district for which it is imposed, prevail over the said limitation provided by state statute. [108 v. 1175.]

Sec. 4366-10. [When council may regulate bulk and location, percentage of lot occupancy, set back buildings, etc.] Whenever any such planning commission, board or officer certifies to such council or other legislative body any such plan for the districting or zoning of the municipality according to the bulk and location of buildings and other structures (including percentage of lot occupancy, set back building lines, and area of yards, courts and other open spaces), then such council or other legislative body may, in the interest of the promotion of the public health, safety, convenience, comfort, prosperity or general welfare, regulate the bulk and location of buildings and other structures thereafter erected or altered, the percentage of lot occupancy, set back building lines and the area of yards, courts and other open spaces and for said purposes may divide the municipality into districts of such number, shape and area as may be deemed best suited to carry out the purposes of this section. Any such regulation imposing a less percentage of lot occupancy, wider or larger courts, deeper yards or other more strict limitations than those provided by state statute shall within the district for which it is imposed, prevail over the said limitations provided by state statute. [108 v. 1175, 1176.]

Sec. 4366-11. [Districting or zoning based upon, what; classification of buildings and structures.] The districting or zoning of any municipality or part thereof may be based upon any combination of two or more of the purposes described in the foregoing three sections. In the determination and establishment of districts as above provided, buildings and other structures may be classified on the basis of the nature or character of trade, industry, profession or other activity conducted or to be conducted therein, the number of persons, families or other group units to reside in or use them, the public, quasi-public or private nature of the use thereof, or upon any other basis or bases relevant to the promotion of the public safety, health, morals, convenience, prosperity or welfare.[1] The council or other legislative body may, from time to time, amend or change the number, shape, area or regulations of or within any district or districts; but no such amendment or change shall become effective unless the ordinance proposing such amendment or change shall first be submitted to the planning commission, board or officer for approval, disapproval or suggestions and the planning commission, board or officer shall have been allowed a reasonable time, not less than thirty days, for consideration and report. The council or other legislative body may create an administrative board to administer the details of the application of the regulations and may delegate to such board, in accordance with general rules and regulations to be set forth in the districting ordinances and regulations, the power to hear and determine appeals from refusal of building permits by building commissoners or other officers, to permit exceptions to and variations from the district regulations in the classes of cases or situations specified in the regulations and to administer the regulations as specified therein; or these administrative powers and functions may be delegated by the council or other legislative body to the planning commission or board. Before any ordinance, measure or regulation authorized by this and the three foregoing sections may be passed, the council or other legislative body shall hold a public hearing thereon, and shall give thirty days' notice of the

time and place thereof in a newspaper of general circulation in the municipality; and during said thirty days the text or copy of the text of such ordinance, measure or regulation, together with the maps or plans or copies thereof forming part of or referred to in said ordinance, measure or regulation and the maps, plans, and reports submitted by the planning commission, board or officer shall be on file, for public examination, in the office of the clerk of the council or other legislative body or in such other office as may be designated by the council or other legislative body. No such ordinance, measure or regulation which violates, differs from or departs from the plan or report submitted by the planning commission, board or officer shall take effect unless passed or approved by not less than three-fourths of the full membership of the council or other legislative body. [108 v. 1175, 1176.]

(1) **When regulations not enforcible.**—When the refusal by a city to permit the construction of a garage is based on an ordinance providing "except when the commissioner of buildings otherwise approves, minor garages shall be located to the rear of the established line of the houses facing the street" and the question of the public morals, safety, health and public welfare are not involved, such refusal is not a valid exercise of the public power and interference with the construction will be enjoined. Meade v. Cincinnati, 32 O. C. A. 17; 14 Oh. App. 412.

No zoning system can be made safe from attack which is founded on purely esthetic reasons. Nor can refuge be taken from such a system under the police power, where it is sought to apply the prohibition to buildings already existing or about to be constructed which are not per se a nuisance, unless provision is made for appropriation of the property thus affected or payment of such damage as may be sustained. Lucas v. State, ex rel., O. L. R., Dec. 31, 1923, page 363.

Zoning ordinance.—Validity of zoning ordinance sustained. See State, ex rel., v. Durant, O. L. R., Jan. 14, 1924.

For general discussion and authorities as to the validity of zoning ordinances, see Treatise by Alfred Bettman, O. L. R., March 19, 1923, and also Treatise by Archibald H. Throckmorton, O. L. R., September 24, 1923, page 251.

For decision of U. S. Dist. Ct. holding zoning ordinance unconstitutional, see Realty Co. v. Euclid, O. L. R., Mch. 17, 1924, p. 607.

Sec. 4366-12. [Foregoing sections shall not modify any power granted by law or charter.] Nothing contained in the foregoing sections 4366-7 to 4366-11 inclusive shall be deemed to repeal, reduce or modify any power granted by law or charter to any municipality, council or other legislative body

of a municipality nor to impair or restrict the power of any municipality under article XVIII of the constitution of Ohio.

[Section or provision held unconstitutional shall not affect others.] Should any section or provision of this act be decided by the courts to be unconstitutional or invalid, the same shall not affect the validity of the act as a whole or any part thereof other than the part so decided to be unconstitutional.

Nothing herein shall be construed as authorizing a municipality to reserve the use of any private property for future public use for the purpose of extending or widening streets. [108 v. 1175, 1177.]

Sec. 4366-13. [Regional planning commissions; employees thereof; expenses.] The city planning commissions of any municipality or group of municipalities, and the county commissioners of any county or counties in which such municipality or group of municipalities is located or any adjoining county or counties may co-operate in the creation of a regional planning commission for any region defined as may be agreed upon by said planning commissions and county commissioners, exclusive, however, of any territory within the limits of a municipal corporation not having a city planning commission. The number of members of such commission, their method of appointment and the proportion of the costs of such regional planning to be borne respectively by the various municipalities and counties in the region shall be such as may be determined upon by said planning commissions and county commissioners. Such county commissioners and the councils or other legislative bodies of such municipalities are hereby authorized to appropriate their respective shares of such costs. The sums so appropriated shall be paid into the treasury of the county in which the greater portion of the region is located and shall be paid out on the certificate of the regional planning commission and the warrant of the auditor of such county for the purposes herein authorized. Within the amounts thus agreed upon and duly appropriated, said regional planning commission may em-

ploy such engineers, accountants and other employes as may be necessary. [110 v. 310.]

Sec. 4366-14. [Organization and maintenance; terms of members.] The board of county commissioners of any county may and, on petition of the city planning commissions of a majority of the municipalities in such county having such planning commission, shall provide for the organization and maintenance of a county planning commission. Such planning commission shall consist of eight citizens of the county appointed by the board of county commissioners, together with the members of the board of county commissioners. If the population of any city in the county exceeds fifty per cent of the total population of the county, then at least three of the appointive members shall be selected from persons nominated by the city planning commission of such city. The appointive members shall be appointed for terms of three years, except that of the eight members first appointed, three shall be appointed for terms of two years and two shall be appointed for a term of one year. The members shall serve without pay. The county planning commission may employ such engineers, accountants and other employes as may be necessary. Their compensation and the expenses of the appointive members of the county planning commission shall be paid from appropriations made by the county commissioners. [110 v. 310, 311.]

Sec. 4366-15. [Powers and duties.] The powers and duties respectively of a regional or county planning commission shall be to make plans and maps of the region or county respectively, showing the commission's recommendation for systems of transportation, highways, park and recreational facilities, the water supply, sewerage and sewage disposal, garbage disposal, civic centers and other public improvements which affect the development of the region or county respectively as a whole or more than one political unit within the region or county and which do not begin and terminate within the boundaries of any single municipality. [110 v. 310, 311.]

Sec. 4366-16. [Certified copies of plans to each municipality.] The regional planning commission of any region or county planning commission of any county, shall, after making the regional or county plan, certify a copy thereof to the city planning commission of each municipality of the region or county and the county commissioners of each county or part of county included in the plan. In the event of the subsequent creation of a city planning commission for any municipality within a county having a county planning commission, or for any municipality subsequently incorporated within the area of a region having a regional planning commission, a copy of the county plan shall be immediately certified to such city planning commission. [110 v. 310, 311.]

Sec. 4366-17. [Effect of adoption of plans.] The city planning commission of any municipality to which a regional or county plan is so certified, may adopt such plan, and it shall thereupon and thereafter have the same force and effect within such municipality as is provided by law or charter for plans prepared and adopted by the local planning commission. The county commissioners of any county may adopt such plan so far as it relates to non-municipal territory. Thereafter no public building, roadway, bridge or viaduct or other public improvement or utility (whether publicly or privately owned), whose construction or location would constitute a departure from the plan, shall be constructed or authorized by the county commissioners except by unanimous vote. Such plans shall not designate the specific lots or parcels of land upon which said system, facilities, buildings and improvements are proposed to be placed, but only the general site or location thereof. The effect of the adoption of such plan by the county commissioners shall cease as regards the location of any sewage or garbage disposal plant and no official action of the county commissioners shall be controlled thereby in such respect, unless the site shown on the plan as the location of such plant is purchased within six months after the adoption of such plan by the county commissioners, or unless proceedings for the appropriation of the necessary property are commenced within such period

of six months and such property is then or thereafter appropriated in such proceedings. [110 v. 310, 312.]

Sec. 4366-18. [County surveyor shall assist.] The county surveyor of the county or counties, for which any regional or county planning commission has been organized, shall give, within the scope of his resources and without interference with his regular duties, such assistance to the commission as may be requested by it. [110 v. 310, 312.]

Sec. 4366-19. [Plans to be filed with county recorder.] Whenever a county or regional plan is adopted by a city planning commission or by the county commissioners, the fact of such adoption shall be certified by the adopting authority to the regional or county planning commission, as the case may be. Thereupon such regional or county planning commission shall deposit a copy of so much of such regional or county plan as is affected by such adoption in the office of the county recorder; but in case such plan shows a recommendation as to the location of a sewage or garbage disposal plant, such deposit shall not be made until after six months from and after the adoption of such plan, and when so deposited the copy of such plan shall also state the action or non-action of the appropriating authority with respect to the purchase or appropriation of property for such plant, as provided in section 5 of this act. [110 v. 310, 312.]

CHAPTER 9.

PUBLIC SAFETY.

CITIES.

Department of Public Safety.

Sec. 4367. [Director of public safety.][1] In each city there shall be a department of public safety, which shall be administered by a director of public safety. The director of public safety shall be an elector of the city, and he shall be appointed by the mayor and shall serve until his successor is appointed and qualified.[2] [99 v. 564, § 146; 96 v. 68, § 146.]

(1) **Old sections.**—Compare old §§ (1545-40) R. S. (Director of Police, Cleveland); (1545-48) R. S. (Director of Fire Service, Cleveland); (1545-134) R. S. (Director of Public Safety, Columbus); (1545-208) R. S. (Police and Fire Board, Springfield); (1545-270), (1545-275) R. S. (Board of City Commissioners, Akron and Youngstown); (1545-296) R. S. (Department of Police, and Department of Public Safety, Hamilton); §§ 1870 and 2436 R. S. (Police Commissioners and Fire Trustees, Cincinnati), all repealed.

Merger of service and safety departments in certain cities. See § 4250, *ante*.

Director of safety may be clerk of council. Op. Atty. Gen. (1915), p. 428.

(2) **Former section** 146 of the Municipal Code, as originally enacted, provided for a board of public safety consisting of from two to four directors, as council should determine. As to constitutionality of former provision authorizing council to determine number of directors, see Zumstein v. Mullen, 67 O. S. 382.

Sec. 4368. [General duties; records.][1] Under the direction of the mayor, the director of public safety shall be the executive head of the police and fire departments. He shall be the chief administrative authority of the charity, correction and building departments. He shall have all powers and duties connected with and incident to the appointment, regulation and government of these departments except as otherwise provided by law. He shall keep a record of his proceedings, a

copy of which certified by him shall be competent evidence in all courts. [96 v. 69, § 148; 96 v. 70, § 150; 99 v. 564, § 147; 96 v. 69, § 147.]

(1) **Old sections** relating to police boards and officers were formerly contained in Chap. 5, Div. 5, Title XII, R. S., §§ 1870 to (2030-23) R. S., all repealed. And see note (1) under § 4367, *supra.*

Old sections relating to the fire department were formerly contained in Chap. 2, Div. 8, Title XII, R. S., §§ 2436 to (2477-91) R. S., all repealed.

Sec. 4369. [Contracts, how made.] The director of public safety shall make all contracts in the name of the city with reference to the management of such departments, and for the erection or repair of all buildings or improvements in connection with, and for the purchase of all supplies necessary for, such departments, subject to the restrictions imposed by law.[1] [99 v. 564, § 147; 96 v. 69, § 147.]

(1) **Contracts.** — See § 4371, *post,* and note.

Employing attorney.—It was held, under former statutes, that the board having charge of police department may employ such counsel as it may select, when necessary to preserve or secure the fund entrusted to its control. Yaple v. Commissioners, 2 C. C. 406, aff'd, 25 B. 336.

Director of public safety has no authority to employ, at public expense, counsel to defend his title to the office, and counsel cannot confer such authority upon him. State, *ex rel.*, v. Noble, 9 N. P. (N. S.) 609; 20 Dec. 308.

Sec. 4370. [Shall be manager of certain institutions.] The director of public safety shall manage, and make all contracts in reference to the police stations, fire houses, reform schools, houses of correction, infirmaries, hospitals, workhouses, farms, pest houses,[1] and all other charitable and reformatory institutions. In the control and supervision of such institutions, the director shall be governed by the provisions of this title relating to such institutions. [99 v. 564, § 147; 96 v. 68, § 147.]

(1) **Contagion hospital.**— Right of a municipality to purchase land for. Op. Atty. Gen. (1917), p. 2454.

Sec. 4371. [Powers of director to make contracts.] The director of public safety may make all contracts and expenditures of money for acquiring lands for the erection or re-

pairing of station houses, police stations, fire department buildings, fire cisterns, and plugs, that may be required, and for the purchase of engines, apparatus, and all other supplies necessary for the police and fire departments, and for other undertakings and departments under his supervision, but no obligation involving an expenditure of more than five hundred dollars shall be created unless first authorized and directed by ordinance of council. In making, altering, or modifying such contracts, the director of public safety shall be governed by the provisions of the preceding chapter relating to public contracts,[1] except that all bids shall be filed with and opened by him. He shall make no sale or disposition of any property belonging to the city without first being authorized by resolution or ordinance of council.[2] [99 v. 564, § 154; 96 v. 71, § 154.]

(1) **Contracts.** — See §§ 4328-4334, *ante*, and notes and forms thereunder. See also § 4403, *post*.

Traveling expenses.— Expenses of city officers may be paid by city, when. Op. Atty. Gen. (1912), p. 432.

(2) **Sales** and leases of municipal property, see also §§ 3698, 3699, 3703, 3704 and 4403.

Police and Fire Departments.

Sec. 4372. [Chief of police.][1] The chief of police shall have exclusive control of the stationing and transfer of all patrolmen and other officers and employes in the department, under such general rules and regulations as the director of public safety prescribes. [96 v. 69, § 148.]

(1) Suspension and removal of chief, see §§ 486-17, 486-17a under "Civil Service", in Part II.

Chief of police may not act as probationer officer. See Op. Atty. Gen. (1922), p. 108.

Sec. 4373. [Emergency patrolmen.] In case of riot or other like emergency, the mayor may appoint additional patrolmen and officers for temporary service,[1] who need not be in the classified list of such department. Such additional officers or patrolmen shall be employed[2] only for the time during which the emergency exists. [96 v. 69, § 148.]

(1) Council may approve bills for detectives employed by mayor and safety director without authority from ordinance or resolution. Op. Atty. Gen. (1918), p. 1046.

(2) **Municipal obligation.**—The word, "employed" implies reciprocal duty and obligation on the part of the city to compensate such emergency patrolmen, and a bank which furnishes funds for such purpose will be subrogated to the rights of such emergency patrolment, and it may recover the money from the municipality. Youngstown v. National Bank, 106 O. S. 563.

Sec. 4374. [Police department; how composed.] The police department of each city shall be composed of a chief of police and such inspectors, captains, lieutenants, sergeants, corporals, detectives, patrolmen, and other police court officers, station house keepers, drivers, and substitutes, as are provided by ordinance or resolution of council.[1] [96 v. 70, § 149.]

(1) **Organizing police and fire departments.**—The Code requires the council to fix the number, salaries and bonds of all officers and other members of the police and fire departments, and the departments so established are to be classified by the director of public safety. (§§ 4214, 4219, 4374 and 4382.) The police department must consist of a chief of police, and such inspectors, captains, lieutenants, sergeants, corporals, detectives, patrolmen, police court officers, station house keepers, drivers and substitutes as council determines in its ordinance. The fire department must consist of a chief of the fire department, and such marshals, assistant marshals, firemen, telephone and telegraph operators as council determines in its ordinance. Forms for these two ordinances are given hereunder and under § 4377, *post*.

Council may also provide for other officers, surgeons, secretaries, clerks and employes under the director of public safety, and fix their salaries and bonds. §§ 4375 and 4377. As to what positions are to be regarded as within the classified service, see §§ 486-1 *et seq.* under "Civil Service", Part II.

Council, in reorganizing the department, may reduce the number of officers, etc., and may do this without regard to the seniority of the members of the departments. State, *ex rel.*, v. Searcey, 31 C. C. 83; 11 C. C. (N. S.) 521, (aff'd, 80 O. S. 740). Members in office at the time the Municipal Code went into effect have no preference over those subsequently appointed. *Ib.*

When number of patrolmen has been reduced by council, the police force may be reclassified regardless of length of service of its members. State, *ex rel.*, v. Searcy, 31 C. C. 83; 11 C. C. (N. S.) 521, (aff'd, 80 O. S. 740).

A municipal council has authority to pass an ordinance providing for the number, salaries and bonds of members of the police department, repealing at the same time the former ordinance under which the department was operated; and where such action is taken by council, all members of the police force lose their positions as of the date of the repeal of the former ordinance under which the department was theretofore operated, and it thereafter becomes the duty of the

director of public safety to appoint members of the force under the contemplated reorganization and upon such terms as council has provided. State, *ex rel.* v. Bish, 12 N. P. (N. S.), 369.

Director of public safety has authority to make rules for days off of policemen; council has same authority for firemen. See Op. Atty. Gen. (1919), p. 83.

FORM OF ORDINANCE ORGANIZING POLICE DEPARTMENT.

Ordinance No.....

Fixing the number, salaries and bonds of members of the police department.

Be it ordained by the council of the city of....., State of Ohio:

Sec. 1. That the police department of the city of....., shall be composed of the following officers and other members, who shall receive the respective salaries hereinafter provided, payable..... out of the police fund of the city, and shall give the respective bonds hereinafter required:

1. A chief of police, who shall receive $.....per annum, and shall give bond in the sum of $.....
2. .....inspectors of police, etc.
3. .....captains, etc.
4. .....lieutenants, etc.
5. .....sergeants, etc.
6. .....corporals, etc.
7. .....detectives, etc.
8. .....patrolmen, etc.

(Enumerating such force as is desired by council.)

Sec. 2. The police department as constituted herein shall be classified, by the director of public safety, as required by law.

Sec. 3. This ordinance shall take effect and be in force from and after the earliest period allowed by law.

Passed.....19....

.....
President of Council.

Attest:

.....
Clerk.

NOTE.—An ordinance providing for other officers, surgeons, secretaries, clerks, etc., under director of public safety, as authorized by § 4375, may be adapted from the above.

Sec. 4375. [Control of, by director of public safety.] The director of public safety shall have the exclusive management and control of all other officers, surgeons, secretaries, clerks and employes as are provided by ordinance or resolution of council. He may commission private policemen,[1] who may not

be in the classified list of the department, under such rules and regulations as council prescribes. [96 v. 70, § 149.]

(1) **Employment of guard.**—Ordinance forbidding employment of during industrial disturbance except under certain restrictions, held invalid. In re Reilly, 23 N. P. (N. S.) 65.

Sec. 4376. [Chief of fire department.][1] The chief of the fire department shall have exclusive control of the stationing and transferring of all firemen and other officers and employes in the department, under such general rules and regulations as the director of public safety prescribes. In case of riot or other like emergency the mayor may appoint additional firemen and officers for temporary service who need not be in the classified list of the department. Such additional officers or firemen shall be employed only for the time during which the emergency exists. [96 v. 70, § 150.]

(1) Suspension and removal of chief, see §§ 486-17, 486-17a under "Civil Service", in Part II.

Sec. 4377. [Fire department; how composed; control.][1] The fire department of each city shall be composed of a chief of the fire department and such marshals, assistant marshals, firemen, telephone and telegraph operators as are provided by resolution or ordinance of council. The director of public safety shall have the exclusive management and control of such other officers, surgeons, secretaries, clerks, and employes as are provided by ordinance or resolution of council. [96 v. 70, § 150.]

(1) Director of public safety has authority to make rules for days off of policemen; council has same authority for firemen. See Op. Atty. Gen. (1919), p. 83. See § 4393, *post*.

FORM OF ORDINANCE ORGANIZING FIRE DEPARTMENT.

Ordinance No.....

Fixing the number, salaries and bonds of members of the Fire Department.

Be it ordained by the Council of the city of....., State of Ohio:

Section 1. That the fire department of the city of....., shall be composed of the following officers and other members, who shall receive the respective salaries hereinafter provided, payable....., out of the fire fund of the city, and shall give the respective bonds hereinafter required:

1. A chief of the fire department, who shall receive $..... per annum, and shall give bond in the sum of $.....
2. .....Marshals, etc.
3. .....Assistant marshals, etc.
4. .....Firemen, etc.
5. .....Telephone and telegraph operators, etc.

(Enumerating such force as is desired by council.)

Sec. 2. The fire department as constituted herein shall be classified by the Director of Public Safety, as required by law.

Sec. 3. This ordinance shall take effect and be in force from and after the earliest period allowed by law.

Passed ..... 19...

.....
President of Council.

Attest:

.....
Clerk.

NOTE.—An ordinance providing for other officers, surgeons, secretaries, clerks, etc., under the Director of Public Safety, as authorized by § 4377, may be adapted from the above.

Sec. 4378. [General duties of police and fire departments.] The police force shall preserve the peace, protect persons and property and obey and enforce all ordinances of council and all criminal laws of the state and the United States. The fire department shall protect the lives and property of the people in case of fire, and both the police and fire departments shall perform such other duties, not inconsistent herewith, as council by ordinance prescribes.[1] The police and fire departments in every city shall be maintained under the civil service system, as provided in this subdivision. [96 v. 71, § 151.]

(1) **Municipal power.**—The police department of a municipality derives its authority from the state: and when such municipality is not expressly or by necessary implication authorized to do so, it can neither enlarge nor restrict the duties of such department or its officers as defined by the legislature. Cleveland v. Payne, 72 O. S. 347.

Municipal liability.—The power to establish and control a fire department is governmental in its nature, and a municipality is not liable for damages resulting from its failure to provide agencies for extinguishing fires or for negligence of the employes or officers in the fire department. Wheeler v. Cincinnati, 19 O. S. 19; Frederick v. Columbus, 58 O. S. 538; Cincinnati v. Cameron, 33 O. S. 336; Dayton v. Pease, 4 O. S. 80, 97-99; Thomas v. Findlay, 6 C. C. 241; see also Blunk v. Dennison Co., 71 O. S. 250.

But see Fowler v. Cleveland, 100 O. S. 158, which holds that while the establishment of a fire department is a governmental act, its operation is a purely ministerial act, and that the ordinary rules for determining negligence in an accident caused by fire apparatus are to be applied. This case expressly overrules the case of Frederick v. Columbus, *supra*. And see Eagle v. Springfield, 22 N. P. (N. S.), 158.

A contrary rule has been established in Aldrich v. Youngstown, 106 O. S. 342, where it was held that the creation and maintenance of a police department by a municipality are done in the exercise of its governmental functions. The performance of an act by an official of such department is not the performance of a ministerial act for which a municipality becomes liable under the maxim respondeat superior, and and that a municipal corporation is not, in the absence of a statutory provision, liable in damages to one injured for the negligent acts of its police department, or any of its members. Fowler, Admr., v. Cleveland, 100 Ohio St., 158, overruled; Frederick, Admr. v. Columbus, 58 Ohio St., 538, and Wheeler v. Cincinnati, 19 Ohio St., 19, followed and approved.

A police officer while engaged in a performance of his duties is discharging a governmental function and the city is not liable for acts of negligence committed by him while thus engaged. Cincinnati v. Butterfield, 32 O. C. A. 546; 14 Oh. App. 395.

The use of a truck as a part of the street cleaning machinery of a municipality was held to be the exercise of a governmental function and the municipality therefore not liable for personal injury therefrom. Akron v. Butler, 108 O. S. 122.

Fire department is not subject to a speed ordinance. Toledo Ry. & L. Co. v. Ward, 25 C. C. 399 (aff'd, 71 O. S. 492).

Likewise, the power to establish a police department and regulate the police is governmental, and municipality is not liable for failure to provide sufficient police protection, or for the negligence of police officers. Western College v. Cleveland, 12 O. S. 375; Robinson v. Greenville, 42 O. S. 625; Alvord v. Richmond, 3 N. P. 136.

Liability of police officer.—Not liable for arrest without warrant of person found violating city ordinance. Ringhand v. Grannan, 12 C. C. (N. S.) 255.

Liability of police officer for arrest without warrant. See Erie Ry. Co. v. Reigherd, 16 O. F. D. 360. See also § 13492 G. C.

Fees.—Chief of police is not entitled to fees for service of process issued by mayor in state cases, and such fees collected and paid into the treasury cannot be recovered by him. Delaware v. Matthews, 32 C. C. 408; 13 C. C. (N. S.) 539; (aff'd, 82 O. S. 423). But see §§ 4534, 4556, *post;* see also § 4581 and note, *post.*

Sec. 4379. [Power of chief of police and chief of fire department as to suspensions.] The chief of the police and the chief of the fire department shall have exclusive right to suspend any of the deputies, officers or employes in his respective department and under his management and control, for incom-

petence, gross neglect of duty, gross immorality, habitual drunkenness, failure to obey orders given him by the proper authority, or for any other reasonable and just cause.[1] [96 v. 71, § 152.]

(1) **Implied power.**—See Kelley v. Cincinnati, 7 N. P. 360.

Grounds.—Where city has failed to provide necessary funds, this is a valid ground for suspension of member of fire department. Osborne v. Columbus, 15 Dec. 561; 3 N. P. (N. S.) 1.

Scope of power.—The chief of police is not vested with power to try and punish officers or employes in the police department. This power is given exclusively to the director of public safety. State, *ex rel.*, v. Kohler, 11 N. P. (N. S.) 497. The power to hear charges, etc., conferred upon the director of public safety could not be delegated to the chief of police. *Ib.*

The plain inference from the statutes is that the director of public safety tries the offenders, the violation being brought to his notice by the chief of police after the chief has exercised his power of suspension. *Ib.*

Sec. 4380. [Reduction and dismissal; police and fire departments.] If any such employe is suspended as herein provided, the chief of police or the chief of the fire department, as the case may be, forthwith in writing, shall certify such fact, together with the cause for such suspension to the director of public safety, who within five days from the receipt thereof, shall proceed to inquire into the cause of such suspension and render judgment thereon, which judgment, if the charge be sustained, may be either suspension, reduction in rank or dismissal from the department, and such judgment in the matter shall be final except as otherwise provided in this subdivision.[1] Said director, in any investigation of charges against a member of the police or fire department shall have the same powers to administer oaths and to secure the attendance of witnesses and the production of books and papers as are conferred by this subdivision upon the mayor. [101 v. 297; 96 v. 71, § 152.]

(1) **Exclusive power.**—The director of public safety has the exclusive power to try and punish officers and employes of the police department and this power is not vested in the chief of police by statute nor can it be delegated to him under a department rule, although the chief has the power to suspend officers and certify the fact to the director of public safety. State *ex rel.* v. Hohler, 11 N. P. (N. S.) 497.

Removal only after suspension.—Under § 4379 the chief of police has the initiative and the director cannot begin a proceeding for any of the causes specified in the statute, but obtains his jurisdiction to try and determine charges by rea-

son of the certification provided for in § 4380. State *ex rel.* v. Kohler, 11 N. P. (N. S.) 497; State, *ex rel.*, v. Baldwin, 77 O. S. 532.

As to power of director in regard to officers under his exclusive control, see § 486-17a, in Part II, under "Civil Service".

Appeal to the civil service commission, § 486-17a.

Rights pending investigation.—When upon review suspension is disapproved, the vacancy created by suspension is thereby terminated and the person filling the vacancy ceases to be an officer. State v. Heinmiller, 38 O. S. 101.

A policeman suspended for cause is not entitled to wages during the time of suspension, even though the cause is afterwards declared insufficient by reviewing authority. Steubenville v. Culp, 38 O. S. 18. State v. Heinmiller, 38 O. S. 101.

A member of fire department wrongfully suspended may not sit quietly by without performing any service or taking any action to have himself reinstated, and hold city liable for his salary. Osborne v. Columbus, 15 Dec. 561; 3 N. P. (N. S.) 1.

Police officers, if improperly ousted from office, may recover their salaries less their earnings. Cleveland v. Luttner, 92 O. S. 493.

Sec. 4381. [Power of mayor as to suspension of chief of police or chief of fire department.][1] Repealed, 103 v. 698.

(1) See "Civil Service", Part II, particularly §§ 486-17, 486-17a.

Sec. 4382. [Classification of service; rules and regulations.] The director of public safety shall classify the service in the police and fire departments in conformity with the ordinance of council determining the number of persons to be employed therein, and shall make all rules for the regulation and discipline of such departments, except as otherwise provided in this subdivision.[1] [99 v. 564, § 153; 96 v. 71, § 153.]

(1) **Rules.**—A rule authorizing the chief of police to try employes alleged to have violated the rules of the department would not be lawful, for the exclusive power to try charges against employes is vested in the director himself. State, *ex rel.*, v. Kohler, 11 N. P. (N. S.) 497.

Director of public safety has authority to make rules for days off of policemen; council has same authority for firemen. Op. Atty. Gen. (1919), p. 83.

A rule of the fire department forbidding an officer to assign his salary or to incur indebtedness which he is unable to pay, was held not unreasonable. State v. Hyman, 22 C. C. 213; so also a rule requiring an officer not to be guilty of conduct unbecoming an officer and a gentleman or prejudicial to the good order of the department. *Ib.*

Enforcement of rules.—Courts will not review testimony in trial for infractions of rules. State, *ex rel.*, v. Hyman, 22 C. C. 213; State *ex rel.*, v. Barrett, 22 C. C. 104; State, *ex rel.*, v. Hyman, 21 C. C. 187.

Fines.—Whether fines can be assessed against a policeman as a means of enforcing discipline, see Kinney v. Toledo, 1 N. P. 374.

Council may approve bills for detectives employed by mayor and safety director without authority from ordinance or resolution. Op. Atty. Gen. (1918), p. 1046.

Sec. 4383. [Relief of members of police or fire department.] Council may provide by general ordinance for the relief out of the police or fire funds, of members of either department temporarily or permanently disabled in the discharge of their duty. Nothing herein shall impair, restrict or repeal any provision of law authorizing the levy of taxes in municipalities to provide for firemen's, police and sanitary police pension funds, and to create and perpetuate boards of trustees for the administration of such funds.[1] [96 v. 72, § 155.]

(1) **Pension funds.**—Provisions for firemen's, police and sanitary police pension funds will be found in Division VI, Chap. 1, §§ 4600-4647, *post*.

VILLAGES.[1]

Marshal.

Sec. 4384. [Election, term, qualifications.][2] The marshal shall be elected for a term of two years, commencing on the first day of January next after his election, and shall serve until his successor is elected and qualified. He shall be an elector of the corporation. When provided for by council, and subject to its confirmation, the mayor shall appoint all deputy marshals, policemen, night watchmen and special policemen, and may remove them for cause, which shall be stated in writing to council.[3] [96 v. 86, § 206; 98 v. 172, § 222.]

(1) **Power to organize and maintain police department** is conferred upon all municipalities in § 3617.

(2) **Old section** 1847 R. S., repealed; and compare old § 2023 R. S., repealed.

(3) **Appointment of deputy marshals.**—Under former statutes where the mayor made appointments of night watchmen and policemen, it was held he could not appoint until authorized by ordinance of council to do so. Schwegman v. St. Bernard, 12 Dec. 9.

Position must first be created.—In order to render valid the appointment of a village policeman, the office must be created and the salary fixed by council, the mayor then appointing and council confirming the appointment. DeRomedis v. Yorkville, 21 N. P. (N. S.), 340.

Confirmation may be by resolution and "yeas" and "nays" must be taken. See Op. Atty. Gen. (1920), p. 485.

Duties of deputy marshals.—For construction of sections as to the powers and duties of deputy marshals in villages, see Schwegman v. St. Bernard, 12 Dec. 9.

Certificate of money in treasury, necessary to meet salaries, was held necessary before such offices could be provided for or appointments made. Uhrig v. Reading, 8 N. P. 573.

Powers and duties of deputies are same as those of marshals. Uhrig v. Reading, 8 N. P. 573.

Sec. 4385. [General powers.] The marshal shall be the peace officer of the village and the executive head under the mayor of the police force. The marshal, the deputy marshals, policemen or night watchmen under him shall have the powers conferred by law upon police officers in all villages of the state, and such other powers not inconsistent with the nature of their offices as are conferred by ordinance. [96 v. 86, § 206.]

Sec. 4386. [Duties to suppress riots and make arrests.] He shall suppress all riots, disturbances and breaches of the peace and to that end may call upon the citizens to aid him. He shall arrest all disorderly persons in the corporation and pursue and arrest any person fleeing from justice in any part of the state. He shall arrest any person in the act of committing any offense against the laws of the state or the ordinances of the corporation, and forthwith bring such person before the mayor or other competent authority for examination or trial,[1] and he shall receive and execute any proper authority for the arrest and detention of criminals fleeing or escaping from other places or states. [R. S. § 1849; 66 v. 173, § 142.]

(1) **Arrest without warrant.**—See § 13492, providing for arrest without warrant; § 4386 must be construed with § 13492. State v. Lewis, 50 O. S. 179.

In case of breach of the peace, arrest without warrant cannot be made unless the offense was committed in the presence of the officer. *Ib.*

Where the officer is justified in making arrest without warrant it is not necessary to the lawfulness of the arrest that the offender be informed of the cause of the arrest, where the officer and cause of arrest were known to him. Wolf v. State, 19 O. S. 248.

An officer acting *bona fide* may arrest without warrant one carrying concealed weapons, if the information leading to the arrest would justify a prudent man in so acting. Ballard v. State, 43 O. S. 340.

Officer without warrant cannot arrest on mere suspicion that the person arrested is a deserter from the army. Kendall v. Scheve, 3 C. C.

526. But a well-grounded suspicion would be enough. State v. West, 3 O. S. 509.

The officer must believe and have reasonable cause to believe that the person arrested was guilty of the offense. Burch v. Franklin, 7 N. P. 155.

Violating city ordinances.—Council may order arrest without warrant of persons violating city ordinances, if in view of officer. White v. Kent, 11 O. S. 550.

Holding until warrant obtained.—Person arrested without warrant can be detained only as long as is reasonably required to secure warrant. Leger v. Warren, 62 O. S. 500. As to reasonableness of delay, see Raitz v. Green, 13 C. C. 455.

Fugitive from another state may be held a reasonable time until requisition papers can be issued. Rea v. Smith, 2 Handy, 193.

Sec. 4387. [Powers of marshal; fees.] In the discharge of his proper duties, the marshal shall have like powers and be subject to like responsibilities as constables and for services actually performed by himself or his deputies, there shall be taxed the same fees and expenses as are allowed constables. [108 v. 1203, 1208; R. S. § 1850; 66 v. 173, § 143.]

Sec. 4388. [Disposition of fines and penalties.] All fees, costs, fines and penalties by him collected shall immediately be paid to the mayor, and he shall report to the council monthly the amount thereof, whence and for what purpose collected, and when paid over. [R. S. § 1851; 66 v. 173, § 144.]

Fire Department.[1]

Sec. 4389. [Fire chief.] In each village having or hereafter establishing a fire department, the head thereof shall be a fire chief, appointed by the mayor for a term of two years, and shall be an elector of the corporation.[2] [96 v. 86, § 207.]

(1) **Power to organize and maintain fire department** is conferred upon all municipalities; section 3617.

(2) **Removal of fire chief.**—Power of the mayor under former statutes to remove fire chief and declare a vacancy. See State, *ex rel.*, v. Bryson, 44 O. S. 457; State v. Heinmiller, 38 O. S. 101.

Sec. 4390. [Organization of department.] Council may provide for the employment of such firemen as it deems best and fix their compensation, or for the services of volunteer firemen. All firemen, other than volunteers, shall be appointed by the mayor for terms of one year, with the advice and consent of the council. [96 v. 86, § 207.]

Sec. 4391. [Council may purchase engines and equipment.] The council may purchase for its own use or for the use of such companies, necessary fire engines, either steam or hand, hose carriages and hose, and all such other apparatus and instruments as is deemed necessary for the extinguishment of fires, and establish lines of fire alarm telegraph within the limits of the corporation.[1] [R. S. § 2471; 66 v. 204, § 327.]

(1) **Municipal liability for failure to provide necessary agencies** for extinguishing fires, see notes under § 4378, *ante*.

Sec. 4392. [Buildings for department.] The council may provide or erect necessary and suitable buildings containing rooms for fire engines, hose carriages, fire apparatus and instruments, and provide for the meetings of the fire and hose companies.[1] [R. S. § 2472; 66 v. 204, § 328.]

(1) **Not subject to levy on execution.**—A building erected for a fire engine house, but rented by the city for other purposes, is not subject to levy under a judgment against the city. Cincinnati v. Frost, Stearns & Co., 5 B. 684.

CITIES AND VILLAGES.

Sec. 4393. [Fire department regulations.] The council may establish all necessary regulations to guard against the occurrence of fires, protect the property and lives of the citizens against damages and accidents resulting therefrom and for such purpose may establish and maintain a fire department, provide for the establishment and organization of fire engine and hose companies, establish the hours of labor[1] of the members of its fire department, but after the first day of January, nineteen hundred and eleven, council shall not require any fireman to be on duty continuously more than six days in every seven, and provide such by-laws and regulations for their government as is deemed necessary and proper. [101 v. 380; R. S. § 2470; 69 v. 54; 67 v. 76.]

(1) See notes to §§ 4374 and 4377, *ante*.

Sec. 4394. [Firemen exempt from certain public service.] No active volunteer fireman or one who has served five years consecutively as a volunteer fireman shall be required to serve on juries or perform military duty in time of peace or labor on highways. [R. S. § 2470; 67 v. 76; 69 v. 54, § 1.]

Sec. 4395. [Regulate the erection of houses and business structures; removal.] The council may regulate the erection of houses and business structures and prohibit within such limits as it may deem proper, the erection of buildings, unless the outer walls be constructed of non-combustible material, and, on the petition of the owners of not less than two-thirds of the ground included in any square, or half-square prohibit the erection on any such square or half-square, of any building, or addition to any building more than ten feet high, unless the outer walls be made of iron, stone, brick and mortar, or of some of them, and to provide for the removal of any building or additions erected contrary to such prohibition.[1] [102 v. 83; R. S. § 2473; 91 v. 124; 66 v. 204.]

(1) **Buildings already erected before the passage of the ordinance may be moved from one part of the prescribed limits to another. Cleveland v. Lenze, 27 O. S. 383.**

FORM OF PETITION FOR REGULATION OF ERECTION OF BUILDINGS.

To the council of the city [*or* village] of ....., State of Ohio:

The undersigned, being the owners of two-thirds of the ground included in the square [*or* half square] bounded as follows: (Here insert street boundaries of square or half square), in the city [*or* village] of ....., hereby petition your honorable body to pass the proper legislation to prohibit the erection on such square [*or* half square] of any building or addition to any building more than ten feet high, unless the outer walls be made of iron, stone, brick and mortar, or of some of them, and to provide for the removal of any buildings or additions erected contrary to such prohibition.

....., owner of .....feet front.

....., owner of .....feet front.

etc., etc.

FORM OF ORDINANCE TO REGULATE THE ERECTION OF BUILDINGS.

Ordinance No.....

To regulate the erection of buildings on the square bounded.....

Be it ordained by the council of the city [*or* village] of....., State of Ohio:

Section 1. That in pursuance of a petition by the owners of two-thirds of the ground included in the square [*or* half square] bounded by (here insert boundaries) presented to council for that purpose and the power

vested in the council by law the erection on said square [*or* half square] of any building or addition to any building, more than ten feet high, unless the outer walls be made of iron, stone, brick, and mortar, or of some of them, be and the same is hereby prohibited.

Sec. 2. That any building or buildings or additions to any building erected contrary to the provisions of this ordinance shall, after thirty days' notice to the owner to remove the same, be removed by the fire chief and the expense of such removal charged to the owner.

Sec. 3. This ordinance shall take effect and be in force from and after the earliest period allowed by law.

Passed.....19....

.....

Mayor.

Attest:

.....

Clerk.

Sec. 4396. [Investigation of fires.] The council may invest any officer of the fire or police department, with the power, and impose on him the duty, to be present at all fires, investigate the cause thereof, examine witnesses, and compel their attendance and the production of books and papers, and to do and perform all such other acts as may be necessary to the effective discharge of such duties. [R. S. § 2474; 66 v. 205, § 330.]

Sec. 4397. [Power to make arrests.] Such officer shall have power to administer oaths, make arrests and enter for the purpose of examination, any building which, in his opinion, is in danger from fire; and he shall report his proceedings to the council at such times as may be required.[1] [R. S. § 2475; 66 v. 205, § 331.]

(1) **Section cited** in State, *ex rel.* v. Bryson, 44 O. S. 457, 469.

Sec. 4398. [Property recovered by police.] Stolen or other property recovered by members of the police force shall be deposited and kept in a place designated by the mayor. Each such article shall be entered in a book, kept for that purpose with the name of the owner, if ascertained, and the person from whom taken, the place where found with general circumstances, the date of its receipt and the name of the officer receiving it. [R. S. § 6858-1; 98 v. 60.]

Sec. 4399. [Inventory to person from whom taken.] An inventory of all money or other property shall be given to the party from whom taken, and in case it is not claimed by some person within thirty days after such arrest and seizure it shall unless otherwise ordered by the board be delivered to the person from whom taken, and to no other person, either attorney, agent, factor, or clerk, except by special order of the mayor. [R. S. § 6858-1; 98 v. 60.]

Sec. 4400. [Disposition to claimant.] If within thirty days such money or property is claimed by any other person it shall be retained by such custodian until after the discharge or conviction of the person from whom taken and so long as it may be required as evidence in any case in court. If such claimant establishes to the satisfaction of the police judge that he is the rightful owner, it shall be restored to him, otherwise, it shall be returned to the accused person, personally, and not to any attorney, agent, factor, or clerk of such accused person, except upon special order of the mayor after all liens and claims in favor of the municipality, against it have first been discharged and satisfied. [R. S. § 6858-1; 98 v. 60.]

Sec. 4401. [Sale of unclaimed property.] Property unclaimed for the period of one year shall be sold by the chief of police or marshal at public auction, after giving due notice thereof, by advertisement published three times in a newspaper of general circulation in such county. In municipalities where there is a police relief fund and trustees and officers thereof the proceeds from such sale shall be paid to the treasurer of such fund and be placed to its credit. In municipalities where there is no police relief fund and trustees and officials thereof, such proceeds shall be paid to the treasurer of the municipality, and be credited to the general fund. [R. S. § 6858-3; 98 v. 61.]

CHAPTER 10.

BOARD OF CONTROL.

CITIES.

Sec. 4402. [Board of control, who to constitute.] The mayor, director of public service and director of public safety shall constitute the board of control. The mayor shall be ex officio president. The board shall keep a record of its proceedings.[1] All votes shall be by yeas and nays and entered on the record, and the vote of a majority of all the members of the board shall be necessary to adopt any question, motion or order. [99 v. 565, § 154a.]

(1) **Provision as to record directory only.**—The statute requiring that action taken by the proper officials modifying an existing municipal contract shall be made a matter of record is directory only, and such action regularly taken is not nullified by failure through an oversight to make a record thereof. Lloyd v. Toledo, 20 C. C. (N. S.), 47. See § 4331 and notes.

Sec. 4403. [When board shall approve contracts.] No contract in the department of public service or the department of public safety in excess of five hundred dollars shall be awarded except on the approval of the board of control, which shall direct the director of the appropriate department to enter into the contract.[1] The members of the board shall prepare estimates of the revenue and expenditures of their respective departments to be submitted to the council by the mayor, as provided by law.[2] [99 v. 565, § 154a.]

(1) **Contracts in excess of $500.**—See also § 4328, providing that no contract for any work under the supervision of the director of public service involving more than $500.00 shall be made unless the expenditure is first authorized and directed by ordinance of council; and § 4371 providing that no contract involving an expenditure of more than $500.00 shall be made in the department of public safety except when first authorized by ordinance of council.

Discretion of board of control.—Discretion of board to award contract to lowest and best bidder will not be interfered with by the courts in absence of proof of an abuse of sound discretion. Cleveland v. Thomas, 15 Oh. App. 76.

Rescission of Contract.—A contract for a street improvement entered into by a director of public service pursuant to authorization and direction by ordinance of the city council, which contract was approved by the board of control of the city, cannot be rescinded by such board of control without the concurrence of council, acting by ordinance. Newark v. Fromholtz, 102 O. S. 81.

A lease entered into by the proper officers of a municipality for property needed for municipal purposes, is not rendered invalid by reason of the fact that it is a contract involving an expenditure of more than $500 and was not approved by the board of control. Columbus v. Spielman et al., 19 N. P. (N. S.), 257.

(2) **Provisions as to estimates.**—See § 3791, providing for submission by the mayor to council of an annual budget of the current expenses. Sections 3787 and 3790, provide for an itemized estimate by the directors and officers provided for in the act, of the amount of money needed in their respective departments or offices for the ensuing year.

CHAPTER 11.

BOARD OF HEALTH.[1]

CITIES AND VILLAGES.

Organization and Powers.

Sec. 4404. [Municipality shall establish a board of health; appointment.][2] The council of each city constituting a city health district, shall establish a board of health,[3] composed of five members to be appointed by the mayor and confirmed by the council, to serve without compensation, and a majority of whom shall be a quorum. The mayor shall be president by virtue of his office. Provided that nothing in this act contained shall be construed as interfering with the authority of a municipality constituting a municipal health district, making provision by charter for health administration other than as in this section provided. [108 v. 1085, 1092; 108 v. 236; 97 v. 460, § 187; 96 v. 79, § 187.]

(1) **General power** of municipality to provide for the public health, abate nuisances, etc., is given in §§ 3646-3650, *ante.*

Board of health statutes in Part II.—Under title "Board of health" in Part II will be found all sections not contained in Title XII, but which relate to municipal boards of health.

As to status of boards of health appointed under this section, and the effect of the recent amendments, see Op. Atty. Gen. (1920), p. 130.

(2) **Old section 2113 R. S., repealed.**

Health districts.—Act establishing health districts and providing that each city shall be a health district, see §§ 1261-16 to 1261-43, under "Board of Health", in Part II.

(3) **Defective ordinance.**—Where an ordinance establishing a board of health was defective because not read three times it was held that the board was nevertheless a *de facto* board and its acts valid. Smith v. Lynch, 29 O. S. 261.

Character of board.—Boards of health, as such, were held not to be bodies corporate and to have no express statutory authority to maintain a suit to prevent the pollution of a stream, or to sue or be sued upon any cause of action. Board of Health v. Columbus, 12 Dec. 553.

Such boards have certain legislative, *quasi* judicial and executive

powers, and may, in some cases, exercise them in a most summary manner. *Ib.*

Majority of quorum of health board was held sufficient to transact business. State, *ex rel.*, v. Massillon, 13 Dec. 292; 24 C. C. 249, 2 C. C. (N. S.) 167.

Provision mandatory requiring council to establish a board of health. State, *ex rel.*, v. Massillon, 24 C. C. 249, 253; 2 C. C. (N. S.) 167.

But mandamus will not lie against council at instance of a taxpayer to compel creation of a board. State, ex rel. v. Orr, 15 C. C. (N. S.), 59.

Appointment of member to place under board not valid. State, *ex rel.*, v. Newark, 6 N. P. 523. See also Op. Atty. Gen. (1915), p. 305.

Repeal of ordinance establishing.—The repeal of an ordinance establishing a board of health abolishes all appointive positions under such board. State, ex rel. v. Colson, 29 O. C. A. 140; 7 Oh. App. 438.

FORM OF ORDINANCE TO ESTABLISH BOARD OF HEALTH.

Ordinance No.....

To Establish a Board of Health.

Be it ordained by the council of the city of ....., State of Ohio:

Section 1. That under and in pursuance of the authority conferred and the duty imposed upon council by § 4404 of the General Code of Ohio, the council establish and it does hereby establish a Board of Health for the city health district of said city of ....., to be constituted and its members appointed in accordance with § 4404 above referred to. The members of the Board of Health shall give bond in the sum of $.....

Sec. 2. This ordinance shall take effect and be in force from and after the earliest period allowed by law.

Passed.....19....

.....
President of Council.

Attest:

.....
Clerk.

Sec. 4405. [When state commissioner may appoint officer for municipality.] If any such city fails or refuses to establish a board of health the state commissioner of health, with the approval of the public health council, may appoint a health commissioner therefor, and fix his salary and term of office. Such health commissioner shall have the same powers and perform the duties granted to or imposed upon boards of health, except that rules, regulations or orders of a general

character and required to be published made by such health commissioners shall be approved by the state commissioner of health. The salary of the health commissioner so appointed, and all necessary expenses incurred by him in performing the duties of the board of health shall be paid by and be a valid claim against such municipality. [108 v. 1085, 1092; 108 v. 236; 97 v. 460, § 187; 96 v. 79, § 187.]

Sec. 4406. [Term of office of members.] The term of office of the members of the board shall be five years from the date of appointment, and until their successors are appointed and qualified, except that those first appointed shall be classified as follows: One to serve for five years, one for four years, one for three years, one for two years, and one for one year, and thereafter one shall be appointed each year. [R. S. § 2114; 95 v. 643, 423; 66 v. 201.]

Sec. 4407. [President pro tem; meetings.] The board of health in municipalities shall elect one of their number president pro tem who shall preside in the absence of the mayor, and shall do and perform all duties incumbent upon the president. The board shall meet for the transaction of business at least once in each calendar month, and as much oftener as is necessary for the prompt and thorough transaction of its business. Special meetings of the board shall be called by the president or three members thereof. [R. S. § 2116; 99 v. 307; 95 v. 423.]

Sec. 4408. [Appointment of commissioner, clerks, nurses, physicians, etc.] In any city health district, the board of health or person or persons performing the duties of a board of health shall appoint for whole or part time service a health commissioner[1] and may appoint such public health nurses, clerks, physicians, and other persons as they deem necessary. [108 v. 1085, 1092; 108 v. 236; R. S. § 2115; 97 v. 331; 95 v. 423; 90 v. 88; 85 v. 59; 66 v. 202.]

(1) **Provision mandatory.**— The section providing that Boards of Health shall appoint health officers is mandatory in character and the establishment of a Board of Health is a police regulation of the

State. State, *ex rel.*, v. Massillon, 24 C. C. 249, 2 C. C. (N. S.) 167.

Certificate of funds on hand, with which to pay health officer's compensation is not necessary before the board makes appropriation for payment of his services. *Ib.*

Removal of appointees, see § 4412, *post*, and note.

Sec. 4409. [Record of proceedings and record of diseases.] The secretary of the board shall keep a full and accurate record of the proceedings of the board together with a record of diseases reported to the health commissioner and on termination of his office shall turn over to his successor, books, records, papers and other matter belonging to the board. Each board of health, or person or persons performing the duties of the board of health shall procure suitable books, blanks, and other things necessary to the transaction of its business. Such records shall be kept as are required by the state commissioner of health and such forms shall be used as he may prescribe. [108 v. 236, 248; R. S. § 2116; 99 v. 307; 95 v. 423.]

Sec. 4410. [Care of sick poor and quarantined persons.] The board of health shall care for the sick poor and each person quarantined when such person is unable to pay for care and treatment, and for all persons sent to the municipal detention hospital when such persons are unable to pay for care and treatment. [108 v. 236, 248; R. S. § 2115; 97 v. 331; 95 v. 423; 90 v. 88; 85 v. 59; 66 v. 202.]

Sec. 4411. [Appointment of sanitary officers and public health nurses.] The board may also appoint as many persons for sanitary duty as in its opinion the public health and sanitary conditions of the corporation require, and such persons shall have general police powers and be known as sanitary police. The board may also appoint as many persons for public health nurse duty as in its opinion the public health and sanitary conditions of the corporation require, and such persons shall be registered nurses and shall be known as public health nurses; provided, however, that where registered nurses are not available the board may appoint other suitable persons as public health nurses.

The council may determine the maximum number of sani-

tary police and public health nurses so to be appointed. [108 v. 11; 102 v. 44; R. S. § 2115; 97 v. 331; 95 v. 423; 90 v. 88; 85 v. 59; 66 v. 202.]

Sec. 4411-1. [Employes.] The board shall determine the duties and fix the salaries[1] of its employes; but no member of the board of health shall be appointed as health officer or ward physician. [103 v. 436.]

(1) Amount of bond of sanitary police and plumbing inspectors fixed by council. Op. Atty. Gen. (1918), p. 549.

Board of health has authority to make per diem allowance to health officer for quarantine work in addition to annual compensation; health officer not authorized to collect from person quarantined; compensation for vaccinations. See Op. Atty. Gen. (1919), p. 105.

Sec. 4412. [Salaries and duties; suspension; hearing.][1] Repealed, 103 v. 698.

(1) This repealed section provided for the suspension and removal of sanitary policemen; for present provision, see § 486-1 *et seq.*, Part II, under title "Civil Service".

Sec. 4413. [Orders and regulations by city board.] The board of health of a city may make such orders and regulations as it deems necessary for its own government, for the public health, the prevention or restriction of disease, and the prevention, abatement or suppression of nuisances.[1] Orders and regulations not for the government of the board, but intended for the general public shall be adopted, advertised, recorded and certified as are ordinances of municipalities,[2] and the record thereof shall be given, in all courts of the state, the same force and effect as is given such ordinances. Provided, however, that in cases of emergency caused by epidemic of contagious or infectious diseases, or conditions or events endangering the public health, such boards may declare such orders and regulations to be emergency measures, and such orders and regulations shall become immediately effective without such advertising, recording and certifying. [108 v. 1085, 1092; 108 v. 236; R. S. § 2118; 95 v. 424; Bates, 3rd Ed., 2122; 90 v. 89; 88 v. 71; 79 v. 78; 66 v. 201.]

(1) **Municipal liability.**—The municipality or its officers in their official capacity are not liable for damages resulting from the negligence of the board of health or health officer. Turner v. Toledo, 15 C. C. 627.

Boards of health are invested with legislative, *quasi* judicial and executive or governmental powers, in the exercise of which, proceedings of a most summary character are permitted, but they are not liable for negligence in the discharge of their official functions. Board of Health v. Columbus, 12 Dec. 553; West v. Mt. Washington, 20 Dec. 125; 9 N. P. (N. S.) 250.

Scope of power.—Boards of health have power to make reasonable regulations for the sanitary inspection of houses of prostitution, and the examination of their inmates to prevent infectious diseases and to promote the public health. Cincinnati v. Allison, 12 Dec. 376.

A regulation by a board of health requiring all known prostitutes to submit to a personal examination once every week by a district physician and providing for the issuance of certificates to those free from disease and requiring the expense of the regulation to be paid by the persons examined, is not unreasonable; but the fees charged must be paid into the city treasury and cannot be paid directly to the physicians. *Ib.*

A municipality may pay for transportation of a leper. Op. Atty. Gen. (1916), p. 827.

The board may require all physicians to register, but it cannot make the right to register depend on approval of officer or board after passing on qualifications. State, *ex rel.*, v. Prendergast, 8 C. C. 401.

Whether board can require vaccination of all pupils as condition to right to attend school, *quere.* Carr v. Board Ed., 1 N. P. (N. S.) 602; 13 Dec. 430; such power is probably given only to Board of Education. But where latter board adopts the order, it may be enforced. *Ib.*

A health ordinance requiring a permit from the board of health before milk could be sold in the city, and authorizing examination and inspection of milk sold and the places where cows were kept, was held valid. Walton v. Toledo, 23 C. C. 547; 3 C. C. (N. S.) 295, (aff'd, 69 O. S. 548).

Board may make reasonable regulations as to sale of milk, to prevent injury to health, and a regulation requiring all milk and cream, with certain exceptions, to be sold in closed bottles, is reasonable. Klopfer v. Board, 9 N. P. (N. S.) 33; 20 Dec. 384; Staas v. State, 15 C. C. (N. S.) 189, aff'd, 81 O. S. 497).

A rule of a board of health providing: "No fowls or animals shall be kept confined, nor shall same be slaughtered or dressed in any basement or any building, a part of which is used and occupied as a market where meats are sold for food," held valid. Shute v. Elyria, 20 C. C. (N. S.) 383.

An order or regulation of a city board of health, forbidding the sale of ice cream on highway or public grounds of the city unless contained in sealed or locked cans or other containers approved by the board of health, is a valid exercise of police power, and is

constitutional. Metropolis v. Elyria, 23 C. C. (N. S.) 544.

A reasonable construction should be given to a rule of the board of health of a city, intended for the protection of the health of its inhabitants, to the end that it may be enforced. Shute v. Elyria, 20 C. C. (N. S.) 383.

See further notes to §§ 3646 and 3650.

(2) See §§ 4227, 4228, 4229, 4230.

Sec. 4414. [Penalty for violation.] Whoever violates any provision of this chapter, or any order or regulation of the board of health made in pursuance thereof, or obstructs or interferes with the execution of such order, or wilfully or illegally omits to obey such order, shall be fined not to exceed one hundred dollars or imprisoned for not to exceed ninety days, or both, but no person shall be imprisoned under this section for the first offense, and the prosecution shall always be as and for a first offense, unless the affidavit upon which the prosecution is instituted, contains the allegation that the offense is a second or repeated offense. [R. S. § 2119; 95 v. 424; Bates, 3rd Ed., 2137.]

Sec. 4415. [Violation by a corporation.] If such violation, obstruction, interference or omission be by a corporation, it shall forfeit and pay to the proper municipality a sum not to exceed three hundred dollars, to be collected in a civil action brought in the name of the municipality. Any officer of such corporation having authority over the matter, and permitting such violation, shall be subject to fine or imprisonment, or both, as heretofore provided. The judgment herein authorized being in the nature of a penalty, or exemplary damage, no proof of actual damages shall be required, but the court or jury, finding other facts to justify recovery, shall determine the amount by reference to all the facts, culpatory, exculpatory, or extenuating, adduced upon the trial. [R. S. § 2120; 95 v. 425; Bates, 3rd Ed., 2138.]

Sec. 4416. [Prosecutions; how instituted.] Prosecutions under this chapter and the civil action provided for in the preceding section, shall be instituted before a justice of the peace within the county, or justice of the peace, mayor or police judge of the municipality where the offense was com-

mitted, or the offending person resides. [R. S. § 2121; 95 v. 425; Bates, 3rd Ed., 2139; 90 v. 92; 66 v. 204.]

Sec. 4417. [Trial by jury.] If imprisonment is or may be a primary penalty, the court shall, after plea of not guilty, unless a trial by jury is waived, issue a venire to any constable of the county, containing the names of sixteen electors residing within the county, to serve as jurors to try such cause. Each party shall be entitled to two peremptory challenges, and challenges for cause in all particulars, as in criminal cases in the court of common pleas. If the sixteen names are exhausted without obtaining a panel of twelve, the court may direct the constable to summon any of the bystanders to fill the panel to twelve, or on demand shall issue other venires for four electors at a time, until the panel of twelve is full. [R. S. § 2121; 95 v. 425; Bates, 3rd Ed., 2139.]

Sec. 4418. [Fines and costs.] In prosecutions under this chapter, no deposit for costs shall be required. A judgment or verdict of guilty shall be immediately followed by sentence and execution thereof, unless suspended pending the preparation and allowance of a bill of exceptions. All fines collected under this chapter shall be paid to the treasurer of the municipality and credited to the sanitary fund of the board of health instituting the prosecution. No fine imposed in any prosecution under this section shall be remitted by the magistrate before whom the complaint is made. [R. S. § 2121; 95 v. 425; Bates, 3rd Ed., 2139.]

Sec. 4419. [Preservation of vital statistics.] The board of health may create a complete and accurate system of registration of births, marriages, deaths, and interments occurring within its jurisdiction for the purpose of legal and genealogical investigations, and to furnish facts for statistical, scientific or sanitary inquiries.[1] [R. S. § 2141; 99 v. 307; 95 v. 435.]

(1) **State bureau** of registration of births and deaths is provided for in §§ 197 *et seq.*, G. C. Those sections provide for local registrars to be appointed for municipalities.

Nuisances.

Sec. 4420. [Abatement of nuisances by board of health.] The board of health shall abate and remove all nuisances within its jurisdiction. It may by order therefor compel the owners, agents, assignees, occupants, or tenants of any lot, property, building or structure to abate and remove any nuisance therein, and prosecute them for neglect or refusal to obey such orders.[1] Except in cities having a building department, or otherwise exercising the power to regulate the erection of buildings, the board of health may regulate the location, construction and repair of water-closets, privies, cesspools, sinks, plumbing and drains. In cities having such departments or exercising such power, the council by ordinance shall prescribe such rules and regulations as are approved by the board of health, and shall provide for their enforcement. [R. S. § 2122; 98 v. 188; 95 v. 425; Bates, 3rd Ed., 2116, 2128.]

(1) **Nuisances.**— See notes to § 3650, ante.

Power of Board of Health to repair public sanitary sewer. See Op. Atty. Gen. (1922), p. 926.

FORM OF NOTICE TO ABATE NUISANCE.

City [*or* village] of....,
Office of the Board of Health.
.....19....

To.....

You are hereby notified that the board of health adopted the following resolution, on....., 19....,

"Resolved, that in the opinion of the board of health the..... (here name the nuisance) on the following described premises (here describe premises), constitutes a public nuisance and the same is hereby declared to be a public nuisance and ordered to be abated, by.....(here state alteration, disinfection or whatever required) within.....days after the service of notice of this resolution upon the owner of said premises, or the same may be done at the expense of the city [*or* village] and charged to said owner, and assessed against his property; and disobedience of this order shall be punished as provided by law; and the clerk is directed to serve notice of this resolution and order upon the owner, agent or other person having control of or occupying said premises."

This resolution and order must be complied with, within.....days from the service of this notice. By order of the Board of Health.

.....
Clerk.

Sec. 4421. [Other powers of the board.] The board of health may also regulate the location, construction and repair of yards, pens and stables, and the use, emptying and cleaning thereof, and of water-closets, privies, cesspools, sinks, plumbing, drains, or other places where offensive or dangerous substances or liquids are or may accumulate. When a building, erection, excavation, premises, business, pursuit, matter or thing, or the sewerage, drainage, plumbing, or ventilation thereof is, in the opinion of the board of health, in a condition dangerous to life or health, and when a building or structure is occupied or rented for living or business purposes and sanitary plumbing and sewerage are feasible and necessary, but neglected or refused, the board of health may declare it a public nuisance and order it to be removed, abated, suspended, altered, or otherwise improved or purified by the owner, agent or other person having control thereof, or responsible for such condition, and may prosecute them for the refusal or neglect to obey such order. The board may also, by its officers and employes, remove, abate, suspend, alter, or otherwise improve or purify them and certify the costs and expense thereof to the county auditor, to be assessed against the property, and thereby made a lien upon it and collected as other taxes. [R. S. § 2122; 98 v. 188; 95 v. 425; Bates, 3rd Ed., 2116, 2128.]

Sec. 4422. [Proceedings where order of board is neglected or disregarded.] When such order of the board of health is neglected or disregarded, in whole or in part, the board may elect to cause the arrest and prosecution of all persons offending, or may elect to do and perform, by its officers and employes, what the offending party should have done. If the latter course is chosen, before the execution of the order of the board is begun, it shall cause a citation to issue, and be served upon the persons responsible, if residing within the jurisdiction of the board, but if not, shall cause it to be mailed by registered letter to such person, if the address is known or can be found by ordinary diligence. If the address cannot be found, the board shall cause the citation to be left upon the premises, in charge of any person residing thereon, otherwise it shall be posted conspicuously thereon. The citation

shall briefly recite the cause of complaint, and require the owner or other person or persons responsible to appear before the board at a time and place stated, or as soon thereafter as a hearing can be had, and show cause, if any, why the board should not proceed and furnish the material and labor necessary to, and remove the cause of complaint. [R. S. § 2123; 95 v. 426; Bates, 3rd Ed., 2129.]

Sec. 4423. [Further proceedings.] If the person or persons cited appear, he or they shall be fully apprised of the cause of complaint and given a fair hearing. The board shall then make such order as it deems proper, and if material or labor is necessary to satisfy the order, and the person or persons cited promise, within a definite and reasonable time, to furnish them, the board shall grant such time. If no promise is made, or kept, the board shall furnish the material and labor, cause the work to be done, and certify the cost and expense to the auditor of the county. If the material and labor are itemized, and the statement is accompanied by the certificate of the president of the board, attested by the clerk, reciting the order of the board, and that the amount is correct, the auditor shall have no discretion, but shall place the sum against the property upon which the material and labor were expended, which shall, from the date of entry, be a lien upon the property, and be paid as other taxes are paid. [R. S. § 2124; 95 v. 426; Bates, 3rd Ed., 2129.]

Sec. 4424. [Nuisance or unsanitary conditions on school property may be corrected.] The board of health shall abate all nuisances and may remove or correct all conditions detrimental to health or well-being found upon school property by serving an order upon the board of education, school board or other person responsible for such property, for the abatement of such nuisance or condition within a reasonable but fixed time. A person failing to comply with such order, unless good and sufficient reason therefor is shown, shall be fined not to exceed one hundred dollars. The board may appoint such number of inspectors of schools and school buildings as it deems necessary to properly carry out these provisions. [R. S. § 2137; 95 v. 433; Bates, 3rd Ed., 2135.]

Dangerous Communicable Diseases.

Sec. 4425. [Quarantine regulations.] In time of epidemic or threatened epidemic, or when a dangerous communicable disease is unusually prevalent, the board of health after a personal investigation by the members or executive officer thereof to establish the facts in the case, and not otherwise, may impose a quarantine on vessels, railroads, stages, or other public or private vehicles conveying persons, baggage or freight, or used for such purpose. It may make and enforce such rules and regulations as such board deems wise and necessary for the protection of the health of the people of the community or state, but the running of any train or car on any steam or electric railroad, or of steamboats, vessels or other public conveyances shall not be prohibited. A true copy of such quarantine rules and regulations adopted by such board of health, shall be immediately furnished by it to the state board of health, and thereafter no change shall be made except by the order of the state board of health or by the local board to meet a new and sudden emergency. [96 v. 80, § 188.]

Sec. 4426. [When approval of state board necessary.] The board of health shall not close public highways, prohibit travel thereon, interfere with public officers in the discharge of their official duties not afflicted with or directly exposed to a contagious or infectious disease, nor establish a quarantine of one city, village or township against another city, village or township, as such, without permission first obtained from the state board of health and under regulations established by the state board. [96 v. 80, § 189.]

Sec. 4427. [Duty to give notice of prevalence of infectious diseases.] Each physician or other person called to attend a person suffering from smallpox, cholera, plague, yellow fever, typhus fever, diphtheria, membranous croup, scarlet fever, or typhoid fever, or any other disease dangerous to the public health, or required by the state board of health to be reported, shall report to the health officer within whose jurisdiction such person is found, the name, age, sex and color of the patient, and the house and place in which such person may be found.[1]

In like manner, the owner or agent of the owner of a building in which a person resides who has any of the diseases herein named or provided against, or in which are the remains of a person having died of any such disease, and the head of the family, immediately after becoming aware of the fact, shall give notice thereof to the health officer. [R. S. § 2125; 95 v. 427; Bates, 3rd Ed., 2118, 2117.]

(1) **Action against physician.**—Proper action against physician for failure to report smallpox, etc., was held to be a civil action in the name of the state to recover the penalty and not by warrant for arrest. State v. Chandler, 7 B. 97.

Sec. 4428. [Duty of board thereafter.] When complaint is made or a reasonable belief exists that an infectious or contagious disease prevails in a house or other locality which has not been so reported, the board shall cause such house or locality to be inspected by its health officer, and on discovering that such infectious or contagious disease exists, the board may, as it deems best, send the person so diseased to a quarantine hospital or other place provided for such persons, or may restrain them and others exposed within such house or locality from intercourse with other persons, and prohibit ingress and egress to or from such premises.[1] [R. S. § 2125; 95 v. 427; Bates, 3rd Ed., 2118, 2117.]

(1) **Scope of power.**—The power here given, in case of infectious disease in any house, is very broad. Under it the board may quarantine a house, and the owner could not recover damages, although it might be a very serious loss to him. Turner v. Toledo, 15 C. C. 627, 634.

If, however, an injury is inflicted in such case, by malice of the public officers, the owner would have a remedy. *Ib.*

The board would have power to make a contract with persons for the care of patients with infectious diseases quarantined in their houses, and the municipality would be bound by this contract. *Ib.*

Sec. 4429. [Quarantine of persons having or exposed to contagious disease.] When a case of smallpox, cholera, plague, yellow fever, typhus fever, diphtheria, membranous croup, scarlet fever or other communicable diseases declared by the board of health or state department of health to be quarantinable is reported within its jurisdiction, the board

of health shall at once cause to be placed in a conspicuous position on the house wherein such disease occurs a quarantine card having printed on it in large letters the name of the disease within, and prohibit entrance to or exit from such house without written permission from the board of health, or shall enforce such restrictive measures as may be prescribed by the state department of health. No person shall remove, mar, deface, or destroy such quarantine card, which shall remain in place until after the patient has been removed from such house, or has recovered and is no longer capable of communicating the disease, and the house and the contents thereof have been properly purified and disinfected by the board of health or treated in such manner as may be prescribed by the state department of health. [108 v. 236, 249; R. S. § 2126; 95 v. 427.]

Sec. 4430. [Duration of quarantine.] Each physician attending a person affected with any such disease shall use such precautionary measures to prevent the spread of the disease as is required by the board of health. No person quarantined by a board of health on account of having a contagious disease or for having been exposed thereto, shall leave such quarantined house or place without the written permission of the board of health, and where other inmates of such house have been exposed to and are liable to become ill of any such diseases, for such period thereafter as may be prescribed in the rules and regulations of the state department of health. [108 v. 236, 249; R. S. § 2126; 95 v. 427.]

Sec. 4431. [Board may employ guards.] The board of health may employ as many persons as it deems necessary to execute its orders and properly guard any house or place containing any person or persons affected with any of the diseases named herein, or who have been exposed thereto, and such persons shall be sworn in as quarantine guards, shall have police powers, and may use all necessary means to enforce the provisions of this chapter for the prevention of contagious or infectious disease, or the orders of any board of health made in pursuance thereof. [R. S. § 2126; 95 v. 427.]

Sec. 4432. [Disinfection of house in which has been contagious disease.] When a person affected with smallpox, yellow fever, typhus fever, diphtheria, membranous croup, or scarlet fever, has recovered and is no longer liable to communicate the disease to others, or has died, the physician shall furnish to the proper board of health a certificate of such recovery or death, and as soon thereafter as the board deems it advisable, its health officer or other person appointed for the purpose shall thoroughly disinfect and purify the house and contents thereof in which such person has been ill or has died, which disinfection and purification shall be done in accordance with the rules and regulations adopted and promulgated by the state board of health. [R. S. § 2128; 97 v. 540; 95 v. 428.]

Sec. 4433. [Disinfection upon request; expenses.] Upon the request of the owner or occupant of a dwelling house, or the head of a family, the board of health shall purify and disinfect any room which has been occupied by any person suffering from pulmonary tuberculosis, commonly called consumption, or room in which any person has died from such disease. The local board of health may purchase such disinfecting apparatus and supplies as it deems necessary for such purpose. The expenses of disinfecting shall be paid by the local board of health. [R. S. § 2128; 97 v. 540; 95 v. 428.]

Sec. 4434. [Destruction of infected property.][1] Such board may destroy any infected clothing, bedding, or other article which can not be made safe by disinfection, and shall furnish to the owner thereof a receipt, of which it shall keep a full and accurate copy, for articles so destroyed, which receipt shall show the number, character, condition and estimated value of the articles destroyed. When a building, hut, or other structure has become infected with smallpox or other dangerous communicable disease, and can not, in the opinion of the board of health, be made safe by disinfection, the board may have such building, hut, or other structure appraised and destroyed. [R. S. § 2128; 97 v. 540; 95 v. 428.]

(1) **Action against board.** — In an action against a board of health for the value of goods or property destroyed to prevent the spread of a contagious disease, it is necessary to both allege and

prove by a preponderance of testimony that the property destroyed was infected, that it could not be made safe by disinfection, and that it was destroyed at the expiration of the quarantine period by the board of health either individually or in accordance with orders issued by them. Clouse v. Coykendall, 29 O. C. A. 76.

Liability does not arise for property destroyed where it is of such a nature that it could have been cared for without permitting it to become infected. *Ib.*

Payment from public treasury of business losses accruing as an incident to promulgation of quarantine orders not authorized. Op. Atty. Gen. (1916), p. 953.

Sec. 4435. [Compensation for property destroyed.] The council of the municipality, upon the presentation of the original receipt or written statement of the appraisers for articles or houses so destroyed, shall pay to the owner thereof, or other person authorized by the owner to receive it, the estimated value of such destroyed articles, or such sum as the council deems just compensation therefor, and in the event the owner is not satisfied with the amount so allowed he may sue for the value thereof. [R. S. § 2128; 97 v. 540; 95 v. 428.]

Sec. 4436. [Maintenance of person confined in quarantined house.] When a house or other place is quarantined on account of contagious diseases, the board of health having jurisdiction shall provide for all persons confined in such house or place, food, fuel and all other necessaries of life, including medical attendance, medicine and nurses when necessary.[1] The expenses so incurred, except those for disinfection, quarantine or other measures strictly for the protection of the public health, when properly certified by the president and clerk of the board of health, or health officer where there is no board of health, shall be paid by the persons or persons quarantined, when able to make such payment, and when not, by the municipality or townships in which quarantined. [108 v. 236, 249; R. S. Sec.; 2128; 97 v. 540; 95 v. 428.]

(1) **Oral contracts** under this section, validity of, see Meily v. Columbus, 27 C. C. 822; 6 C. C. (N. S.) 398.

Physician may recover compensation.—Under favor of this section, a physician who renders medical service to a quarantined smallpox patient, who is unable to pay therefor, is entitled to re-

cover compensation from the municipal corporation which was promptly apprised of the situation, but took no action with reference thereto. Barberton v. Lohmers, 18 C. C. (N. S.) 196. And see Op. Atty. Gen. (1914), p. 1735.

But where a physician is employed by the board of health without the consent of the city council to attend upon all cases of smallpox existing or thereafter developing in the city during the term of his employment, such contract is illegal and void and mandamus will not lie to compel council to provide payment for services rendered thereunder. State, ex rel., v. Krause, 18 N. P. (N. S.) 419.

Expense of quarantine. See Op. Atty. Gen. (1923), No. 460.

Sec. 4436-1. [Quarantine in work camp, expense.] That any person, partnership, or corporation, that maintains any work camp, shall pay to any city, village, township or county in which said work camp is maintained, any and all expense caused by any contagious or infectious disease which shall originate or exist in said work camp. [101 v. 260.]

Sec. 4437. [When person residing in quarantined house may attend public gathering.] No person residing in or occupying a house in which a person is suffering from smallpox, cholera, plague, typhus fever, diphtheria, membranous croup, scarlet fever or other dangerous contagious disease, shall be permitted to attend any public, private or parochial school or college or Sunday school, or any other public gathering, until the quarantine provided in such diseases has been removed by the board of health. All school principals, Sunday school superintendents, or other persons in charge of such schools, are hereby required to exclude any and all such persons until they present a written permit of the board of health to attend or re-enter such schools. [108 v. 236, 250; R. S. Sec. 2129; 95 v. 429.]

Sec. 4438. [When a legal resident of another county.] When a person with a contagious disease quarantined in a county is a legal resident of another county of the state, and is unable to pay such expenses, they shall be paid by the county in which he has a legal residence, if notice and a sworn statement of the amount of such expenses are sent to the infirmary directors of such county within thirty days after

the quarantine in such case was discharged. [R. S. Sec. 2128; 97 v. 540; 95 v. 428.]

Sec. 4439. [Expense of quarantining county infirmary.] The expenses for quarantining a county infirmary or other county public institution, shall be paid by the county when properly certified by the president and clerk of the board of health or health officer, where there is no board of health of the municipality in which such institution is located. [R. S. Sec. 2128; 97 v. 540; 95 v. 428.]

Sec. 4440. [Disposal of bodies of persons dying of contagious diseases.] Bodies of persons who have died of smallpox, cholera, plague, yellow fever, typhus fever, diphtheria, membranous croup, scarlet fever or other dangerous contagious or infectious disease, shall be buried or cremated within twenty-four hours after death, unless permission to do otherwise is given in writing by the board of health. No public or church funeral shall be held in connection with the burial of such person, and such body shall not be taken into any church, chapel or other public place. Only adult members of the family and such other persons as are actually necessary may be present at its burial or cremation. [R. S. Sec. 2131; 95 v. 430.]

Sec. 4441. [Admission of person suffering from contagious disease to certain institutions.] No person suffering from, who has been exposed to, or is liable to become ill of, smallpox or other contagious disease or infectious disease may be sent to or admitted into a prison, jail, workhouse, infirmary, children's or orphans' home, state hospital or institution for the insane, epileptic, blind, feeble-minded or deaf and dumb or other state or county benevolent institution without first making known the facts concerning such illness or exposure to the superintendent, or other person in charge thereof. When small-pox or other dangerous, contagious or infectious disease is in a jail or prison and a prisoner therein exposed to such disease is sentenced to the penitentiary, such prisoner shall be confined and isolated in such jail or prison or other proper place, upon the order of the proper court, for such time as is necessary to establish the fact that he has not contracted such disease. [R. S. Sec. 2132; 95 v. 431.]

Sec. 4442. [Contagious disease in public institution.] When smallpox, cholera, yellow fever, diphtheria, scarlet fever or other dangerous, contagious or infectious disease appears in any state, county or municipal, benevolent, correctional or penal institution, the superintendent or manager thereof shall at once isolate the person or persons so affected and enforce the provisions of this chapter for the prevention of contagious diseases, so far as they may apply, and the rules, regulations and orders of the state board of health to that effect. [R. S. Sec. 2132; 95 v. 431.]

Sec. 4443. [Temporary buildings.] The trustees or managers of any such institution may erect any necessary temporary building for the reception of such affected persons or for the detention of persons exposed to such diseases and may remove such persons to and confine them in such buildings. [R. S. Sec. 2132; 95 v. 431.]

Sec. 4444. [Removal of affected or exposed persons to hospital.] Such trustees or managers may contract for the care, treatment or detention of any such persons with any corporation having a hospital or other proper place for the isolation or care of persons suffering from or exposed to contagious disease and may remove such persons to such hospital or place. In case of persons detained in an institution as punishment for crime, an order for such removal shall be obtained from the court which imposed such punishment. In an order for such removal, the court may require such provisions to be made for safely guarding the prisoner while in such hospital or place as it deems necessary. [R. S. Sec. 2132; 95 v. 431.]

Sec. 4445. [Effect of quarantine as to common carriers.] When quarantine is declared, all railroads, steamboats, or other common carriers, and the owners, consignees or assignees of any railroad, steamboat, stage or other vehicle used for the transportation of passengers, baggage or freight, shall submit to any rules or regulations imposed and any examination required by a board of health or health officer. They shall submit to any examination required by the health au-

thorities respecting any circumstance or event touching the health of the crew, operatives, or passengers and the sanitary condition of the baggage and freight. [R. S. Sec. 2134; 95 v. 432; Bates 3rd Ed.. 2144.]

Sec. 4446. [Penalty.] Whoever, being an owner, consignee or assignee or other persons interested in any manner set forth in the preceding section, makes an unfounded statement or declaration respecting the points under such examination shall be subjected to the penalties provided by law for violations of the requirements of this chapter and the orders of the state or local boards of health. [R. S. Sec. 2134; 95 v. 432, Bates 3rd Ed. 2144.]

Sec. 4447. [How quarantine rules shall apply.] All rules and regulations passed by the board of health or health officer shall apply to all persons, goods or effects arriving by railroad, steamboat or other vehicle of transportation, after quarantine is declared. [R. S. Sec. 2135; 95 v. 432; Bates 3rd Ed. 2145.]

Sec. 4448. [Board shall inspect schools and may close them and prohibit public gatherings.] Semi-annually, and oftener if in its judgment necessary, the board of health shall inspect the sanitary condition of all schools and school buildings within its jurisdiction, and may disinfect any school building. During an epidemic or threatened epidemic, or when a dangerous communicable disease is unusually prevalent, the board may close any school and prohibit public gatherings for such time as it deems necessary. [R. S. Sec. 2137; 95 v. 433; Bates 3rd Ed. 2133.]

Sec. 4449. [Gratuitous vaccination.][1] The board of health may take measures and supply agents and afford inducements and facilities for gratuitous vaccination. [R. S. Sec. 2137; 95 v. 433; Bates, 3rd Ed. 2133.]

(1) A health officer is entitled to such compensation for vaccination under section 4449 G. C., as may be fixed and allowed by board of health under section 4411-1 G. C. Op. Atty. Gen. (1919), p. 105.

Sec. 4450. [In case of epidemic municipality may borrow and levy tax therefor.] In case of epidemic or threatened epidemic or during the unusual prevalence of a dangerous communicable disease, if funds are not otherwise available, the council of a municipality may borrow any sum of money that the local board of health[1] deems necessary to defray the expenses necessary to prevent the spread of such disease. Such money may be borrowed until the next levy and collection of taxes is made, at a rate of interest not to exceed six per cent per annum. Thereupon the board may expend the amount so authorized to be borrowed, which amount, or so much thereof as is expended, shall be a valid claim against the municipality from the fund so created. [R. S. Sec. 2138; 95 v. 433; Bates, 3rd Ed. 2148.]

(1) Board of health without authority to maintain water works. Council cannot borrow money for board to do so. Op. Atty. Gen. (1918), p. 1211.

Sec. 4451. [Duty of council to make levy.] When expenses are incurred by the board of health under the provisions of this chapter, upon application and certificate from such board, the council shall pass the necessary appropriation ordinances to pay the expenses[1] so incurred and certified. The council may levy and set apart the necessary sum to pay such expenses and to carry into effect the provisions of this chapter. Such levy shall, however, be subject to the restrictions contained in this title. [R. S. Sec. 2138; 95 v. 433; Bates, 3rd Ed. 2148.]

(1) Village liable for expense of township patients in village quarantine hospital, when. Op. Atty. Gen. (1918), p. 1507.

Emergency levy; balances transferred to sinking fund. See Op. Atty. Gen. (1921), p. 169.

Quarantine Hospitals.

Sec. 4452. [Hospital for dangerous contagious disease.][1] The council of a municipality may purchase land within or without its boundaries and erect thereon suitable hospital buildings for the isolation, care or treatment of persons suffering from dangerous contagious disease, and provide for the

maintenance thereof. The plans and specifications for such buildings shall be approved by the board of health. [R. S. Sec. 2130; 95 v. 430.]

(1) **Contagion hospital.** — Right of a municipality to purchase land for; restriction in deed. Op. Atty. Gen. (1917), p. 2454.

Two cities may not maintain jointly. Op. Atty. Gen. (1918), p. 336.

Sec. 4453. [Expense of such buildings; bond issue.] If, at an election held for that purpose, two-thirds of the votes cast are in favor thereof, the council may issue bonds and apply the proceeds thereof to such purposes. Such bonds may not exceed in amount twenty-five thousand dollars, with a rate of interest not to exceed five per cent per annum and the principal shall be paid within ten years. After the erection of such buildings, the council each year may make such appropriations for their care, use and maintenance as in its judgment are necessary. [R. S. Sec. 2130; 95 v. 430.]

Sec. 4454. [Board of health shall have charge and control.] Such buildings shall be under the care and control of the board of health. The board shall appoint all employes or other persons necessary to the use, care and maintenance thereof and regulate the entrance of patients thereto and their care and treatment. [R. S. Sec. 2130; 95 v. 430.]

Sec. 4455. [Who may be removed to such hospital.] When a person, suffering from a dangerous contagious disease, is found in a hotel, lodging house, boarding house, tenement house or other public place in the municipality, the board of health, if it deems it necessary for the protection of the public health, may remove such person to such hospital, where all needful provisions shall be made for his care and treatment, and, if able, the expense so incurred shall be paid by him. [R. S. Sec. 2130; 95 v. 430.]

Sec. 4456. [Quarantine hospital.] A municipality may establish a quarantine hospital within or without its limits. If without its limits, the consent of the municipality or township shall be first obtained, but such consent shall not be

necessary if the hospital is more than eight hundred feet from any occupied house or public highway. When great emergency exists, the board of health may seize, occupy and temporarily use for a quarantine hospital, a suitable vacant house or building within its jurisdiction. The board of health of a municipality, having a quarantine hospital, shall have exclusive control thereof. [R. S. Sec. 2130; 95 v. 430.]

Sec. 4457. [Erection of buildings, destruction of property.] The board of health may erect temporary wooden buildings or field hospitals deemed necessary for the isolation or protection of persons or freight supposed to be infected, and may employ nurses, physicians and laborers sufficient to operate them and sufficient police to guard them. Such board may cause the disinfection, renovation or destruction of bedding, clothing or other property belonging to corporations or individuals when such action is deemed necessary by the board or a reasonable precaution against the spread of contagious or infectious diseases. [R. S. Sec. 2136; 95 v. 432; Bates, 3rd Ed., 2146; 90 v. 94; 76 v. 69.]

Food and Supplies.

Sec. 4458. [Inspectors, appointments and duties.] The board of health may appoint, define their duties and fix the compensation of, such number of inspectors of dairies, slaughter houses, shops, wagons, appliances, food and water supplies for animals, milk, meat, butter, cheese, and substances purporting to be butter or cheese, or having the semblance of butter or cheese, and such other persons as is necessary to carry out the provisions of this chapter, and such inspectors for such purposes may enter any house, vehicle or yard. The board may appoint and authorize the health officer to perform the duties of such inspectors. [R. S. Sec. 2139; 95 v. 434; Bates, 3rd Ed. 2133.]

Sec. 4459. [Record of meat and milk dealers; permit from board.] The board of health shall keep for public inspection a record of the names, residences and places of business of all persons engaged in the sale of milk or meat, and may

require permits, after inspection, to vend either milk or meat to be renewed semi-annually, for which a charge of not more than fifty cents may be made. If, upon the inspection, the cows, or milk are found to be kept in an unsanitary condition, the board may refuse to grant such permit or revoke one already given. The board may require a certificate from a licensed veterinarian that the cows furnishing milk brought for sale within its jurisdiction are free from tuberculosis or other dangerous disease. [R. S. Sec. 2139; 95 v. 434; Bates, 3rd Ed. 2133.]

Sec. 4460. [Duty of dairyman or vendor of milk in case of certain diseases.] In case scarlet fever, typhoid or other dangerous contagious or infectious disease should occur in the family of a dairyman or among his employes, or in a house in which milk is kept for sale, such dairyman or vender of such milk shall immediately notify the health officer of the municipality in which such milk is sold or offered for sale of the facts of the case, and the health officer may order the sale of such milk stopped pending an investigation and for such time thereafter as the board of health may require. The investigation shall be made without delay, and the board of health may make and enforce such orders as it deems necessary to prevent the sale of impure, adulterated and unwholesome milk or milk liable to carry disease. [R. S. Sec. 2139; 95 v. 434; Bates, 3rd Ed. 2133.]

Sec. 4461. [Inspection of dairies and places where dairy products are made.] All dairies, including the cows, cow stables, milk houses and milk vessels, the owners of which offer for sale within the limits of the corporation any milk or butter manufactured by such owners, and any manufactory of butter or cheese or place where such substances, or either of them, are sold shall be subject to inspection by the inspectors. Such inspectors may enter any place where milk is sold or kept for sale and any vehicles used for the conveyance of milk within the corporate limits. They may also enter any manufactory or place where butter or cheese, or substances having the semblance of butter or cheese, are manu-

factured, or any place where such substances are sold or kept for sale within the corporate limits. [R. S. Sec. 2140; 95 v. 434; Bates, 3rd Ed. 2134.]

Sec. 4462. [Test or analysis of dairy products.] When an inspector has reason to believe that milk found in such municipality is impure or adulterated, or that any butter or cheese, or substance having the semblance of butter or cheese, found therein contains any impure, unwholesome or deleterious substance; or is being sold or offered for sale under a false or deceptive name or designation, or that any butter or cheese is not made from pure cream or milk, or that any substance having the semblance of butter or cheese is being sold or offered for sale without being branded or stamped, as required by law, he shall take specimens thereof and subject them to satisfactory tests, or, if the board of health so direct, to chemical analysis. The result of such test or analysis shall be recorded and preserved as evidence by such inspector and a certificate, sworn to by the analyst shall be admissible in evidence in prosecutions under this chapter or any law of the state. [R S. Sec. 2140; 95 v. 435; Bates, 3rd Ed. 2134.]

Sec. 4463. [Employment of scavengers.] The council may empower the board of health to employ such number of scavengers for the removal of swill, garbage and offal from the houses, buildings, yards and lots within the municipality, as it deems necessary. In such case the board may make contracts therefor, subject to the approval of council, to be signed by the proper officers of the council, and may regulate the work to be done. Upon the request of the board of health, it shall be the duty of council to lease or purchase suitable lands, the location of which shall be approved by the board of health, to be used as a dump ground for such and other noxious substances removed from the municipality. [R. S. Sec. 2142; 95 v. 435.]

Sec. 4464. [Board may regulate the sale of ice for domestic use.] No ice shall be cut to be sold or used for domestic purposes in a municipality from a pond, lake, creek or river

within the limits of such municipality unless a permit therefor is first obtained from the board of health thereof. No person shall sell or deliver ice in a municipality for domestic purposes unless a permit therefor is first obtained from the board of health thereof. Such board may refuse a permit or revoke a permit therefor granted when, in its judgment, such ice would be detrimental to public health. [95 v. 330, § 2; 94 v. 370, § 1.]

Sec. 4465. [Board may prohibit sale of ice for domestic purposes.] The board of health may prohibit the sale or use of any ice for domestic purposes within the limits of the municipality when, in its judgment, it is unfit for use and the use thereof would be detrimental to public health. The board may prohibit, and, through its officers, stop, detain and prevent the bringing of any such ice for the purpose of sale or use for domestic purposes into the limits of the municipality and in the same manner stop, detain and prevent the sale of such ice for domestic purposes within the limits of the municipality when, in its judgment, the use thereof would be detrimental to public health. [95 v. 330, § 3; 94 v. 370, § 2.]

Sec. 4466. [Penalty.] Whoever violates any provision of the preceding two sections or an order or regulation of the board of health made in pursuance thereof, shall be fined not to exceed one hundred dollars. [95 v. 330, § 4; 94 v. 371, § 3.]

Sanitary Plant.

Sec. 4467. [Term "sanitary plant" defined.] The term "sanitary plant," as used herein, shall mean a structure with necessary land, necessary fixtures, appliances and appurtenances required for the treatment, purification and disposal in a sanitary manner of either or both the liquid or solid wastes of the municipality. [R. S. Sec. 2143; 95 v. 435; Bates, 3rd Ed. 2142a.]

Sec. 4468. [Municipality may obtain plans and real estate for sanitary plant.] Upon the recommendation of the board of health of a municipality, or, if the powers of such board

have been vested in any other officer or board, upon the recommendation of such officer or board, the council may cause plans and estimates to be prepared and acquired by condemnation or otherwise such land or lands within or without the corporate limits as are necessary to provide for the proper disposal in a sanitary manner of the sewage, garbage and waste matters, and either or any of them, of the municipality. [R. S. Sec. 2143; 95 v. 435; Bates, 3rd Ed. 2142a.]

Sec. 4469. [Approval of state board of health necessary.] Upon obtaining the approval of the state board of health, the council may contract for, erect and maintain a sanitary plant or plants on the lands so acquired with all necessary buildings, machinery, appliances and appurtenances for the treatment, purification and disposal in a sanitary and economic manner of the sewage or garbage, nightsoil, dead animals, offal, spoiled meats and fish or other putrid substances or any liquid or solid wastes or any substance injurious to the health of the municipality. [R. S. Sec. 2143; 95 v. 435; Bates, 3rd Ed. 2142a.]

Sec. 4470. [Council may contract for removal of waste substances; expense thereof.] The council may contract for a period of not to exceed five years for the collection and removal of such garbage, nightsoil, dead animals, and other solid waste substances at the expense of the municipality or at the expense of persons responsible for the existence of such waste substances. [R. S. Sec. 2144; 95 v. 436; Bates, 3rd Ed. 2142b.]

Sec. 4471. [How funds raised for such purposes.] For such purpose the council may use any funds raised and necessary therefor, and, in case no funds are available and no bonds have been authorized for such purposes and it becomes necessary to issue and sell bonds for such purposes, the question of issuing bonds of a municipality shall be submitted at an election therefor, conducted in the same manner as in case of the issue of other bonds of the municipality for specific purposes in excess of the legal limit.[1] A majority of votes cast

shall be sufficient to authorize the municipality to issue bonds under this section. The council shall not issue such bonds unless a majority of the qualified electors of the municipality voting are in favor thereof. [R. S. Sec. 2145; 95 v. 436; Bates, 3rd Ed. 2142c.]

(1) See §§ 3939, *et seq., ante.*

Sec. 4472. [Appointment of a sanitary board.] Before submitting such proposition to a vote of the people, the council by resolution may determine to have all the work in connection with the erection and maintenance of such sanitary plant and the acquisition of the necessary real estate therefor put under the control of a sanitary board, which shall be appointed before such vote is taken. [R. S. Sec. 2146; 95 v. 436; Bates, 3rd Ed. 2142d.]

Sec. 4473. [How sanitary board chosen.] The sanitary board shall consist of two citizens from each of the two political parties casting the highest vote at the last preceding municipal election, who shall be appointed by the mayor, with the consent and approval of the council, and shall serve for a term of two years and until their successors are duly appointed. [R. S. Sec. 2146; 95 v. 436; Bates 3rd Ed. 2142d.]

Sec. 4474. [Compensation and powers of sanitary board.] The sanitary board shall have such reasonable compensation as the council of the municipality prescribes. It shall have entire control of the erection and maintenance of the sanitary plant and the purchase of the necessary real estate therefor on behalf of the municipality. In its discretion it may modify the original plans and specifications, subject to the approval of the state board of health, but the total cost thereof shall not exceed the original estimate. [R. S. Sec. 2146; 95 v. 436; Bates, 3rd Ed. 2142d.]

Sec. 4475. [Levy for sanitary fund.] To provide a fund for the payment of the principal and interest of the bonds, issued under these provisions, and to maintain such sanitary plant or plants, the council, in addition to the other levies

authorized by law, may levy annually a sufficient tax therefor on all the property subject to taxation in the municipality, which shall be levied and collected in the same manner as other taxes. The proceeds thereof shall constitute "the sanitary fund" of the municipality, and shall be held like other funds thereof, subject only to the written order of the council or sanitary board which has control of the work. [R. S. Sec. 2147; 95 v. 437; Bates, 3rd Ed. 2142e.]

Sec. 4476. [Annual reports.] On or before the fifteenth day of January of each year, the board of health or health department shall make a report in writing for the preceding calendar year to the council of the municipality and to the state commissioner of health. Such report shall be on the sanitary condition and prospects of such municipality, and shall contain the statistics of deaths, the action of the board and its officers and agents and the names thereof. It shall contain other useful information, and the board shall suggest therein any further legislative action deemed proper for the better protection of life and health. Such board of health and health departments shall promptly furnish any special report called for by the state commissioner of health. [108 v. 236, 250; R. S. Sec. 2148; 95 v. 437; Bates, 3d Ed., 2136.]

CHAPTER 12.

CIVIL SERVICE.[1]

CITIES.

(1) **Repeals.** — §§ 4477 to 4505, inclusive, relating to civil service in cities, and comprising all of this chapter, have been repealed; see 103 O. L. 698, 713, and 106 O. L. 400, 419. In their stead §§ 486-1, *et seq.*, applying to employes of the state, counties, cities and city school districts, were enacted. These sections will be found in Part II, under title "Civil Service."

CHAPTER 13.

TRUSTEES OF THE SINKING FUND.

CITIES AND VILLAGES.

Sec. 4506. [Tax to create sinking fund.][1] Municipal corporations having outstanding bonds or funded debts shall, through their councils and in addition to all other taxes authorized by law, levy and collect annually a tax upon all the real and personal property in the corporation sufficient to pay the interest and provide a sinking fund for the extinguishment of all bonds and funded debts heretofore issued and incurred and the taxes so raised shall be used for no other purpose whatever. [109 v. 336, 346; 96 v. 54, § 101.]

(1) **Old section 2712 R. S., repealed.**

The only lawful borrowing power to meet deficiencies in revenues of a municipality is that provided in section 3931 G. C. Op. Atty. Gen. (1913), p. 1712.

Limitation on levies for interest and sinking fund. See Op. Atty. Gen. (1922), p. 205.

Payment of judgments. — This section, prior to its amendment, provided for payment of judgments from the sinking fund. For present provisions, see § 5649-1c, under "Taxation", and § 2295-8 under "Miscellaneous Statutes", in Part II.

By the terms of the act, this section took effect Jan. 1, 1922, and its provisions govern and apply to all ordinances, resolutions, measures and proceedings pending on that date. (109 v. 348.)

The fund to be raised for the purpose of retiring bonds issued since January 1, 1922, is no part of the sinking fund of a municipal corporation which is the fund raised and maintained for the purpose of retiring generally bonds issued prior to that date. See Op. Atty. Gen. (1922), p. 1130.

Sec. 4507. [Trustees of the sinking fund.][1] In each municipality there shall be a board, designated as the trustees of the sinking fund, which shall have the management and control of such sinking fund. In cities, such board shall consist of four citizens of such city, who shall be electors thereof, well known for their intelligence and integrity, to be appointed

by the mayor, for one, two, three and four years respectively, and their successors shall be appointed for four years from the expiration of their respective terms. Such appointments shall be so distributed that not more than two members of such board shall belong to the same political party. Any vacancy by death, resignation, removal from the city or otherwise of either of such trustees shall be filled by appointment by the mayor for the unexpired portion of such term. In villages, the mayor, clerk and chairman of the finance committee of council shall be the trustees of the sinking fund. [96 v. 38 § 46; 96 v. 54 § 102.]

(1) **Old section.**—Compare old § 2715 R. S., repealed.

By the provisions of the "Griswold Act" (109 O. L. 336), this board is to continue to exercise its powers only until present outstanding bonds are retired, after which it shall be deemed abolished and its powers transferred to the treasurer of the municipality. See § 2295-14, under "Miscellaneous Statutes", in Part II.

Sec. 4508. [Compensation and bond.][1] The trustees of the sinking fund shall serve without compensation and shall give such bond as council may require, but a surety company authorized to sign such bonds shall be sufficient security, and the costs thereof, together with all other incidental and necessary expenses of such trustees, shall be paid by them from funds under their control. [96 v. 54 § 103.]

(1) **Old section.**—Compare old §§ 2715 and 2716 R. S., repealed.

Sec. 4509. [Organization of board.][1] The trustees of the sinking fund, immediately after their appointment and qualification, shall elect one of their number as president and another as vice-president, who, in the absence or disability of the president, shall perform his duties and exercise his powers, and such secretary, clerks or employes as council may provide by an ordinance which shall fix their duties, bonds and compensation. Where no clerks or secretary is authorized, the auditor of the city or clerk of the village shall act as secretary of the board. [97 v. 517 § 104; 96 v. 53 § 104.]

(1) **Old section.** — Compare old § 2717 R. S., repealed.

When it is duty of city auditor to act as secretary of sinking fund trustees. Op. Atty. Gen. (1916), p. 549.

Sec. 4510. [Meetings; record of proceedings.][1] The trustees of the sinking fund shall make their own rules, but their meetings shall be open to the public, and all questions relating to the purchase or sale of securities, payment of bonds, interest or judgments or involving the payment or appropriation of money shall be decided by a yea and nay vote with the name of each member voting recorded on the journal, and no question shall be decided unless approved by a majority of the whole board. [96 v. 54 § 105.]

(1) **Old section.**—Compare old 2718 R. S., repealed.

Sec. 4511. [Duty of trustees with respect to bonded indebtedness of city.][1] Upon demand of the board, the auditor of the city or clerk of the village shall report to it a full and detailed statement of the outstanding indebtedness of the corporation for bonds issued, and the board shall take charge of and keep a full record, and report to council at least once a year a full detailed statement thereof, with the statement of their investments and general financial business of the city or village which shall be published in any annual report published by the corporation. [96 v. 55 § 106.]

(1) **Old section.**—Compare old § 2719 R. S., repealed.

Transfer of powers to treasurer. —See note to § 4507.

Sec. 4512. [Auditor's or clerk's report to trustees.][1] Upon demand of the board, the city auditor or village clerk shall report to it balances belonging to the city or village, to the credit of the sinking fund, interest accounts, or for any bonds issued for or by the corporation, and all officers or persons having them shall immediately pay them over to the trustees of the sinking fund, who shall deposit them in such place or places as the majority of such board shall select. [96 v. 55 § 107.]

(1) **Old section.**—Compare old § 2720 R. S., repealed.

Sec. 4513. [Report of trustees to council; duty of council.][1] On or before the first Monday in May of each year, the trustees of the sinking fund shall certify[2] to council the amount of tax necessary to provide a sinking fund for the future pay-

ment of bonds heretofore issued by the corporation, for the payment of interest on such bonded indebtedness, and the rents due on perpetual leaseholds of the corporation not payable from a special fund, and the expenses incident to the management of the sinking fund. The council shall place the several amounts so certified in the tax ordinance before and in preference to any other item and for the full amount certified.[3] Such taxes shall be in addition to all other taxes authorized by law. [109 v. 336, 346; 96 v. 55, § 108.]

(1) **Old section.—Compare old** §§ 2721, 2721*a* R. S., repealed.

Payment of future bonds.—See generally provisions of the "Griswold Act" (109 O. L. 336); particularly § 5649-1b, under "Taxation", in Part II, providing for a tax levy to pay bonds as they mature.

(2) **The trustees must certify** an amount necessary to provide for sinking fund and interest and the amount so certified must be placed in the taxing ordinance to the full amount before and in preference to any other item. State, ex rel., v. Zangerle, 94 O. S. 447.

(3) **Failure to levy will not invalidate bonds.**—Nor is an issue of municipal bonds rendered invalid under the recent amendment of Section 2 of Article XII of the state Constitution by reason of the failure of council to make provision for levying and collecting annually by taxation an amount sufficient to pay the interest on the bonds and to provide a sinking fund for their final redemption at maturity. Link v. Karb, 14 N. P. (N. S.) 244. See note to § 3794, *ante*.

Sec. 4514. [How trustees shall invest moneys.][1] The trustees of the sinking fund shall invest all moneys received by them in bonds of the United States, the State of Ohio, or of any municipal corporation, school, township or county bonds, in such state, and hold in reserve only such sums as may be needed for effecting the terms of this title. All interest received by them shall be re-invested in like manner. [99 v. 136 § 109; 96 v. 55 § 109.]

(1) **Old section.** — Compare old § 2722 R. S., repealed.

Legislative intent as to investment.—Sections 3922 and 4514, General Code, evince an intention upon the part of the Legislature to encourage the investment of funds in the hands of the sinking fund trustees, or commission, in the bonds of that municipality, and the purchase of such bonds by the sinking fund trustees, or commission, does not in legal effect amount to a retirement of such bonds, but such bonds become assets in the hands of such

trustees, or commission, the same as other securities purchased by them. Cleveland v. Baker, 25 C. C. (N. S.) 369; 4 Oh. App. 68.

Sinking fund trustees may not invest money in "notes" of a municipality. Op. Atty. Gen. (1912), p. 1677.

Cannot purchase city bonds on credit. Op. Atty. Gen. (1913), p. 1456.

Sec. 4515. [Competitive bidding; maximum amount.] At least once every three years the trustees of the sinking fund shall advertise for proposals for the deposit of all sums held in reserve and shall deposit such reserve in the bank or banks, incorporated under the laws of this state or of the United States, situated within the county, which offer, at competitive bidding, the highest rate of interest and best security and accommodation and give a good and sufficient bond issued by a surety company authorized to do business in this state, or furnish good and sufficient surety in a sum not less than twenty per cent. in excess of the maximum amount at any time to be deposited. There shall not be deposited in any one bank an amount in excess of the paid-in capital stock and surplus of such bank, or to exceed in amount four hundred thousand dollars except when such moneys are deposited for the purpose of meeting the payment of some obligation. [101 v. 243; 99 v. 136 § 109.]

Sec. 4516. [Publicity.] The trustees of the sinking fund shall determine the method by which such bids shall be received, the authority which shall receive them, the sufficiency of the security offered, the time for the contracts for which deposits of public money may be made and all details for carrying into effect the authority here given, but proceedings in connection with such competitive bidding and the deposit of money shall be conducted in such manner as to insure full publicity and shall be open at all times to the inspection of any citizen. As to deposits made under this authority, neither the trustees of the sinking fund nor their bondsmen, if such trustees of the sinking fund have exercised due care, shall be liable for any loss occasioned thereby. [101 v. 243; 99 v. 136 § 109.]

Sec. 4516-1. [When certain provisions do not apply.] The

provisions of sections 4515 and 4516 of the general code shall not apply where sums held in reserve, by trustees of the sinking fund, are deposited in the city treasury, so as to become part of the general city balance to be deposited in banks as otherwise provided by law. [102 v. 466.]

Sec. 4517. [Payment of obligations by trustees.][1] The trustees of the sinking fund shall have charge of and provide for the payment of all bonds issued by the corporation and the interest maturing thereon. They shall receive from the auditor of the city or clerk of the village all taxes, assessments and moneys collected for such purposes and invest and disburse them in the manner provided by law. For the satisfaction of any obligation under their supervision, the trustees of the sinking fund may sell or use any of the securities or moneys in their possession. [109 v. 336, 346; 97 v. 517, § 110; 96 v. 55, § 110.]

(1) **Old section.**—Compare old § 2723 R. S. repealed.

Extent of power of trustees.—This section confers full power upon the sinking fund trustees, or commission, to protect the credit of the municipality by giving them unlimited power to use the money and securities in their possession for the purpose, and such power is not limited by either Sections 3923, 3924 or 4522, General Code. Cleveland v. Baker, 25 C. C. (N. S.) 369; 4 Oh. App. 68.

When board to be abolished, see note to § 4507, *ante*.

Trustees of sinking fund may not sell securities in order to purchase other municipal bonds. See Op. Atty. Gen. (1921), p. 678.

Application of surplus receipts of bonds fund. See Op. Atty. Gen. (1922), p. 1130.

Disposition of funds received from inheritance tax. See Op. Atty. Gen. (1922), p. 1130.

Sec. 4518. [How money to be drawn and deposited.][1] Money shall be drawn by check only, signed by the president and at least two members of the board, and attested by the secretary or clerk. All securities or evidence of debt held by the trustees for the corporation shall be deposited with the treasurer thereof or with a safety deposit company or companies within the corporation, or, if none exists, then in a place of safety to be indicated or furnished by council, and when so deposited they shall be drawn only upon the applica-

tion of three members and in the presence of at least two members of the city board, or upon the application and in the presence of at least two members of the village board. [96 v. 55 § 111.]

(1) **Old section.**—Compare old § 2724 R. S., repealed.

Sec. 4519. [Powers and duties; investigation.][1] The trustees of the sinking fund may investigate all transactions involving or affecting the sinking fund of any branch or department of the municipal government, and they shall have such other powers and perform such other duties, not inconsistent with the nature of the duties prescribed for them by law, as may be conferred upon or required by council. [97 v. 517 § 112; 96 v. 56 § 112.]

(1) **Old section.**—Compare old §§ 2727 and 2728 R. S., repealed.

Sec. 4520. [Trustees may issue bonds for certain purposes.] Repealed, 109 v. 336, 339.

Sec. 4521. [Recording of bonds.] Before they become valid in the hands of any purchaser, all bonds issued by a city shall be recorded in the office of the sinking fund trustees, and shall bear the stamp of the board of sinking fund trustees, containing the words "Recorded in the office of the sinking fund trustees," signed by the secretary. The record shall show date of issue, for what purpose issued, rate of interest, amount of issue, when due, principal and interest where payable. [97 v. 517 § 114; 96 v. 56 § 114.]

Sec. 4522. [How such bonds shall be signed and attested.] Bonds issued by the trustees of the sinking fund shall be signed by the mayor and president of such board of trustees. When the mayor of a village is also the president of such board of trustees, he shall sign as such mayor and president of the board. They shall be attested by the auditor or clerk of the corporation and the secretary of the board of trustees of the sinking fund and have affixed the seal of the corporation issuing them. They shall be sold as provided by law for the sale of bonds by a municipal corporation.[1] The trus-

tees of the sinking fund, on demand of the owner or holder of any coupon bond, may issue in place thereof a registered bond of the same denomination, bearing the same rate of interest and payable both interest and principal at the same time, and provide the method of effecting such exchange. [96 v. 56 § 115.]

(1) **Forms** of bond and notice of sale. See those given under § 3916 and 3924, *ante*, which may be readily adapted.

Construction of statutes relating to the finances of the municipality and in *pari materia*. See Cincinnati v. Guckenberger, 60 O. S. 353.

See note to § 4517.

Lost bonds.—Court of equity has no power to compel municipality to reissue a lost municipal bond, or to renew the legal evidence of the debt. Citizens Bank v. Cincinnati, 19 Dec. 685; 8 N. P. (N. S.) 393; 13 C. C. (N. S.) 14.

CITIES.

Tax Commission.[1]

Sec. 4523. [Board of tax commissioners.] In each city, the trustees of the sinking fund shall be a board of tax commissioners, but as members of such board they shall receive no compensation for their services.[2] [96 v. 38 §§ 46, 47.]

(1) **Old sections.** — See old §§ 1545-72, 2690*m*, 1545-149, 2690*a*, and 2690*e* R. S. (repealed), providing, by special acts, for tax commissioners for various cities.

(2) **Effect of Smith one per cent. Law.**—See notes under § 3784 and "order of procedure" under § 3787, *ante*.

Sec. 4524. [Oath; organization.] As members of the board of tax commissioners, they shall each take an oath to support the constitution of the United States and of this state and to faithfully and honestly perform their duties as such tax commissioners. Such board shall organize by appointing one of its members president and another vice-president. A majority of the members thereof shall constitute a quorum for the transaction of business. [96 v. 38 § 48.]

Sec. 4525. [Record of proceedings, clerk.] The board of tax commissioners shall keep a full record of all its proceedings. The city auditor shall be clerk of the board, but shall receive

no additional salary or compensation for such services. He shall enter in a book, to be provided by the city for that purpose, a full and detailed statement of all proceedings of the board, which shall be signed by the president or vice-president and such clerk. [96 v. 38 § 48.]

Sec. 4526. [Powers and duties of board of tax commissioners.] Upon receipt of the levies made by the council, as provided by law, the board of tax commissioners shall consider them and within ten days after such receipt shall return them to the council with its approval or rejection, and, in case of rejection, giving its reasons therefor.[1] It may approve or reject any part or parts thereof, and the parts rejected by such board shall not become valid levies unless the council of such municipality shall thereafter, by three-fourths vote of all members elected thereto, adopt such levy or part thereof. If the board of tax commissioners approve such levies, or if it neglects to return them with its approval or rejection within such ten days, they shall be valid and legal. In no case shall the board of tax commissioners have authority to increase such levy. [96 v. 38 § 49.]

(1) See note to § 3793, *ante*.

Subdivision III. Judicial.

CHAPTER 1.

JURISDICTION OF MAYOR.[1]

CITIES.

Sec. 4527. [Final jurisdiction in cities.] In cities, not having a police court, the mayor shall have final jurisdiction to hear and determine any prosecution for the violation of an ordinance of the corporation, unless imprisonment is prescribed as part of the punishment, and in keeping his dockets and files, he shall be governed by the laws pertaining to justices of the peace.[2] [108 v. 1203, 1208; R. S. Sec. 1816; 69 v. 192; 66 v. 169.]

(1) **Other provisions.**—For section giving mayor jurisdiction in adulteration of food cases, and other special cases, see § 13423 G. C.

Bills of exceptions are provided for by §§ 10359 to 10363 G. C.

Error proceedings are provided for in §§ 13751, *et seq.* G. C.

Review on weight of evidence, see Koch v. State, 73 O. S. 131; Fike v. State, 25 C. C. 554.

Tribunals of limited jurisdiction must at their peril keep within their jurisdiction and are answerable to any one whose rights are invaded. Truman v. Walton, 59 O. S. 517; Truesdell v. Combs, 33 O. S. 186; Washer v. Iler, 29 C. C. 319; 9 C. C. (N. S.) 271, (aff'd, 75 O. S. 638.)

(2) See note to § 4535, *post.*

Sec. 4528. [Jurisdiction and duties.] He shall have final jurisdiction to hear and determine any prosecution for a misdemeanor, unless the accused is, by the constitution, entitled to a trial by jury,[1] and his jurisdiction in such cases shall be co-extensive with the county, and in keeping his dockets and files making report to the county auditor, disposing of unclaimed monies, and in purchasing his criminal docket and blanks for state cases, shall be governed by the laws, pertaining to justices of the peace.[2] [109 v. 173, 174; 108 v. 1203, 1208; R. S. Sec. 1817; 69 v. 192; 66 v. 169.]

(1) **No jury trial, when.**—In cases where fine is the punishment, and imprisonment is provided only when fine is not paid, defendant has no right to jury trial, and mayor may try the case. Ward v. State, 5 N. P. 81; see also Inwood v. State, 42 O. S. 186; Peters v. State, 8 N. P. 595; 67 O. S. 494; Schlagel v. State, 3 N. P. (N. S.) 429.

Entering a plea of guilty is a waiver of jury trial. Hillier v. State, 26 C. C. 777; 5 C. C. (N. S.) 245; DeMuth v. State, ex rel., 27 O. C. A. 585, 7 Oh. App. 245; aff'd, State, ex rel., v. DeMuth, 96 O. S. 519.

Final jurisdiction under the circumstances mentioned is clearly given in this section, and it must be construed as an exception to the general provisions of § 13510 (7146 R. S.) State v. Borham, 72 O. S. 358. See also Dominick v. State, 27 C. C. 305; 6 C. C. (N. S.) 192; DeMuth v. State, ex rel., 27 O. C. A. 585; 7 Oh. App. 245; aff'd, State, ex rel., v. DeMuth, 96 O. S. 519.

Change of venue in misdemeanor prosecutions before mayor not authorized. Fike v. State, 25 C. C. 554. And see Kappes v. State, 25 C. C. 723; 4 C. C. (N. S.) 14; Decker v. State, 5 N. P. (N. S.) 364.

Nor is affidavit of prejudice allowed. Carey v. State, 70 O. S. 121.

Jurisdiction in cases of violation of liquor laws, see Savors v. State, 8 N. P. (N. S.) 228; Peters v. State, 11 N. P. 555.

(2) **Validity.**—See notes to § 4536, *post*.

Sec. 4529. [Clerk of mayor's court not to be concerned in prosecution or defense.] Neither the clerk of the mayor's court, nor his deputy, shall be concerned as counsel or agent in the prosecution or defense of any case that is or has been, before the court of which such person is clerk or deputy. [R. S. Sec. 1817a; 78 v. 50.]

Sec. 4530. [Jurisdiction where jury is waived.] He shall have such jurisdiction in the cases mentioned in the last two sections, notwithstanding the right to a jury, if before the commencement of the trial, the accused waives a jury trial.[1] [R. S. Sec. 1818; 69 v. 192; 66 v. 169.]

(1) **When record silent as to waiver.**—When defendant is entitled to jury trial, and the record is silent as to waiver, see Ward v. State, 5 N. P. 81; Evans v. State, 3 C. C. (N. S.) 23.

When imprisonment part of punishment.—By force of Section 4530, General Code, the mayor of a city not having a police court, has jurisdiction to pronounce sentence where the accused charged with a misdemeanor enters a plea of guilty, although imprisonment is a part of the punishment and the complaint is not made by the party injured. State, ex rel., v. DeMuth, 96 O. S. 519.

Sections referred to.—Held that words "last two sections" refer to Secs. 4527 and 4528. *Ib.*

Sec. 4531. [Certain city cases must be tried by jury.] If the charge is the violation of an ordinance in a matter with respect to which imprisonment may be a part of the punishment, and the accused does not waive a jury, the mayor shall, nevertheless, impanel a jury, and try the case on the affidavit, in the same manner, and with like effect, as misdemeanors are tried in the court of common pleas on indictment.[1] [R. S. Sec. 1819; 69 v. 192; 66 v. 169.]

(1) Cited in Morgan v. Nolte, 37 O. S. 23.

Sec. 4532. [Certain state cases may be tried by jury.] If the charge is the commission of a misdemeanor, prosecuted in the name of the state, and the accused, being entitled to a jury, does not waive the right, the mayor may, nevertheless, impanel a jury, and try the case on the affidavit, in the same manner, and with like effect, as such cases are tried in the court of common pleas on the indictment.[1] [R. S. Sec. 1820; 69 v. 192; 66 v. 169.]

(1) **Procedure.**—See §§ 13432, *et seq.*, G. C.

Sec. 4533. [In certain state cases accused may be recognized.] The mayor may, however, decline to have such state case tried before him by a jury, if in his opinion the public interest will thereby be promoted, and, having entered that fact on his minutes, inquire into the complaint, discharge the accused, or recognize him to the court of common pleas or probate court, as the case may be, or commit him in default of bail.[1] [R. S. Sec. 1821; 69 v. 192; 66 v. 169.]

(1) **Money in lieu of bail.**—It is illegal, unless authorized by statute, for a police officer, or magistrate, to receive money in lieu of bail for appearance of person accused of a criminal offense. Reinhard v. City, 49 O. S. 257.

When money so deposited may be received back, see *Ib.*

Mayor has discretion to refuse a jury trial and hold the accused to answer to a higher court. Hillier v. State, 26 C. C. 777; 5 C. C. (N. S.) 245.

Sec. 4534. [Concurrent jurisdiction of mayors with justices in criminal proceedings; fees.] In felonies and other criminal proceedings not herein provided for, such mayor shall have jurisdiction and power throughout the county concurrent with justices of the peace.[1] The chief of police shall by himself or a police officer of the municipality designated by him attend on the sittings of such court, to execute the orders and process thereof and to preserve order therein, and such chief of police or other police officer of the municipality shall execute and return all writs and process to them directed by the mayor, and their jurisdiction in the execution of such writs and process, in criminal cases, and in cases of violations of ordinances of the corporation, shall be co-extensive with the county, and in civil cases shall be co-extensive with the jurisdiction of the mayor therein, and in serving such writs and process and taxing costs thereon, shall be governed by the laws pertaining to constables. The fees of the mayor in all cases shall be the same as those allowed justices of the peace and in all cases there shall be taxed for services of such chief of police or other police officer the same fees and expense as those allowed constables.[2] [108 v. 1203, 1209; 102 v. 476; R. S. Sec. 1822; 69 v. 192; 66 v. 169.]

(1) **Jurisdiction** in certain special cases, (such as prosecutions for violation of pure food laws, for violation of laws relating to cruelty to animals, etc.), is given in § 13423 G. C.

Intoxicating liquors.— Jurisdiction of mayor in violations of liquor laws, see §§ 6212-17f and 6212-18.

Criminal jurisdiction of justices of the peace is provided in § 13422 G. C. See, also, note to § 4542, *post.*

(2) **Fees** of chief of police, before present amendment, see Delaware v. Matthews, 13 C. C. (N. S.) 539.

See § 4213 and notes thereto, *ante;* see also note to § 4581, *post.*

VILLAGES.

Sec. 4535. [Final jurisdiction under ordinances; keeping dockets and files.] In villages, the mayor shall have final jurisdiction to hear and determine any prosecution for the violation of an ordinance[1] of the corporation unless imprisonment is prescribed as part of the punishment, and in keeping his dockets and files, he shall be governed by the laws

pertaining to justices of the peace. [108 v. 1203, 1209; R. S. Sec. 1823; 69 v. 192; 66 v. 169.]

(1) **In absence of accused.**—The mayor cannot try a person accused of violating an ordinance, who after giving bail to appear at a certain time fails to appear at the hour fixed for trial. Truman v. Walton, 59 O. S. 517.

Sec. 4536. [Jurisdiction in certain state offenses; keeping dockets and files.] He shall have final jurisdiction to hear and determine any prosecution for a misdemeanor[1] unless the accused is, by the constitution, entitled to a trial by jury. His jurisdiction in such cases shall be co-extensive with the county, and in keeping his dockets and files, making report to the county auditor, disposing of unclaimed monies, and in purchasing his criminal docket and blanks for state cases, shall be governed by the laws pertaining to justices of the peace. [109 v. 173, 174; 108 v. 1203, 1209; R. S. Sec. 1824; 69 v. 192; 66 v. 169.]

(1) **President of council** as acting mayor has no authority to hear and determine prosecution for misdemeanor. State v. Hance, 4 C. C. (N. S.) 541; 26 C. C. 273.

Constitutionality.—This section giving jurisdiction coextensive with the county is constitutional. Carey v. State, 70 O. S. 121; Kubach v. State, 2 C. C. (N. S.) 133, 25 C. C. 489.

Jurisdiction in liquor cases.—Under this section mayor has jurisdiction in prosecutions in each county in which any part of the territory of the municipality is located and hearing may be had in any portion of the municipality though not within the county in which the offense was committed. State v. Pape, 105 O. S. 515.

Affidavit of prejudice not allowed. § 1687 G. C. has no application to mayors. Carey v. State, 70 O. S. 121; nor has § 10306 G. C. Kappes v. State, 5 C. C. (N. S.) 183.

Information not necessary to be filed. Misdemeanor cases may be instituted upon filing affidavit. Kubach v. State, 2 C. C. (N. S.) 133; 25 C. C. 489.

Jury not necessary where fine only is punishment. Kubach v. State, 2 C. C. (N. S.) 133; 25 C. C. 489; Harlow v. State, 1 N. P. (N. S.) 323; Wells v. State, 1 N. P. (N. S.) 309.

See further notes to § 4528, *ante*.

Sec. 4537. [Jurisdiction when jury is waived.] He shall have the jurisdiction in the cases mentioned in the last two sections, notwithstanding the right to a jury, if before the commencement of the trial, a waiver in writing, subscribed

by the accused, is filed in the case.[1] [R. S. Sec. 1825; 69 v. 192; 66 v. 169.]

(1) See note to § 4530, *ante.*

Sec. 4538. [When violation of ordinance tried by jury.] He may summon a jury, and try the accused, in any prosecution for the violation of an ordinance, where imprisonment is a part of the prescribed punishment, and the accused does not waive a jury, and in such case, judgment shall be rendered in accordance with the verdict, unless a new trial, for sufficient cause, is granted. [R. S. Sec. 1826; 69 v. 192; 66 v. 169.]

Sec. 4539. [When he may recognize for violation of ordinance.] He may decline to permit the trial, mentioned in the last section, if in his opinion the public interest will be thereby promoted, and having entered that fact on his docket, proceed to inquire into the complaint, and discharge the accused, recognize him [1] to the court of common pleas,[2] or commit him in default of bail, and in such case the court of common pleas shall have jurisdiction of the offense. [R. S. Sec. 1827; 69 v. 192; 66 v. 169.]

(1) **When mayor may recognize.**—On disagreement by jury, the mayor may recognize accused to appear before Common Pleas Court, instead of retrying him. Earhart v. Lebanon, 5 C. C. 578.

Where imprisonment is prescribed as punishment, it is discretionary with mayor whether he bind defendant over to grand jury or try the case on its merits. King v. New London, 8 N. P. (N. S.) 34.

(2) **Procedure in Common Pleas Court.**—When upon violation of a village ordinance, a mayor certifies the case to the Court of Common Pleas, the proper course is to proceed to trial upon the affidavit filed before the mayor. Finnical v. Cadiz, 61 O. S. 494.

Sec. 4540. [When misdemeanor may be tried by jury.] In misdemeanors prosecuted in the name of the state he may summon a jury and try the case notwithstanding the accused has a right to a jury which he has not waived, if a request for such trial subscribed by the accused is filed in the case, before the commencement of the trial. In such case the trial shall be had on the affidavit in the same manner and with like effect as a trial is had on indictment for such offense in the

court of common pleas. [R. S. Sec. 1828; 89 v. 362; 69 v. 192; 66 v. 169.]

Sec. 4541. [When he may recognize in such cases.] If in the opinion of the mayor the public interest will thereby be promoted, he may decline to permit such trial, and having entered that fact on his docket, proceed to inquire into the complaint, and discharge the accused, recognize him to the court of common pleas or probate court, as the case may be, or commit him in default of bail. [R. S. Sec. 1829; 69 v. 192; 66 v. 169.]

Sec. 4542. [Jurisdiction in felonies; duties of marshal.] In felonies, and other criminal proceedings not herein provided for, such mayor shall have jurisdiction and power throughout the county, concurrent with justices of the peace.[1] The marshal shall execute and return all writs and process to him directed by the mayor, and shall, by himself or deputy, attend on the sittings of such court, to execute the orders and process thereof, and to preserve order therein.[2] His jurisdiction, and that of his deputies, in the execution of such writs and process, in criminal cases, and in cases of violation of ordinances of the corporation, shall be co-extensive with the county, and in civil cases shall be co-extensive with the jurisdiction of the mayor therein, and in the execution of writs and process and the taxing of costs thereon shall be governed by the laws pertaining to constables. [108 v. 1203, 1209; R. S. Secs. 1830, 1848; 71 v. 76; 69 v. 192; 66 v. 169.]

(1) **Jurisdiction.**—In felonies the mayor has only the powers of an examining court and can only discharge or recognize the accused to the Court of Common Pleas or Probate Court. Truman v. Walton, 59 O. S. 517, 526.

(2) **Marshal,** who has arrested a person under warrant issued upon complaint to the marshal, is not thereby disqualified from performing his duties as marshal, before and and during the trial of such person so arrested. Mineral City v. Render, 51 O. S. 122.

Sec. 4543. [Boundary line between villages adjoining each other.] When two villages adjoin each other on opposite sides of the line of any railroad, the boundary line between such

villages, except where otherwise established by law shall be along the middle of the right of way of such railroad. [88 v. 242 § 1; Bates 1830-1; 78 v. 93.]

Sec. 4544. [Appointment of police justice; powers and duties.] Upon the recommendation of the mayor, the council may, by an affirmative vote of two-thirds of all the members elected, appoint a justice of the peace, resident of the corporation, or if there is no such justice of the peace, another suitable person resident of the corporation or a justice of the peace for the township in which such corporation is situated, police justice, who shall, during the term of office of such mayor, unless removed on suggestion of such mayor by a two-thirds vote of all the members of the council, have concurrent jurisdiction of all prosecutions for violations of ordinances of the corporation with full power to hear and determine them, and shall have the same powers, perform the same duties, and be subject to the same responsibilities in all such cases as are prescribed by law, to be performed by and are conferred upon the mayors of such corporations. Any person so appointed police justice, other than a justice of the peace, shall take an oath of office and give bond in such sum for the faithful performance of his duties as the council may require.[1] [R. S. Sec. 1831; 98 v. 159, 353; 93 v. 12; 89 v. 139; 69 v. 192.]

(1) **Validity.**—The provisions of this section to the extent of conferring power upon the council of a municipality to appoint a police justice, are unconstitutional and therefore void. Hilton v. State ex rel., 108 O. S. 233. And see In re Derrick, 11 C. C. (N. S.) 518.

Council may fix compensation of police justice. Op. Atty. Gen. (1918), p. 1352.

Jurisdiction, see *Ib.*, and Morgan v. Tighe, 12 C. C. 719; Thomas v. Fremont, 12 Dec. 605.

The authority of police justice appointed under this section cannot be questioned, neither can the question of the constitutionality of the section be raised other than in a quo warranto proceeding. Stiess v. State, 103 O. S. 33.

A police justice may punish for contempt committed in his presence while he is exercising his official duties. Meek v. McGorray, 16 C. C. (N. S.) 9; (aff'd without opinion, 81 O. S. 542).

Sec. 4545. [Manner of signing process; seal, powers.] Such justice of the peace so appointed shall be styled "Police jus-

tice,'' in which style he shall sign all process and records during the time he shall serve. He shall have a seal, to be provided by the council, with the name of the state in the center, and the words ''Police justice of the village of.....,'' around the margin, and all the provisions of this chapter applicable to the mayor of a village shall apply to such police justice. [R. S. Sec. 1832; 69 v. 192.]

Sec. 4546. [Police court.] In each village where a police court is established by law, such police court shall continue to exercise all powers and functions conferred by law thereon, and shall be known as the police court of such village.[1] [96 v. 86 § 208.]

(1) See note to § 4567, *post.*

Sec. 4547. [Jurisdiction; employes.] The police court of such village shall have the jurisdiction conferred upon it by law, and the mayor as judge of such court and the clerk, assistant clerks and all other officers and employes of such court, shall be elected or appointed and shall exercise their powers and duties in the manner provided in such laws. [96 v. 87 § 209.]

CITIES AND VILLAGES.

Sec. 4548. [Jurisdiction and powers of mayor.] The mayor shall be a conservator of the peace throughout the corporation, and within the limits thereof shall have the jurisdiction and powers of a justice of the peace in civil cases,[1] and his proceedings therein may be reviewed in the same manner. He shall have the jurisdiction in criminal cases herein provided. [R. S. Sec. 1744; 66 v. 169.]

(1) **Validity** of statute conferring jurisdiction of justice on mayor, see Steamboat Indiana v. Milliken, 7 O. S. 383.

Damage cases, jurisdiction in, see Railroad Co. v. Scahill, 33 B. 250.

Bastardy cases, jurisdiction in, see Miller v. Oehler, 36 O. S. 64.

Powers.—Not authorized to accept money in lieu of bail. Columbus v. Dunnick, 41 O. S. 602.

May refuse change of venue, Volk v. Westerville, 3 N. P. (N. S.) 241.

Sec. 4549. [Powers of mayors in criminal matters.] The mayor shall have, within the corporate limits, all the powers conferred upon the sheriffs to suppress disorder and keep the peace.[1] He shall award and issue all writs and process that may be necessary to enforce the administration of justice throughout the corporation, and for the lawful exercise of his jurisdiction, according to the usages and principles of law. He shall subscribe his name and affix his official seal to all writs, process, transcripts, and other official papers.[2] In cities having no police judge, in the absence or during the disability of the mayor, he may designate a justice of the peace to perform his duties in criminal matters, which justice shall, during the time, have the same power and authority as the mayor.[3] [R. S. Sec. 1837; 66 v. 169.]

(1) **Liability of mayor.**—When a person is arrested on a warrant for violating an ordinance subsequently held invalid, the mayor is not liable in an action for false imprisonment. Wheeler v. Gavin, 5 C. C. 246.

But he is liable when he does not keep within his prescribed jurisdiction. Truesdell v. Combs, 33 O. S. 186; Truman v. Walton, 59 O. S. 517. See also Garrison v. Bricker, 7 O. L. R. 337.

(2) **Seal.**—A transcript and bill of exceptions to review a mayor's judgment of conviction must be authenticated by the official seal of the mayor. Zupanic v. Collinwood, 16 C. C. (N. S.) 213.

A warrant for arrest issued by the mayor of a municipality without affixing to it his official seal is invalid. Lenarcie v. State, 23 C. C. (N. S.) 73.

(2) **In villages.**—See § 4544 and Volk v. Westerville, 3 N. P. (N. S.) 241.

See Op. Atty. Gen. (1915), p. 254.

Sec. 4550. [Duties, fees, office, seal.] He shall keep a docket, and shall be entitled to receive the same fees allowed justices of the peace for similar services.[1] He shall keep an office at a convenient place in the corporation, to be provided by the council, and shall be furnished by the council with the corporate seal of the corporation in the center of which shall be the words, "Mayor of the city of ———," "Mayor of the village of ———," as the case may be.[2] [R. S. Sec. 1745; 66 v. 169.]

(1) **When fees not allowed.**—Where salary of mayor is fixed and it is further provided that he shall not be allowed fees for any services

performed, except those provided by law, the fees received are for the benefit of the municipality. Hatch v. Cincinnati, 17 O. S. 48.

An officer whose fees are regulated by statute can charge fees for those services only to which compensation is by law fixed. Debolt v. Trustees, 7 O. S. 237.

Fees of mayor, when paid into treasury, see § 4213 and notes. Fees in cities, see § 4534.

(2) **Execution of corporation deed.**—To the mayor is confided the corporate seal, and he is the chief administrative and executive officer, and it would seem is the proper person to sign deed by corporation. Tiffin v. Shawhan, 43 O. S. 178, 186.

Whether council can authorize clerk to execute a deed for city is a question. *Ib.*

Sec. 4551. [Appeal and error.] Appeals may be taken from the decision of the mayor in civil cases, in the same manner as from justices of the peace, but when a municipality extends into two or more counties, the appeal shall be taken to the court of common pleas of the county in which one or more of the defendants reside. A conviction under an ordinance of any municipal corporation may be reviewed by petition in error, in the same manner and to the same extent as was heretofore permitted on writs of error and certiorari, and the judgment of affirmance or reversal may be reviewed in the same manner, and for this purpose a bill of exceptions may be taken,[1] or a statement of facts embodied in the record on the application of any party, but no such petition shall be filed except on leave of the court or judge thereof,[2] and such court or judge may suspend the sentence, as in criminal cases.[3] [R. S. Sec. 1752; 72 v. 42, § 1; 66 v. 170, § 125.]

(1) **Allowing bill of exceptions.**—See §§ 10359-10363 G. C. Under former statutes, see Bradner v. Grundetisch, 15 C. C. 32; Germantown v. Basore, 22 C. C. 417, 421.

Review on weight of evidence.—Former statutes provided that conviction might be examined into by upper court on writ of error and reviewed on weight of evidence. The present section merely changes the remedy and allows a bill of exceptions, but does not interfere with review on weight of evidence. Flatau v. Mansfield, 14 C. C. 592; Slaughter v. Columbus, 61 O. S. 53; Germantown v. Basore, 22 C. C. 417. For holding under former law, see Van Buskirk v. Newark, 26 O. S. 37.

This section only applies where judgment is for violation of a municipal ordinance. Fike v. State, 4 C. C. (N. S.) 81, 25 C. C. 554.

Where bill of exceptions does not show that it contains all the evidence, court is not called upon to

consider the weight of the evidence. Schlagel v. State, 3 N. P. (N. S.) 429.

Sufficiency of bill of exceptions, see Silverton v. Davis, 30 C. C. 523; 10 C. C. (N. S.) 60 (aff'd 80 O. S. 709); Bosodi v. State, 13 C. C. 275; Whitman v. State, 7 C. C. (N. S.) 334; Zupanic v. Collinwood, 16 C. C. (N. S.) 213.

Failure of mayor to transmit bill of exceptions within the time required cannot prejudice petition in error. Capple v. State, 17 Dec. 75; 4 N. P. (N. S.) 339.

It is not essential to the jurisdiction of the reviewing court that the mayor note on his docket the signing and filing of the bill. Burchard v. State, 83 O. S. 1.

When time fixed for allowance of bill of exceptions, under former statute, see Capple v. State, 17 Dec. 75; 4 N. P. (N. S.) 339; King v. New London, 8 N. P. (N. S.) 34; Decker v. State, 5 N. P. (N. S.) 36.

Review.—The judgment of a mayor upon an issue presented by a plea in bar may be reviewed independently of the other issues of the case, where presented upon a bill of exceptions containing evidence upon this issue alone. Whitman v. State, 7 C. C. (N. S.) 334.

Reversal. — Upon reversal the Common Pleas Court should remand the cause to the Mayor's Court for further proceedings, unless the ordinance in question is found to be invalid or no offence was charged in the affidavit. Akron v. Temple, 16 C. C. (N. S.) 327.

(2) **Leave to file petition in error.**—Conviction in mayor's court for breach of ordinance may be reviewed by Court of Common Pleas, but leave to file a petition in error is a condition precedent. Miller v. Bellefontaine, 2 C. C. 139.

And refusal of Common Pleas Court to allow a petition in error to be filed is not reviewable in the Circuit Court. Canfield v. Brobst, 71 O. S. 42.

(3) **Power to suspend sentence.**—A mayor cannot suspend sentence and take bond unless an order to do so is made by Court of Common Pleas. Scio v. Hollis, 7 N. P. 281, 282.

Sec. 4552. [Ordinances as to juries; qualifications of jurors.] The council of any municipality may prescribe by ordinance for summoning and impaneling juries under this division, and the jurors so summoned shall have the qualifications of jurors in the court of common pleas, and may be impaneled to try any case which, by the constitution, or the provisions of this division, is triable by jury. [R. S. Sec. 1839; 66 v. 180.]

Sec. 4553. [Talesmen.] When a juror so summoned, upon challenge or inquiry, is found incompetent, he may be dismissed, and a talesman called by the marshal, or other officer attending the trial, and the panel shall be filled in the same

manner as panels are filled in the court of common pleas. [R. S. Sec. 1840; 66 v. 180.]

Sec. 4554. [Duties and penalties of jurors; fees.] Jurors so summoned shall perform like duties, and be subject to like rules and penalties, as jurors before justices of the peace. In civil cases jurors shall receive the same compensation as is provided for jurors before justices of the peace in civil cases; and in ordinance and state cases the same compensation as is provided for jurors before justices of the peace in criminal cases; in ordinance cases payment shall be made from the municipal treasury and in state cases from the county treasury upon the certificate of the court. [109 v. 173, 174; 108 v. 1203, 1210; R. S. Sec. 1841; 66 v. 180.]

Sec. 4555. [How fees paid.] In cases for the violation of ordinances, the fees of witnesses and jurors shall be paid, on the certificate of the officer presiding at the trial, from the corporation treasury, and in state cases on like certificate from the county treasury. [R. S. Sec. 1842; 66 v. 180.]

Sec. 4556. [Fees of officers.] The fees of the mayor, in all cases, shall be the same as those allowed justices of the peace,[1] and the fees of the marshal, chief of police, and other police officer serving writs or process of the court, in all cases, shall be the same as those allowed constables. [109 v. 173, 174; 108 v. 1203, 1210; R. S. Sec. 1843; 66 v. 180.]

(1) **Fees of mayor,** when turned into municipal treasury, see § 4213 and notes.

Where persons convicted work out their fines and costs, the mayor is not entitled to collect his fees from the municipality. Gibson v. Zanesville, 31 O. S. 184.

Limitation of fees.—An officer whose compensation is paid in fees is authorized to charge fees in those cases only which are provided by statute. State v. Lewis, 22 C. C. 618; affirmed by Supreme Court, see Jones v. Commissioners and Lewis v. State, 57 O. S. 189.

Op. Atty. Gen. (1919), p. 255.

Sec. 4557. [Contempts; rules.] The officer presiding at any such trial may punish contempts, and compel the attendance of jurors and witnesses, and to establish rules for the exami-

nation and trial of all cases brought before him, as justices of the peace.[1] [R. S. Sec. 1844; 66 v. 180.]

(1) **Jurisdiction** to punish for contempt; necessity of charges; see *In re* Stein, 19 Dec. 367.

Sec. 4558. [Supervision of prison.] The mayor, and in his absence, the president of the council, may grant to magistrates of adjoining or contiguous townships the temporary use of the corporation prison, station or watch-houses, to confine criminals, or other persons dangerous to the peace of the community, until they can be safely removed therefrom to the county jail, or other place of security. [R. S. Sec. 1845; 66 v. 170.]

Sec. 4559. [When offender may be confined until fine and costs paid.] When a fine is the whole or part of a sentence, the court or mayor may order that the person sentenced shall remain confined in the county jail, workhouse, or prison, until the fine and costs be paid, or secured to be paid, or the offender be otherwise legally discharged.[1] [R. S. Sec. 1846; 66 v. 314; 60 v. 66.]

(1) **When mayor not entitled to costs.**—When a person works out his fine and costs, at a city workhouse, the city is not liable to the mayor for his costs. Gibson v. Zanesville, 31 O. S. 184.

Execution against person.—Legislature has by law authorized execution against the person in a criminal case only where fine is imposed as part of the penalty, except under § 12377 G. C. Luetzler v. Perry, 18 C. C. 826.

Mittimus amended.—Where mayor has directed that defendant be confined "until costs are paid," it is not error for a court on *habeas corpus* to direct amendment of mittimus by providing for imprisonment until the costs are paid or secured to be paid. *In re* Stanfeal, 9 C. C. (N. S.) 553 (affirmed 78 O. S. 24.)

Sec. 4560. [Jurisdiction over railroad forming part of boundary line.] When the line of a railroad adjoins or forms a part of the boundary line of a municipal corporation, such municipal corporation shall have jurisdiction over the entire width of the right of way of the line of railroad, so adjoining or forming a part of the boundary line of such municipal corporation, for the punishment of the violation of the ordi-

nances of such municipal corporation. [92 v. 428, § 1; Bates, 1830-2; 98 v. 159; 93 v. 12; 89 v. 139; 69 v. 192.]

Sec. 4561. [How fines and forfeitures recovered.] Fines, penalties, and forfeitures may, in all cases, and in addition to any other mode provided, be recovered by suit or action before any justice of the peace, or other court of competent jurisdiction, in the name of the proper municipal corporation, and for its use. In any suit or action where pleading is necessary, it shall be sufficient if the petition sets forth generally the amount claimed to be due in respect of the violation of the by-law or ordinance, referring to its title, and the date of its adoption or passage, and showing, as near as may be practicable, the true time of the alleged violation. [R. S. Sec. 1864; 66 v. 167.]

Sec. 4562. [Suits must be commenced within one year.] Suits or prosecutions for the recovery of fines, penalties, or forfeitures, or for the commission of any offense made punishable by any by-law or ordinance of any municipal corporation, shall be commenced within one year after the violation of the ordinance, or commission of the offense, and not afterward. [R. S. Sec. 1865; 66 v. 167.]

Sec. 4563. [Party to be committed in default of payment.] When a fine, imposed for the violation of an ordinance of the corporation, is not paid, the party convicted shall, by order of the mayor, or other proper authority, or on process issued for the purpose, be committed until such fine and the costs of prosecution are paid, or the party is discharged by due process of law.[1] [R. S. Sec. 1866; 66 v. 168.]

(1) **Constitutional.**—Where act authorized the arrest on execution of person against whom a fine has been adjudged, imprisonment until fine is paid is not unconstitutional. *In re* Beall, 26 O. S. 195.

But a court cannot impose a fine and order commitment until fine is paid, unless the statute so provides. Lougee v. State, 11 O. 68.

Under a statute such as this, it was held a fine might be collected either by commitment of person or execution against his chattels. Huddleson v. Ruffin, 6 O. S. 604.

Sec. 4564. [Imprisonment, where to be made.] Imprisonment under the ordinances of a municipal corporation shall be in the workhouse or other jail thereof, if the corporation is provided with such workhouse or a jail. Any corporation not provided with a workhouse, or other jail, shall be allowed, for the purpose of imprisonment, the use of the jail of the county, at the expense of the corporation, until it is provided with a prison, house of correction, or workhouse. Persons, so imprisoned in the county jail shall be under the charge of the sheriff of the county, who shall receive and hold such persons in the manner prescribed by the ordinances of the corporation, until discharged by due course of law. [R. S. Sec. 1867; 66 v. 168.]

Sec. 4565. [Use of county jail may be prohibited.] The county commissioners, at their discretion, on giving ninety days' written notice to the council of any corporation, may prohibit the use of the county jail for the purpose authorized in this chapter. [R. S. Sec. 1868; 66 v. 168.]

Sec. 4566. [Limit of such prohibition.] If, within ninety days after such notice is given, the council of such corporation efficiently provides, by the passage of appropriate ordinances, and the making of the necessary contracts for the immediate erection of a prison, workhouse, or house of correction, notwithstanding the notice and prohibition provided for in the preceding section, the corporation shall continue to have the use of the county jail for the purpose of imprisonment, until such prison, workhouse, or house of correction, is erected and ready for use. [R. S. Sec. 1869; 66 v. 168.]

CHAPTER 2.

POLICE COURTS.[1]

Sec. 4567. [Police judge; election and term; dockets and files; report.] In each municipality where a police judge is provided by law, such judge shall be chosen for a term of four years, commencing on the first day of January next after the election. Except when otherwise provided by law, the election, power and duties, and, in case of vacancy, the appointment of judges of police court shall be as prescribed by the provisions of this chapter, and such judge in keeping his dockets and files, making report to the county auditor disposing of unclaimed moneys, and in purchasing his criminal docket and blanks for state cases, shall be governed by the laws pertaining to justices of the peace. [109 v. 173, 174; 108 v. 1203, 1210; 96 v. 95, § 230; 98 v. 172, § 222; 96 v. 93, § 222.]

(1) **Former provisions.** — The Municipal Code of 1902 did not contain a uniform municipal police court law but, instead, provided (M. C. §§ 190, 191, 192, 208, 209, 210), that in each municipality where a police court was established, whether by general or special act, such police court should continue to exercise its powers and functions and that all acts providing for such courts should remain in full force and effect. This provision left the law relating to police courts, much of which was contained in special acts, exactly as it was before, except that a few minor sections were expressly repealed. Enactments of a new municipal police court law would have required a two-thirds vote of the general assembly (Const. of Ohio, art. IV, sec. 15; Steamboat Northern Indiana v. Millikin, 7 O. S. 383; State v. Voris, 8 N. P. 16), and the Municipal Code did not receive such vote. As to the sections of the previous police court laws repealed, a two-thirds vote is not required to abolish courts or limit their jurisdiction. (State *ex rel.* v. Wright, 7 O. S. 333; State v. Kinninger, 46 O. S. 570; Backenstoe v. State, 2 N. P. (N. S.) 178.)

In the present General Code the laws of a general nature relating to police courts and left in force by the Municipal Code of 1902, have been grouped together and codified while the special police court acts have been omitted from the General Code, but are contained in the Appendix thereto.

Special acts providing for po-

lice courts or municipal courts in various cities will be found in the following sections of the General Code:

Akron, §§ 1579-497 to 1579-549.
Alliance, §§ 1579-195 to 1579-232.
Ashtabula, §§ 14693 to 14695.
Canton, §§ 14696 to 14705.
Cincinnati, §§ 1558-1 to 1558-45a.
Cleveland, §§ 1579-1 to 1579-45i.
Columbus, §§ 1558-46 to 1558-93d.
Dayton, §§ 1579-46 to 1579-89.
Hamilton, §§ 1579-90 to 1579-126a.
Lima, §§ 14740-24 to 14740-34.
Lorain, §§ 1579-601 to 1579-641.
Massillon, §§ 1579-416 to 1579-458.
Middletown, §§ 1579-183 to 1579-194.
Newark, §§1579-367 to 1579-415.
Piqua, §§ 1579-560 to 1579-600.
Portsmouth, §§ 1579-459 to 1579-496.
Sandusky, §§ 1579-233 to 1579-275.
Toledo, §§ 1579-276 to 1579-329.
Youngstown, §§ 1579-127 to 1579-182.
Zanesville, §§ 1579-330 to 1579-366.

Validity of special acts.—The Supreme Court has upheld special acts establishing local courts, declaring that § 1 of Art. 4 of the Constitution of Ohio vests in the legislature full power to determine what other courts it will establish, either for separate counties or districts, or local, if deemed proper, and to define their jurisdiction; and holding that the power thus conferred is not limited by § 26 of Art. 2 of the Constitution, which ordains that all laws of a general nature shall have uniform operation throughout the state. State *ex rel.* v. Bloch, 65 O. S. 370. See also Meyer v. Dempsey, 62 O. S. 637; State v. Archibald, 52 O. S. 1.

Sec. 4568. [Compensation of police judge.] The judge of the police court shall receive such annual compensation, not to exceed two thousand dollars, as the council prescribes, payable quarterly, from the city treasury, and such further compensation, payable quarterly from the county treasury, as the commissioners of the county may designate by resolution duly entered on the journal. [108 v. 1203, 1210; R. S. Sec. 1797; 88 v. 67; 66 v. 177.]

Sec. 4569. [Acting police judge.] During the absence, inability, or disability of the judge, the mayor may hold the court or may select for that purpose a reputable member of the bar or a justice of the peace residing within the city, who shall have the jurisdiction and powers conferred upon judges of police courts, be styled "acting police judge," and, as such, sign all process and records during the time he shall serve and perform all other acts pertaining to the office.[1] All courts shall take judicial notice of the selection and powers of such persons. In case the mayor holds the court he shall have all

the powers and perform all the duties of the judge. [R. S. Sec. 1802, 1803; 95 v. 293; 70 v. 248; 66 v. 170.]

(1) **Validity.**—The power given the mayor to appoint, in the temporary absence of police judge is not in contravention of Art. 4, § 13, of the Constitution. Molitor v. State, 6 C. C. 263.

Where appointment defective.—Even if the power to appoint is not constitutional, yet the person acting under the appointment will be a *de facto* judge. *Ex parte* Strang, 21 O. S. 610; Brown v. Toledo, 7 N. P. 435.

The acts of a *de facto* officer, when questioned collaterally, are as valid and binding as those of an officer *de jure*. *Ex parte* Strang, 21 O. S. 610; Molitor v. State, 6 C. C. 263; and this is so even though the one appointing had only colorable authority to appoint. *Ex parte* Strang, 21 O. S. 610.

Sec. 4570. [Compensation of acting police judge.] The person selected as acting police judge shall be paid for the time occupied, in the same manner and at the same rate as the police judge. The amount so paid shall not be deducted from the compensation of the police judge, if such absence, inability or disability of the police judge and the holding of the court by such acting judge does not exceed sixty days in any one year. [R. S. Sec. 1803; 79 v. 85; 70 v. 248; 66 v. 170.]

Sec. 4571. [Vacancy, how filled.] A vacancy in the office of judge of a police court shall be filled by the governor of the state as provided by law. [96 v. 95, § 230.]

Sec. 4572. [Official seal.] Each police court shall have a seal with the name of the state in the center, and the style of the court in the margin. It shall be the duty of the council to furnish such seal. [R. S. Sec. 1786; 72 v. 51.]

Sec. 4573. [Terms of court.] The police court shall always be open for the transaction of business, but may adjourn from day to day, or from time to time, and shall be considered as holding monthly terms, each commencing on the first Monday of the month.[1] [R. S. Sec. 1793; 72 v. 51.]

(1) **Holidays.**—Courts may adjourn on a legal holiday. Jones v. State, 14 C. C. 35. But it is not unlawful to hold court on holiday. State v. Thomas, 61 O. S. 444.

Sec. 4574. [Procedure and rules.] The mode in which business shall be brought before the court shall be fixed by ordinance of the council or rule of court.[1] [R. S. Sec. 1794; 72 v. 51.]

(1) **Limitation.** — The requirement that a warrant must be founded on oath or affirmation. is not dispensed with by §§ 4574 and 4576 G. C. Eichenlaub v. State, 36 O. S. 140, 144.

Necessity of warrant in police court prosecutions, see Stief v. Cincinnati, 19 Dec. 484; 6 O. L. R. 602.

Sec. 4575. [Rules of the court.] The judge shall adopt such rules of practice and procedure as will give each party a proper statement of any charge against him and a full opportunity of being heard, which rules shall be placed in the court room. [R. S. Sec. 1795; 66 v. 177.]

Sec. 4576. [General powers.] The police court shall have power to issue process, preserve order, punish contempts, summon and impanel jurors, grant new trials [1] and motions in arrest of judgment, suspend execution of sentence upon notice of intention to apply for leave to file a petition in error,[2] and such other powers incident to the court of common pleas as may be necessary for the exercise of the jurisdiction herein conferred, and the enforcement of the judgments and orders of the court.[3] [R. S. Sec. 1791; 72 v. 51.]

(1) **New trial and motions.**— Granting new trials in Police Court is governed by same rules as those in Courts of Common Pleas in criminal cases. Germantown v. Basore, 22 C. C. 417.

Time for filing motion for new trial. See Evans v. State, 23 C. C. 103; 3 C. C. (N. S.) 23 (aff'd 68 O. S. 700).

(2) **Reviewable on weight of evidence.**—Judgments of a mayor of conviction for the violation of an ordinance may be reviewed on the weight of the evidence. Flatau v. Mansfield, 14 C. C. 592, 595. *Contra* Williams v. State, 25 O. S. 628. Since the decision in Williams v. State *supra*, the law has been changed by statute and that case no longer applies, and a conviction either in a police court or mayor's court may be reviewed on the weight of the evidence. Germantown v. Basore, 22 C. C. 417. See also Slaughter v. Columbus, 61 O. S. 53.

But a judge of police court having the opportunity to see the witnesses is best qualified to judge of their credibility, and his findings should not be disturbed unless man-

ifestly wrong. Evans v. State, 23 C. C. 103; Niefeld v. State, 23 C. C. 246.

(3) **Powers incident to Court of Common Pleas.**—See Germantown v. Basore, 22 C. C. 417, 421.

Powers in general.—By this section the police court has power to punish for contempt failure to answer subpœna. Woods v. State, 30 B. 290.

Written charges are not necessary. *Ib.*

Rule of police court limiting admittance to trials, denies accused a public hearing, see Fields v. State, 17 Dec. 16.

Power of police judge to revoke suspension of execution of sentence is not impaired or limited by passing of term in which such sentence is made. Schaefer v. State, 27 C. C. 791.

Sec. 4577 [Jurisdiction.] The police court shall have jurisdiction of, and to hear, finally determine, and to impose the prescribed penalty for, any offense under any ordinance of the city, and of any misdemeanor committed within the limits of the city, or within four miles thereof.[1] The jurisdiction of such court to make inquiry in criminal cases shall be the same as that of a justice of the peace. Cases in which the accused is entitled to a jury trial, shall be so tried, unless a jury be waived.[2] [R. S. Sec. 1787; 97 v. 7, § 1; 66 v. 176, § 166.]

(1) **What jurisdiction may be conferred.**—Police courts may be given jurisdiction of offenses committed outside city limits. *Ex parte* Hagenschneider, 7 N. P. 313; Fletcher v. State, 18 C. C. 674; Burch v. State, 7 N. P. 379.

But see *contra*, State v. Voris, 8 N. P. 16.

Police court has no jurisdiction to try criminal offenses committed more than four miles beyond the limit of the municipality. Hinckley v. State, 18 Dec. 19.

Jurisdiction conferred on police courts extends to petit larceny and all such inferior offenses as are not required to be prosecuted by indictment. Cole v. State, 29 O. S. 226; Davis v. State, 32 O. S. 24. But the court has no jurisdiction to try the question of the guilt or innocence of a person charged with a felony, but in such case must discharge, recognize or commit the defendant. State *ex rel.* v. Hamilton, 3 C. C. 10.

Information supported by oath.—One charged with a misdemeanor was prosecuted by information. The information being unsupported by oath or affirmation, held, a motion to quash will lie. Eichenlaub v. State, 36 O. S. 140.

Mistake in sentence.—See Lee v. State, 32 O. S. 113.

Suspended sentence.—See In re Pontius, 26 C. C. (N. S.) 178.

(2) **Jury.**—A police court of a city, in trying a person charged with a misdemeanor, committed outside the city, but within four miles thereof, does not err in overruling a challenge to the array of jurors,

made on the ground that jurors were drawn wholly from within the city limits. State v. Fendrick, 77 O. S. 298.

In cases of misdemeanors final judgment cannot be entered without submission to a jury or a written waiver of a jury by the accused. In re Hildebrand, 15 C. C. (N. S.) 187.

Where record silent as to demand for jury or waiver of jury, as to the jurisdiction where accused entitled to jury trial, unless waived, see Evans v. State, 3 C. C. (N. S.) 23.

Sec. 4578. [In what name prosecutions brought and conducted.] Prosecutions for offenses against the laws of the state shall be brought and conducted in the name of the state, and prosecutions for violations of city ordinances shall be brought and conducted in the name of the corporation.[1] In any case a new trial may be granted within the same time and for the same cause as in like cases in the court of common pleas. [R. S. Sec. 1792; 66 v. 177.]

(1) **Averments necessary in information.**—As to what must be averred in information. See Massa v. State, 3 C. C. 9.

Sec. 4579. [Jurors and witnesses; jurors' fees.] The police court shall have power to compel the attendance of witnesses, jurors, and parties. Jurors shall have the qualifications and be subject to the challenges of those in court of common pleas in like cases. They shall be selected, summoned and impaneled in accordance with an ordinance of the council,[1] or if no such ordinance is in force, in accordance with a rule of the court. They shall receive the same fees as are allowed jurors in the court of a justice of the peace in criminal cases, which shall be paid from the county treasury in state cases, and the city treasury in cases for the violation of ordinances, upon the certificate of the court or clerk thereof.[2] [108 v. 1203, 1210; R. S. Sec. 1798; 66 v. 177.]

(1) **Ordinance.**—Provisions of ordinance governing juries is exclusive. Where it does not provide for a struck jury, there is no authority for it. State *ex rel* v. Ermston, 4 C. C. 81.

Ordinance may provide that jurors drawn for the trial of any cause may be required to serve as jurors in any other cause during the term. Molitor v. State, 6 C. C. 263.

(2) **Payment of jury fees.**—When municipality and when State pays jury fees, see State *ex rel.* v. Cappeller, 5 B. 363.

Sec. 4580. [Witnesses' fees; how paid.] Witnesses in the police court shall be allowed the same fees as are allowed before justices of the peace in criminal cases. In ordinance cases said fees shall be paid from the city treasury and in state cases they shall be paid from the county treasury upon the certificate of the court or clerk thereof. [108 v. 1203, 1210; R. S. Sec. 1799; 66 v. 178.]

Sec. 4581. [Other fees; disposition of fees, fines, etc.] The fees of the police clerk and judge shall be the same as those allowed justices of the peace, and the fees of the marshal, chief of police, or other police officer of the municipality serving the writs or process of the court, shall be the same as those allowed constables. All fees, fines, forfeitures and expenses collected shall be disposed of and accounted for by the judge and clerk in the same manner as provided for a mayor under the provisions of section 4270 of the General Code. [108 v. 1203, 1210; R. S. Sec. 1800; 66 v. 178.]

Sec. 4582. [Recognizances.] In felonies, the court shall recognize such of the witnesses as will probably be required in the court of common pleas to appear in that court. One instrument, in which, under the penalty named, the witnesses shall severally undertake to appear before the court of common pleas of the county forthwith, or at the next term, as the case may be, shall be sufficient. Recognizances, whether of the accused or the witnesses, shall, when taken, be certified and entered on the journal, and forthwith delivered to the clerk of the court of common pleas, and neither coverture, nor minority, shall be a defense to any recognizance. [R. S. Sec. 1801; 66 v. 178.]

Sec. 4583. [Hearing in felonies.] In felonies committed in the county, the court shall have the powers of a justice of the peace to hear the case, and discharge, recognize or commit.[1] If upon such hearing the court is of the opinion that the offense is only a misdemeanor, and that the court may entertain jurisdiction of it under the preceding section, a plea of guilty of such misdemeanor may be received, and sentence and

judgment pronounced. If in such case the accused decline to enter such plea, the court, without discharging the accused shall cause the prosecuting attorney to immediately file in the court an information against the accused for such misdemeanor, on which charge he shall be tried in that court, after an entry has been made discharging him of the felony. [R. S. Sec. 1789.]

(1) **Cannot convict of felony.** —Police Court has no authority to convict a person charged with a felony. State v. Hamilton, 3 C. C. 10.

Sec. 4584. [When on charge of misdemeanor proof shows felony.] Where the charge is the commission of a misdemeanor, and the proof shows that the party has committed a felony, the court, upon the proper affidavit being filed, shall discharge the party as to the misdemeanor and admit him to bail or commit him, as the case may be, for the felony. [R. S. Sec. 1790.]

Sec. 4585. [Notarial powers.] The judge of police court shall have the same power to take acknowledgment of deeds, and other instruments of writing, administer oaths, and take and certify depositions, as a justice of the peace.[1] [R. S. Sec. 1787; 66 v. 176 § 166.]

(1) **Acknowledgments.** — See Crumbaugh v. Kugler, 2 O. S. 373; Moore v. Moore, 3 O. S. 154.

Sec. 4586. [Substitute when prosecuting attorney absent.] When there is a temporary inability or absence of the prosecuting attorney or a vacancy in the office by resignation, death or otherwise, the judge of police court shall appoint a competent member of the bar to perform the duties of the office.[1] Such appointee shall act until the removal of the inability or the return of such prosecuting attorney, and in case of vacancy, until his successor shall be chosen as provided by law and has duly qualified. Such appointee shall qualify in the same manner, shall have the same power and authority to discharge the same duties, be subject to the same liabilities, and shall receive the same salary as the officer whom he succeeds. In case of inability or temporary absence of such

prosecutor, the judge may deduct such amount from his salary. [R. S. Sec. 1815; 94 v. 69; 66 v. 179.]

(1) **Defective appointment.**— Where the judge has erred in making the appointment of an acting prosecutor, such appointee is nevertheless, a *de facto* officer. Ermston v. Cincinnati, 7 N. P. 635.

The finding of the judge that the prosecuting attorney is absent, as a condition precedent to appointment of an acting prosecutor, is not conclusive of the fact, in a suit by the appointee for compensation for his services. *Ib.*

Sec. 4587. [Probation officers.] In each municipality having a police court, the council, by ordinance, shall provide for the appointment of one or more persons to be known as probation officers. Probation officers shall devote their time to the interests of persons placed upon probation. Upon the order of the police court, they shall investigate the circumstances of any case that may come before the court for final jurisdiction. [99 v. 342, § 12.]

Sec. 4588. [Appointment, compensation; privilege of returning to service.] The probation officers shall be appointed by the police court, and serve at its pleasure. They shall receive such compensation as the council by ordinance prescribes. If a member of the police department is appointed probation officer, he shall have the privilege of returning at any time to the active service in the department and to the same rank and standing as he held at the time of appointment as probation officer. [99 v. 342, § 12.]

Sec. 4589. [Dispatch of business; interpreter.] The business of the court shall be dispatched with all the speed consistent with a full, fair trial or hearing of the cases. In cities where there is more than one police judge, the judges of the police court may appoint an interpreter[1] for the court, and in case they fail to agree, the clerk of the court may appoint such interpreter, for a term of two years, who shall receive as compensation fifteen hundred dollars per year, payable monthly out of the city treasury upon the certificate of the court. The judges may, for adequate cause, remove

him. In all cases in which said interpreter is used a fee of one dollar shall be taxed in the bill of costs, and, when collected, paid into the municipal treasury. [108 v. 1203, 1211; R. S. Sec. 1796; 97 v. 387; 90 v. 256; 88 v. 99; 66 v. 177.]

(1) **Mandamus** against the police judges is the proper recourse for one claiming to be illegally excluded from this office. Rubinstein v. Wright, 17 C. C. (N. S.) 261.

CHAPTER 3.

CLERK OF POLICE COURT.

Sec. 4590. [Police clerk, election and term.] In each municipality where a clerk of police court is provided by law, such clerk shall be chosen for a term of two years, commencing on the first of January next after his election. Except when otherwise provided by law, the appointment, powers and duties of the clerk of police court shall be as prescribed by the provisions of this chapter.[1] [96 v. 95, § 230; 98 v. 172, § 222; 96 v. 93, § 222.]

(1) See note to § 4567.

Sec. 4591. [Vacancy, how filled.] A vacancy in the office of clerk of the police court shall be filled by the mayor for the unexpired term. [96 v. 95, § 230.]

Sec. 4592. [Bond and compensation.] The clerk of police court shall give such bonds, with sureties, as may be required by the council and county commissioners, and shall receive for his services, in city cases, a fixed salary[1] to be prescribed by ordinance, not to exceed two thousand dollars per annum, and for state cases such further allowance, not to exceed two thousand dollars per annum, payable from the county treasury, as the county commissioners deem proper. [R. S. Sec. 1808; 97 v. 101; 93 v. 615; 91 v. 158, 195; 89 v. 19; 88 v. 161; 84 v. 27; 83 v. 68; 66 v. 178.]

(1) **The salary of a police court clerk** elected at the first election after the municipal code went into effect may be increased by the city council then in office. State v. Madigan, 16 C. C. (N. S.) 202.

Sec. 4593. [Powers, salary, and bond of deputy clerk.] A deputy clerk of the police court may perform any duty of the principal.[1] He shall receive such compensation as the council

prescribes, not to exceed fifteen hundred dollars nor less than seven hundred dollars per year. The principal may take from him an undertaking, with sureties, for the faithful performance of his official duties. [R. S. Sec. 1809; 92 v. 401; 85 v. 7; 83 v. 68; 67 v. 72.]

(1) **Affidavit.**—Power of deputy clerk as to taking. Feasel v. State, 6 N. P. (N. S.) 321.

Sec. 4594. [Powers of the clerk.] When an affidavit is filed with him for a peace warrant, search warrant, or charging any person with the commission of an offense, the clerk of the police court shall have power to issue a warrant under the seal of such court to arrest the accused or search the place described. He may admit to bail any person accused of a misdemeanor or violation of an ordinance for his appearance at the next sitting of the police court or mayor, as the case may be, and the bond given shall continue until the case is finally disposed of. He may admit to bail any person accused of a felony when the amount of bail has been fixed by the court or mayor, as the case may be. He may appoint one or more deputies to be approved by the council, administer oaths and perform all other things which may be performed by the clerk of the court of common pleas in like cases.[1] [R. S. Sec. 1804; 92 v. 98; 84 v. 26, 27; 83 v. 68; 67 v. 72; 66 v. 178.]

(1) **Section constitutional.**—Issuing warrant is a ministerial and not a judicial act. Molitor v. State, 6 C. C. 263.

Sec. 4595. [Duties as to papers.] He shall file and preserve all information, process, motions, and papers of every description used in the court, except such as he may be required to transmit to another court. [R. S. Sec. 1805; 66 v. 179.]

Sec. 4596. [Journal; record.] He shall keep a journal of all orders and judgments of the court. On the opening of the court on any day, the minutes of the preceding day shall be read, and signed by the judge, the errors, if any, being first corrected. The entries on the journal in any case, in connection with the information and other papers, shall constitute

and have the force of, a final record. [R. S. Sec. 1806; 66 v. 179.]

Sec. 4597. [Inability or absence of clerk.] When there is a temporary inability or absence of the clerk and no deputy has been appointed, the judge of such court may appoint a competent person, who, upon giving the bond and taking the oath of office prescribed, shall have the powers and perform the duties of the clerk. The person so appointed shall be paid from the city treasury, on the order of the council, at the same rate the clerk is paid for similar services. Such appointment shall be valid only until the inability is removed or the clerk returns. [R. S. Sec. 1810; 94 v. 69; 66 v. 179.]

Sec. 4598. [When clerk and deputy not to practice.] Neither the clerk nor his deputy shall be concerned as counsel or agent in the prosecution or defense of any case that is or has been before the court. [R. S. Sec. 1811; 66 v. 179.]

Sec. 4599. [Report.] On the first Monday of each month, he shall make, under oath, to the city auditor, a report of all fines, penalties, fees, and costs imposed by the court in city cases, showing in what cases they have been paid, and in what cases they remain unpaid, and, at the same time, he shall make a like report to the county auditor as to state cases. He shall immediately pay into the city and county treasuries, respectively, the amount then collected, or which may have come into his hands, from all sources, during the preceding month. [R. S. Sec. 1807; 66 v. 179.]

DIVISION VI.

MISCELLANEOUS.

CHAPTER 1.

PENSION FUNDS.[1]

CITIES AND VILLAGES.

Firemen's Pension Fund.

Sec. 4600. [Trustees, how composed.] In any municipal corporation, having a fire department supported in whole or in part at public expense, the council by ordinance may declare the necessity for the establishment and maintenance of a firemen's pension fund. Thereupon a board of trustees, who shall be known as "trustees of the firemen's pension fund" shall be created, which shall consist of the director of public safety, and in villages of the fire chief, and five other persons, members of such department. But upon petition of a majority of the members of the fire department, such director or fire chief may designate a less number than five to be elected trustees. [97 v. 242, § 1 a, b; 95 v. 223.]

(1) **Power of legislature to change pension laws.**—Under former pension laws it was held within the power of the legislature to change or wholly abolish pensions to disabled firemen. Price v. Farley, 22 C. C. 48.

Volunteer Firemen.—Village or city council without right to provide pensions for volunteer firemen. Op. Atty. Gen. (1914), p. 511.

When firemen entitled to benefits of state industrial insurance. See Op. Atty. Gen. (1922) p. 198.

Special acts creating a school teachers' pension fund limited in operation to certain school districts were held unconstitutional. State *ex rel. v.* Hubbard, 22 C. C. 252 aff'd, 65 O. S. 574.

Enforced contributions invalid.—Under a special school teachers' pension act, it was held that deductions from salaries to support the fund, made without consent of the teachers, is forbidden by § 2, Art. 12, and the bill of rights of the Const. of Ohio. State *ex rel.* v. Hubbard, 22 C. C. 252 (aff'd, 65 O. S. 574), and teachers accepting positions after notice of such deductions, are not estopped to attack validity of law. *Ib.*

Sec. 4601. [Election of members, notice.] On the second Monday of the month following the determination of such director or fire chief to create such fund, an election shall be held to choose five trustees from the department. The director of public safety or fire chief, as the case may be, shall give notice thereof by posting it in a conspicuous place at the headquarters of the department and at the house of each company composing it. Between the hours of nine o'clock in the forenoon and six o'clock in the afternoon on the day designated, each person in the fire department, who, by its rules, is designated a member thereof, shall send or cause to be sent by mail or otherwise, in writing the names of five persons, members of the department who are his choice. [97 v. 242, § 1b; 95 v. 223.]

Sec. 4602. [Canvass of the vote; tie vote.] All votes so cast shall be counted and canvassed by the director of public safety or fire chief, as the case may be, who shall announce the result, and the five members receiving the highest number of votes shall be members of the board of trustees of the firemen's pension fund for the ensuing year. If any two persons receive a tie vote for the office, it shall be decided by lot or in any other way agreed upon by the persons for whom such tie vote was cast. [97 v. 242, § 1b; 95 v. 223.]

Sec. 4603. [Term of members; vacancies; general duties.] The members so elected shall serve for one year, or until their successors are elected, and the election for such successors shall be held each year upon the second Monday of the same month in which the first election is held. In case of vacancy by death, resignation or otherwise, among the members so elected, the remaining members shall choose a successor until the next election. Such board of trustees shall administer and distribute the firemen's pension fund. [97 v. 242, § 1b; 95 v. 223.]

Sec. 4604. [Organization of board; secretary.] The director of public safety or fire chief, as the case may be, shall be president of the board of trustees, and the secretary, clerk or

corresponding officer of the fire department shall be secretary. In case there is no such officer, the trustees shall appoint a secretary. The secretary shall keep a full record of the proceedings of the board of trustees of the firemen's pension fund, and the board may fix his compensation therefor, to be paid from such fund. [97 v. 242, § 1a; 95 v. 223.]

Sec. 4605. [Tax to maintain fund; how levied.][1] In each municipality availing itself of these provisions, to maintain the firemen's pension fund, the council thereof each year, in the manner provided by law for other municipal levies, and in addition to all other levies authorized by law, may levy a tax of not to exceed three-tenths of a mill on each dollar upon all the real and personal property, as listed for taxation in such municipality. In the matter of such levy, the board of trustees of the firemen's pension fund shall be subject to the provisions of law controlling the heads of departments in the municipality, and shall discharge all the duties required of such heads of departments. [97 v. 243, 1c; 95 v. 223.]

(1) Trustees of firemen's pension fund are without authority to borrow money with which to pay pensions. Op. Atty. Gen. (1920), p. 323.

Sec. 4606. [Levy of tax and portion of Dow tax which may be used.] A failure of such board of trustees to act in the manner required by law of the heads of departments in such municipality in the making of such levy shall not limit the power of council to make it. If the council fails in any year to make the maximum levy herein authorized, in addition to the amount realized therefrom, there shall be passed to the credit of the firemen's pension fund such portion of the annual tax on the business of trafficking in intoxicating liquors required by law to be passed to the credit of the general fund in the municipality, as when added to the amount realized from such levy for the firemen's pension fund, will equal the amount that would be realized from a full levy of three-tenths of a mill, or such part thereof as is necessary to meet the pension pay roll, but the portion used of such tax on the business of trafficking in intoxicating liquors shall not exceed sixteen-

thirtieths of the amount of such tax required to be passed to the credit of the general fund in the municipality. [97 v. 243, § 1c; 95 v. 223.]

Sec. 4607. [When fines, penalties and license fees shall belong to fund.] All fines imposed upon members of the fire department of the municipality by discipline or punishment by the authority having charge or control thereof, and the proceeds of all suits for penalties for the violation of a statute of the state or ordinances of such municipality with the execution of which such department is charged, and licenses or other fees payable thereunder, shall be credited to the pension fund. [97 v. 243, § 1c; 95 v. 223.]

Sec. 4608. [Trustees of fund may receive donations.] The trustees of the fund may take by gift, grant, devise or bequest, moneys, or real or personal property, upon such terms as to the investment or expenditure thereof as is fixed by the grantor or determined by such trustees. [97 v. 243, § 1c; 95 v. 223.]

Sec. 4609. [Contributions from members of department.] The trustees of the fund may also receive such uniform amounts from each person designated by the rules of the fire department, a member thereof, as he voluntarily agrees to, to be deducted from his monthly pay, and the amount so received shall be used as a fund to increase the pension which may be granted to such person or his beneficiaries. [97 v. 243, § 1c; 95 v. 223.]

Sec. 4610. [Treasurer of municipality, custodian of fund.] The treasurer of the municipality shall be the custodian of the fireman's pension fund, and shall pay it out upon the proper order of the trustees thereof. The treasurer shall execute a bond in such sum and form as is satisfactory to the trustees, conditioned for the faithful performance of his duties with respect to the fund. [97 v. 244, § 1d; 95 v. 223.]

Sec. 4611. [How fund may be invested.] The trustees of the fund may invest moneys received by them, other than

those raised in taxation, in interest bearing bonds of the United States or of this state, or of any county, township, school district or municipal corporation in the state. [97 v. 244, § 1e; 95 v. 223.]

Sec. 4612. [Rules and regulations.] Such trustees shall make all rules and regulations for the distribution of the fund, including the qualifications of those to whom any portion of it shall be paid and the amount thereof, but no rules or regulations shall be in force until approved by the director of public safety or the fire chief of the municipality, as the case may be.[1] [97 v. 244, § 1f; 95 v. 223.]

(1) **Qualifications** under former statutes, see State v. Pension Fund Trustees, 18 C. C. 887.

Review of decision of board as to person entitled to pension, not allowed unless expressly authorized, see Karb v. State, 54 O. S. 383.

Reduction of pension.—A fireman who has been retired and regularly put upon the pension roll in accordance with the laws of the state and the regulations of the trustees of the firemens' pension fund, cannot thereafter be discharged from the fire department for violating one of its rules before his retirement, and his pension be reduced. State, ex rel., v. Trustees, 20 C. C. (N. S.) 13.

Sec. 4613. [Beneficiaries of existing funds.] All persons drawing pensions or entitled to them from existing fireman's pension fund shall be and remain beneficiaries in pension funds credited under this chapter in the same municipality where they are beneficiaries in such existing funds, and shall receive such amounts and be subject to the rules and regulations adopted by the board of trustees. [97 v. 244, § 1g; 95 v. 223.]

Sec. 4614. [Boards hereunder shall be successors of existing boards.] Upon the organization of a board of trustees of the fireman's pension fund, under this chapter, all moneys, credits, investments and property of every kind and description held by the board of an existing fireman's pension fund in the municipality shall by such existing board be delivered, transferred and conveyed to the new board, and the new board shall be the successor of the existing board as to the ownership of all such property. [97 v. 244, § 1g; 95 v. 223.]

Sec. 4615. [Annual report to council.] The trustees of the fireman's pension fund shall make a report to the council of the municipality of the condition of the fund on the first day of January of each year. [97 v. 244, § 1e; 95 v. 223.]

Police Relief Fund.

Sec. 4616. [Trustees, how composed.] In any municipal corporation, having a police department supported in whole or in part at public expense, the council by ordinance may declare the necessity for the establishment and maintenance of a police relief fund. Thereupon a board of trustees, who shall be known as "trustees of the police relief fund" shall be created, which in cities shall consist of the director of public safety, and in villages of the marshal, and five other persons, members of such department. But upon petition of a majority of the members of the police department, such director or marshal may designate a less number than five to be elected trustees. [97 v. 245, § 2a; 95 v. 226.]

Sec. 4617. [Election of members, notice.] On the second Monday of the month following the determination of such director or marshal to create such fund, an election shall be held to choose five trustees from the department. The director of public safety or marshal, as the case may be, shall give notice thereof by posting it in a conspicuous place at the headquarters of the department and at the various station houses within the municipality. Between the hours of nine o'clock in the forenoon and six o'clock in the afternoon on the day designated, each person in the police department, who, by its rules, is designated a member thereof, shall send, or cause to be sent, by mail or otherwise, in writing, the names of five persons, members of the department, who are his choice. [97 v. 245, § 2b; 95 v. 226.]

Sec. 4618. [Canvass of the vote; tie vote.] All votes so cast shall be counted and canvassed by the director of public safety or marshal, as the case may be, who shall announce the result, and the five members receiving the highest number of votes shall be members of the board of trustees of the police

relief fund for the ensuing year. If any two persons receive a tie vote for such office, it shall be decided by lot or any other way agreed upon by the persons for whom such tie vote was cast. [97 v. 245, § 2b; 95 v. 226.]

Sec. 4619. [Term of members; vacancies; general duties.] The members so elected shall serve for one year, or until their successors are elected, and the election for such successors shall be held each year upon the second Monday of the same month in which the first election is held. In case of vacancy by death, resignation, or otherwise, among the members so elected, the remaining members shall choose a successor until the next election. Such board of trustees shall administer and distribute the police relief fund.[1] [97 v. 246, § 2b; 95 v. 226.]

(1) **Mandamus to enforce payment.**—A pension being in the nature of a gratuity there is no legal liability for its payment which can be enforced in an action for money, but the remedy for recovery of a pension, payment of which has been wrongfully discontinued, is by mandamus. State, ex rel., v. Holmes, 23 C. C. (N. S.) 133; 5 Oh. App. 1; (aff'd, Holmes v. State, 93 O. S. 480).

Right of action for writ of mandamus limited to six years from the time when right of action accrued. *Ib.*

Sec. 4620. [Organization; secretary.] The director of public safety or marshal, as the case may be, shall be president of the board of trustees, and the secretary or corresponding officer of the police department shall be secretary. In case there is no such officer, the trustees shall appoint a secretary. The secretary shall keep a full record of the proceedings of the board of trustees of the police relief fund, and the board may fix his compensation therefor, to be paid from such fund. [97 v. 246, § 2b; 95 v. 226.]

Sec. 4621. [Tax to maintain fund; how levied.][1] In each municipality availing itself of these provisions, to maintain the police relief fund, the council thereof each year, in the manner provided by law for other municipal levies, and in addition to all other levies authorized by law, may levy a tax of not to exceed three-tenths of a mill on each dollar upon all

the real and personal property as listed for taxation in the municipality. In the matter of such levy, the board of trustees of the police relief fund shall be subject to the provisions of law controlling the heads of departments in such municipality, and shall discharge all the duties required of such heads of departments. [97 v. 246, § 2c; 95 v. 226.]

(1) Trustees of police relief fund are without authority to borrow money with which to pay pensions. Op. Atty. Gen. (1920), p. 323.

Sec. 4622. [Levy of tax and portion of Dow tax which may be used.] A failure of such board of trustees to act in the manner required by law of the heads of departments in such municipality in the making of such levy shall not limit the power of council to make it. If the council fails in any year to make the maximum levy herein authorized, in addition to the amount realized therefrom, there shall be passed to the credit of the police relief fund such portion of the annual tax on the business of trafficking in intoxicating liquors required by law to be passed to the credit of the general fund in the municipality, as, when added to the amount realized from such levy for the police relief fund, will equal the amount that would be realized from a full levy of three-tenths of a mill, or such part thereof as is necessary to meet the pension pay roll, but the portion used of such tax on the business of trafficking in intoxicating liquors shall not exceed thirteen-thirtieths of the amount of such tax required to be passed to the credit of the general fund in such municipality. [97 v. 246, § 2c; 95 v. 226.]

Sec. 4623. [What fines, penalties and license fees belong to fund.] All fines imposed upon members of the police department of the municipality by way of discipline or punishment by the authority having charge or control thereof, and all rewards, fees, or proceeds of gifts and emoluments allowed by the authority in charge or control of the department, paid and given for or on account of any extraordinary service of any member of the force, and moneys arising from the sale of unclaimed property or money, after deducting all expenses

incident thereto, shall be credited to the police relief fund. [97 v. 247, § 2c; 95 v. 226.]

Sec. 4624. [Trustees of fund may receive donations.] The trustees of the fund may take by gift, grant, devise or bequest, moneys or real or personal property, upon such terms as to the investment or expenditure thereof as is fixed by the grantor or determined by the trustees. [97 v. 247, § 2c; 95 v. 226.]

Sec. 4625. [Contributions from members of department.] The trustees of the fund may also receive such uniform amounts from each person designated by the rules of the police department, a member thereof, as he voluntarily agrees to, to be deducted from his monthly pay, and the amount so received shall be used as a fund to increase the pension which may be granted to such person or his beneficiaries, or in the discretion of such trustees money derived from such monthly deductions shall be used to relieve members of the force who contribute thereto when sick or disabled from the performance of duty, for funeral expenses, relief of their families in case of death or for pensions when honorably retired from the force. [97 v. 247, § 2c; 95 v. 226.]

Sec. 4626. [Treasurer of municipality, custodian of fund.] The treasurer of the municipality shall be the custodian of the police relief fund, and shall pay it out upon the proper order of the trustees thereof. The treasurer shall execute a bond in such sum and form as is satisfactory to the trustees, conditioned for the faithful performance of his duties with respect to the fund. [97 v. 247, § 2d; 95 v. 226.]

Sec. 4627. [How fund may be invested.] The trustees of the fund may invest moneys received by them, other than those raised by taxation, in interest bearing bonds of the United States, or of this state, or of any county, township, school district or municipal corporation in the state. [97 v. 247 § 2e; 95 v. 226.]

Sec. 4628. [Rules and regulations.][1] Such trustees shall make all rules and regulations for distribution of the fund,

including the qualification of those to whom any portion of the fund shall be paid and the amount thereof, with power also to give credit for prior continuous actual service in the fire department or in any other department of the city rendering service in fire prevention, but, no rules or regulations shall be in force until approved by the director of public safety or the marshal of the municipality, as the case may be. [106 v. 557; 97 v. 248, § 2f; 95 v. 226.]

(1) Retired policeman may receive from fund and serve as park policeman. Op. Atty. Gen. (1918), p. 1008.

Power of trustees to increase pensions. See Op. Atty. Gen. (1921), p. 113.

Sec. 4629. [Beneficiaries of existing funds.] All persons drawing pensions or entitled to them or other relief from existing police relief or pension funds shall be and remain beneficiaries in pension funds created under this subdivision in the same municipality where such persons are beneficiaries in such existing funds, and shall receive such amounts and be subject to the rules and regulations adopted by the board of trustees.[1] [97 v. 248, § 2g; 95 v. 226.]

Claim enforced by mandamus.—A pensioner suspended by a board acting without authority can enforce payment of his pension by mandamus proceedings, subject, however, to the statute of limitations requiring action to be brought within six years from the accrual of the right. State, ex rel., v. Holmes, 23 C. C. (N. S.) 133; 5 Ohio App. 1; (aff'd, Holmes v. State, ex rel., 93 O. S. 480).

Sec. 4630. [Boards hereunder shall be successors of existing boards.] Upon the organization of a board of trustees of the police relief fund, under this subdivision, all moneys, credits, investments and property of every kind and description held by the board of an existing police relief fund in the municipality shall by the existing board be delivered, transferred and conveyed to the new board, and the new board shall be the successor of the existing board as to the ownership of all such property. [97 v. 248 § 2g; 95 v. 226.]

Sec. 4631. [Annual report to council.] The trustees of the police relief fund shall make a report to the council of the

municipality of the condition of the fund on the first day of January of each year. [97 v. 248 § 2e; 95 v. 226.]

Sanitary Police Pension Fund.

Sec. 4632. [Trustees, how composed.] In any municipal corporation, having a sanitary police force,[1] supported in whole or in part at public expense, the council by ordinance may declare it necessary to establish and maintain a sanitary police pension fund. Thereupon a board of trustees, who shall be known as "trustees of the sanitary police pension fund" shall be created, which shall consist of the board or officer having charge or control of the health department in such municipality and five persons, members of the sanitary police force. But upon petition of a majority of the members of the sanitary police force, such board or officer, as the case may be, may designate a less number than five to be elected trustees. [97 v. 248, § 3a; 95 v. 230.]

(1) **Pension fund.**—A municipal corporation having but one sanitary policeman cannot provide a sanitary police pension fund. Op. Atty. Gen. (1914), p. 946.

Sec. 4633. [Election of members, notice.] On the second Monday of the month following the determination of such board or officer to create such fund, an election shall be held to choose five trustees from the force. Such board or officer, as the case may be, having charge or control of the health department, shall give notice thereof by posting it in a conspicuous place at the headquarters of such force. Between the hours of nine o'clock in the forenoon and six o'clock in the afternoon of the day designated, each person in the sanitary police force, who by its rules is designated a member thereof, shall send or cause to be sent by mail or otherwise in writing, the names of five persons, members of the force who are his choice. [97 v. 248, § 3b; 95 v. 230.]

Sec. 4634. [Canvass of the vote; tie vote.] All votes so cast shall be counted and canvassed by the board or officer, as the case may be, having charge or control of the health department, who shall announce the result, and the five mem-

bers receiving the highest number of votes shall be members of the board of trustees of the sanitary police pension fund for the ensuing year. If any two persons receive a tie vote for such office, it shall be decided by lot or in any other way agreed upon by the persons for whom such tie vote was cast. [97 v. 249, § 3b; 95 v. 230.]

Sec. 4635. [Term of members; vacancies; general duties.] The members so elected shall serve for one year, or until their successors are elected, and the election for such successors shall be held each year upon the second Monday of the same month in which the first election is held. In case of vacancy by death, resignation, or otherwise, among the members so elected, the remaining members shall choose a successor until the next election. Such board of trustees shall administer and distribute the sanitary police pension fund. [97 v. 249, § 3b; 95 v. 230.]

Sec. 4636. [Organization; secretary.] The presiding officer of the board, or the officer, as the case may be, having charge or control of the health department, shall be president of the board of trustees, and the secretary or corresponding officer of the health department shall be secretary. In case there is no such officer, the trustees shall appoint a secretary. The secretary shall keep a full record of the proceedings of the board of trustees of the sanitary police pension fund, and the board may fix his compensation therefor, to be paid from such fund. [97 v. 249, § 3b; 95 v. 230.]

Sec. 4637. [Tax to maintain fund; how levied.] In each municipality availing itself of these provisions, to maintain the sanitary police pension fund, the council thereof each year, in the manner provided by law for other municipal levies, and in addition to all other levies authorized by law, may levy a tax of not to exceed one-thirtieth of a mill on each dollar upon all the real and personal property, as listed for taxation in such municipality. In the matter of such levy, the board of trustees of the sanitary police pension fund shall be subject to the provisions of law controlling the heads of depart-

ments in such municipality, and shall discharge all the duties required of such heads of departments. [97 v. 249 § 3c; 95 v. 230.]

Sec. 4638. [Levy of tax and portion of Dow tax which may be used.] A failure of such board of trustees to act in the manner required by law of the heads of departments of such municipality, in the making of such levy shall not limit the power of council to make it. If the council fails in any year to make the maximum levy herein authorized, in addition to the amount realized therefrom, there shall be passed to the credit of the sanitary police pension fund such portion of the annual tax on the business of trafficking in intoxicating liquors required by law to be passed to the credit of the general fund in the municipality, as, when added to the amount realized from such levy for the sanitary police pension fund will equal the amount that would be realized from a full levy of one-sixtieth of a mill, or such part thereof as is necessary to meet the pension pay roll, but the portion used of such tax on the business of trafficking in intoxicating liquors shall not exceed one-thirtieth of the amount of the tax required to be passed to the credit of the general fund in such municipality. [97 v. 249, § 3c; 95 v. 230.]

Sec 4639. [What fines, penalties and license fees belong to fund.] All fines imposed upon any member of the sanitary police force of the municipality by way of discipline or punishment by the authority having charge or control thereof, and the proceeds of all suits for penalties for the violation of a statute of the state or ordinances of the municipality with the execution of which the health department is charged, and licenses or other fees payable thereunder, shall be credited to such pension fund. [97 v. 250, § 3c; 95 v. 230.]

Sec. 4640. [Trustees of fund may receive donations.] The trustees of the fund may take by gift, grant, devise or bequest, moneys or personal property, upon such terms as to the investment or expenditure thereof as is fixed by the grantor or determined by such trustees. [97 v. 250, § 3c; 95 v. 230.]

Sec. 4641. [Contributions from members of force.] The trustees of the fund may also receive such uniform amounts from each person designated by the rules of the sanitary police force, a member thereof, as he voluntarily agrees to, to be deducted from his monthly pay, and the amount so received shall be used as a fund to increase the pension which may be granted to such person or his beneficiaries. [97 v. 250, § 3c; 95 v. 230.]

Sec. 4642. [Treasurer of municipality, custodian of fund.] The treasurer of the municipality shall be the custodian of the sanitary police pension fund, and shall pay it out upon the proper order of the trustees thereof. The treasurer shall execute a bond in such sum and form as is satisfactory to the trustees, conditioned for the faithful performance of his duties with respect to the fund. [97 v. 250, §3d; 95 v. 230.]

Sec. 4643. [How fund may be invested.] The trustees of the fund may invest moneys received by them, other than those raised by taxation, in interest-bearing bonds of the United States or of this state, or of any county, township, school district or municipal corporation in the state. [97 v. 251, § 3e; 95 v. 230.]

Sec. 4644. [Rules and regulations.] Such trustees shall make all rules and regulations for the distribution of the fund, including the qualifications of those to whom any portion of the fund shall be paid and the amount thereof, but no rules or regulations shall be in force until approved by the board or officer, as the case may be, having charge or control of the health department. [97 v. 251, § 3f; 95 v. 230.]

Sec. 4645. [Beneficiaries of existing funds.] All persons drawing pensions or entitled to them or other relief from existing sanitary police pension funds shall be and remain beneficiaries in pension funds created under this chapter in the same municipality where such persons are beneficiaries in the existing funds, and shall receive such amounts and be subject to the rules and regulations adopted by the board of trustees. [97 v. 251, § 3g; 95 v. 230.]

Sec. 4646. [Boards shall be successors of existing boards.] Upon the organization of a board of trustees of the sanitary police pension fund, under this chapter all moneys, credits, investments and property of every kind and description held by the board of an existing sanitary police pension fund in such municipality shall by such existing board be delivered, transferred and conveyed to the new board, and such new board shall be the successor of the existing board as to the ownership of all such property. [97 v. 251, § 3g; 95 v. 230.]

Sec. 4647. [Annual report to council.] The trustees of the sanitary police pension fund shall make a report to the council of the municipality of the condition of such fund on the first day of January of each year. [97 v. 251, § 3e; 95 v. 230.]

Fireman's Indemnity Fund.

Sec. 4647-1. [Creation of firemen's indemnity fund.][1] That in all municipalities having no firemen's pension fund created under the provisions of chapter I, title 12, division 6 of the General Code of Ohio, and having and maintaining therein a fire department supported in whole or in part at public expense, a firemen's indemnity fund shall be created and disbursed as herein provided. [109 v. 90.]

(1) When firemen entitled to benefits of state industrial insurance. See Op. Atty. Gen. (1922), p. 198.

Sec. 4647-2. [Trustees of firemen's indemnity fund.] In all municipalities coming within the provisions of this act there shall be created a board of trustees to be known as "Trustees of Firemen's Indemnity Fund," which board shall consist of the director of public safety in municipalities having such officer, and the chief of the fire department in all other municipalities, who shall be the presiding officer of such board; and five other persons, members of the fire department, therein, who shall be elected and serve as provided in sections 4601, 4602, 4603, of the General Code herein. The board shall elect its secretary from any of its own members. [109 v. 90.]

Sec. 4647-3. [Tax levy for fund; minimum amount.] The indemnity fund shall consist of an amount of not less than

three ten-thousandths of one per cent of the total tax valuation of each municipality, but in no case shall such fund be less than four hundred dollars ($400.00). [109 v. 90.]

Sec. 4647-4. [Council authorized to levy tax; annual levy.][1] The council or other authority charged with the duty of levying municipal taxes shall at the time next occurring after the creation of such board, and in the manner provided by law for the levying of other taxes for municipal purposes, levy not more than three-tenths of one mill upon each dollar of the taxable property in such municipality, provided that the total of said indemnity fund shall be raised in not less than four years. When the total fund has been once raised the said authorities shall annually thereafter make such levy as shall bring the amount of the indemnity fund to the amount provided for in this act, all of which levies shall be in addition to all other levies provided by law, and shall not be limited by any law restricting such levies; provided, however, that should the said council or other authority at any time fail or refuse to make and certify the necessary levy for the creation or maintenance of said indemnity fund the said board of firemen's indemnity fund may make and certify to the county auditor the necessary levy for such purposes and such county auditor shall place the same upon the tax duplicate and cause the same to be levied and assessed against the taxable property within the municipality in the same manner as though such levy had been made and certified by the council or other taxing authority; and the taxes when so levied and collected shall be distributed and paid into said indemnity fund. [109 v. 90.]

(1) Levy for firemen's indemnity fund. See Op. Atty. Gen. (1922), p. 164.

Sec. 4647-5. [Custodian of funds.] The custodian of the other funds of such municipality shall be the custodian of said firemen's indemnity fund, and before receiving said funds such custodian shall give an additional bond therefor with sureties thereon to the approval of the said board, and in such amount as said board shall designate, conditioned that such custodian will keep and disburse said fund, as in this act

provided, and upon surrendering said office turn over to his successor the amount remaining therein. [109 v. 90.]

Sec. 4647-6. [Investment of funds.] The custodian of said firemen's indemnity fund shall invest the same, upon the orders of the said board, in bonds of the United States, state of Ohio, or of any county, township or municipal corporation of the state, or upon such direction may leave said funds with any bank or other financial institution of the state; provided, however, that said board may direct that a portion of said funds be so invested and the balance thereof left with such financial institution or institutions and said custodian may require security from any such bank or other financial institution with which any part of said fund shall be left. [109 v. 90.]

Sec. 4647-7. [Disbursement of funds.] All accruing interest on said funds shall be added thereto and said funds shall be disbursed and paid out by said custodian upon the orders only of the said board of firemen's indemnity fund. [109 v. 90.]

Sec. 4647-8. [Beneficiaries of fund, who shall be; allowances.][1] The beneficiaries of any such firemen's indemnity fund shall be members of the fire department or their dependents who shall be entitled to be paid the amounts following:

For total disability of a fireman, sustained while in the discharge of his duties as fireman, the sum of two-thirds of his salary or average earnings, which shall in no case exceed eighteen ($18.00) per week, and which shall be fixed and determined by the said board of firemen's indemnity fund. For partial disability such an amount per week as shall be fixed by the board of firemen's indemnity fund which in no case shall exceed ten ($10.00) dollars per week. Provided, however, that no such pension shall be paid to a fireman under full salary during the time of any such disability.

To the widow of any fireman killed while in the discharge of his duties as fireman, or who dies from exposure or injury received while in the discharge of such duty, a sum not to exceed twenty-five ($25.00) dollars per month, so long as she

remains his widow, and the further sum of not to exceed ten ($10.00) dollars per month for each dependent child under sixteen years of age.

Nothing in this act contained shall be deemed to preclude or limit any municipality from availing itself of the provisions of chapter I, title 12, division 6 of the General Code of Ohio, and a municipality having a firemen's indemnity fund created and maintained under the provisions of this act may at any time avail itself of the said provisions of the General Code and thereupon the provisions of this act shall not apply to such municipalities. [109 v. 90.]

(1) Indemnity of firemen; how determined. See Op. Atty. Gen. (1922), p. 37.

Sec. 4647-9. [Laws applicable.] The board of trustees in determining the rules and regulations for the addition and disposition of the indemnity funds shall be governed as far as applicable by sections 4607 and 4608 of the General Code. [109 v. 90.]

CHAPTER 2.

PUBLIC BUILDINGS.

CITIES AND VILLAGES.

Sec. 4648. [Examination of public buildings as to safety in case of fire.] On application of the owner or person having control of an opera house, hall, theater, church, schoolhouse, college, academy, seminary, infirmary, sanitarium, children's home, hospital, medical institute, asylum, or other buildings used for the assemblages or betterment of people in a municipal corporation, the mayor, civil engineer, and chief engineer of the fire department shall carefully make a joint examination thereof to ascertain the means provided for the speedy and safe egress of persons at any time there assembled, and for extinguishing fire at or in such place. If the corporation has no such engineer, the mayor and two members of council shall make such examination.[1] [R. S. Sec. 2568; 90 v. 3; 74 v. 61; 62 v. 139.]

(1) **Power of municipality** to provide for inspection of buildings, see §§ 3636, 3638, 3639, *ante*.

Sec. 4649. [Certificate of safety.] Upon such examination, if it is found that such building is abundantly provided with means for speedy and safe egress of such persons, and, if above the first floor, that it is provided therein with water or other equally efficient agency, and proper means to apply it, so that fire at such place can be immediately extinguished, or if the assembly rooms of such church are situated upon the ground floor, with a sufficient number of low windows, in their opinion, provided for, to secure safe and easy means of escape in case of alarm, they or a majority of them, shall issue to such owner or person having control, a certificate of the fact, which shall continue in force one year, unless sooner revoked by council. [R. S. Secs. 2568, 2569; 62 v. 139.]

Sec. 4650. [Re-examination in case of change in building.] If a change or alteration is made in such building, the owner or person having charge of it shall notify the mayor of the fact, who shall cause to be made a re-examination in all respects like that provided for in the preceding section, and if upon such examination such owner, or person having control, is entitled to such certificate, it shall be issued to him, with like effect. [R. S. Sec. 2570; 62 v. 139.]

Sec. 4651. [Appeal from refusal to issue certificate.] If any owner or person having control of such place, feels himself aggrieved by the refusal of such officer to issue such certificate, he may appeal from the decision to the council, which shall appoint three disinterested persons to examine the premises, and two of whom may issue such certificate. [R. S. Sec. 2571; 62 v. 139.]

Sec. 4652. [Penalties against owner or person having control.] Whoever, being the owner or having control as an officer, agent, or otherwise, of any opera house, hall, theater, church, schoolhouse, college, academy, seminary, infirmary, sanitarium, children's home, hospital, medical institute, asylum, or other building used for the assemblage or betterment of people, in a municipal corporation, county or township in this state, permits it to be used when any door affording exit therefrom is locked or barred, or opens inwardly, when the place is not provided with ample means for the safe and speedy egress of the persons who may be there assembled, when sufficient water and proper means to apply it, or other efficient means are not provided on each floor to extinguish any fire which may occur therein, or when the proper certificate provided for in this chapter has not been issued, or is not in full force, shall be fined not less than fifty dollars, and not more than five hundred dollars, and ten dollars additional for each day or night such building is permitted to be used after such conviction is had and until changes, alterations or additions have been made sufficient to warrant the issuing of a certificate by the chief inspector of workshops and factories. [R. S. Sec. 2572; 93 v. 34; 92 v. 408; 90 v. 4; 62 v. 139.]

Sec. 4653. [Fines, disposition of; duty of mayor or prosecuting attorney.] Such fines and costs shall be recovered in the name and for the use of the municipal corporation, if such building is located within the corporate limits, if not then for the use of the county in which located and suit is brought. The mayor, with the aid of the police, or the prosecuting attorney, with the aid of the sheriff, if such building is not located within a municipal corporation, shall see that the provisions of the preceding section are strictly enforced. [R. S. Sec. 2572; 93 v. 34; 92 v. 408; 90 v. 4; 62 v. 139.]

Sec. 4654. [When inspections and certificates dispensed with; requirements for the issuing of certificates.] When a structure referred to in the first section of this chapter has been inspected by the chief inspector of workshops and factories, and he has issued to the owner thereof or to his agent, a certificate that it is properly arranged for the safe and speedy egress of persons assembled therein, and also properly provided with means for the extinguishment of fire at or in such structures, as required by law, such certificate shall dispense with all other such inspections and certificates in regard to the safety of such structures. [R. S. Sec. 2572a; 92 v. 409; 90 v. 4; 88 v. 85; 86 v. 46.]

Sec. 4655. [Notice to mayor or prosecuting attorney of refusal.] If such inspector finds that such structure is not properly arranged for the safe and speedy egress of persons therein assembled, or not properly provided with means for the extinguishment of fire at or in such structure, as required by law, or that it is such as to endanger the lives of the persons there assembled, from fire or other cause, he shall notify in writing the owner, officer or agent in charge thereof, and the mayor of the municipal corporation if such structure is located in a municipal corporation, if not, the prosecuting attorney of the county wherein it is located, that he refuses such certificate, specifying his reasons and the alterations, additions and appliances necessary to be made and furnished before a certificate will be issued. [R. S. Sec. 2572a; 92 v. 409; 90 v. 4; 88 v. 85; 86 v. 46.]

Sec. 4656. [Duty of mayor or prosecuting attorney.] No certificate required by law, in regard to the safety of such structure, shall be issued by the mayor or any officer or person under any provision of law until the requirements of such notice are complied with to the satisfaction of the chief inspector, and the mayor of the municipality, with the aid of the police, or the prosecuting attorney, with the aid of the sheriff, upon receiving such notice, shall prohibit the use of such buildings for the assemblage of people until such changes, alterations and additions have been made and the inspector's certificate has been issued. [R. S. Sec. 2572a; 92 v. 409; 90 v. 4; 88 v. 85; 86 v. 46.]

Sec. 4657. [When inspections to be made; inspector to have access to buildings.] The chief inspector of workshops and factories, or his district inspectors, shall make inspections of buildings named in the first section of this chapter, as often as he deems necessary, or upon the written demand of the agent or owner of such structures, or upon the written request of five or more citizens of the municipal corporation, county or township in which such structure is located;[1] and they shall have access to such buildings at any time it is deemed necessary to inspect them.[2] [R. S. Sec. 2572b; 93 v. 35; 92 v. 409; 87 v. 279; 86 v. 47.]

(1) **Duties of inspector.**—It is no part of the duties of building inspectors to see that the funds and records are placed in what they regard as a safe and suitable building for that purpose. State *ex rel.* v. Commissioners of Ottawa Co., 5 N. P. 260, 262.

(2) **Purpose of inspection.**—The purpose of these statutes is to insure safe buildings for the assemblages of the people. *Ib.*

Sec. 4658. [Exits and life lines.][1] If a factory, workshop, tenement house,[2] inn or public house is more than two stories high,[3] the owner[4] or agent of the owner shall provide convenient exits from the different upper stories thereof, which shall be easily accessible in case of fire, and the owner or person having control of an inn or public house where travelers or boarders are lodged above the second story thereof, shall also provide a good rope or other life line for each sleeping

room for guests above such story.[5] [R. S. Sec. 2573; 99 v. 83; 80 v. 187; 74 v. 176.]

(1) **Section not limited to municipality.**—This section is not confined to buildings in municipalities. Rose v. King, 49 O. S. 213.

(2) **Tenement house defined.**—See Rose v. King, 49 O. S. 213.

(3) **More than two stories.**—A building more than two stories requires a fire escape from the second as well as the higher stories. Rose v. King, 49 O. S. 213.

(4) **Meaning of "owner."**—Does not mean owner of the fee, but owner of the factory. Lee v. Smith, 42 O. S. 458.

(5) **Exercise of police power.**—A statute requiring fire escapes on certain buildings and on failure to erect them, providing a punishment by fine and an injunction to enjoin use of building, is but an exercise of police power. Cincinnati v. Steinkamp, 54 O. S. 284.

Sec. 4659. [Life-saving device or net, where kept.] The owner or agent of the owner of a factory, workshop, tenement house, inn, or public house, if it is more than three stories high, in addition to the provisions governing three-story buildings, shall provide a life-saving device or net, which shall be approved by the fire chief of the city, or village in which such building is situated, or if such building is situated outside of the city or village, such life-saving device or net shall be approved by the state inspector of workshops and factories. Such life-saving device or net shall be kept on the first floor at or near the entrance of the building. [R. S. Sec. 2573; 99 v. 83; 80 v. 187; 74 v. 176.]

Sec. 4660. [Mayor shall require such escapes.] The mayor of each municipality shall require the owner or agent of the owner of such factory, workshop,[1] tenement house, or inn or public house, within the meaning of the preceding two sections to comply with the requirements of such section within sixty days from the serving of a notice by the mayor so to do,[2] unless such owner or agent for owner shall have previously complied with the requirements of such sections. Whoever being such owner or agent of owner fails to comply with the requirements of the preceding three sections within the time specified in such notice, shall forfeit not less than fifty nor more than three hundred dollars for each month he so fails,

to be recovered in the name of and for the use of such municipality in an action in the police court or other competent tribunal. Such owner or agent for owner may also be held for civil damages to the party injured. [R. S. Sec. 2574; 80 v. 187; 76 v. 33; 74 v. 176.]

(1) **Store building** would be included. Hagedorn v. Windhorst, 21 Dec. 364.

(2) **Effect of failure to give notice.**—Failure of mayor to give notice does not prevent tenant from recovering from owner of tenement house for injuries received through neglect to comply with §§ 4658 and 4659. Rose v. King, 49 O. S. 213.

Sec. 4661. [Mayor to examine building once a year; compensation.] The mayor of each municipality, personally, or by the marshal or chief of police thereof, or other proper person whom the mayor appoints acting under his direction, as inspector of fire-escapes shall carefully examine such factories, workshops, tenement houses, inns or public houses once in each year, and report all violations of the preceding five sections to the council thereof, and thereupon proceedings shall be commenced against the person so offending. The mayor, marshal, or chief of police, or person so appointed by the mayor to act as inspector of fire-escapes, shall be entitled to receive for such notices and examinations, such fees as the council may by ordinance provide. [R. S. Sec. 2575; 80 v. 187; 74 v. 176.]

Sec. 4662. [Examination of theaters and halls and certificate of compliance.] The mayor, chief of fire department and building inspector of a municipal corporation, or if such corporation has no chief of police or building inspector, the mayor and two members of council, and in townships, the trustees thereof, shall carefully examine each opera house, theatre or hall, to ascertain whether the provisions of law have been complied with. If upon such examination it is found that such building complies with the provisions of law, the mayor, chief of police and building inspector or members of council, or the trustees of the township, shall issue to such owner or person a certificate of such fact, which shall continue in force one year. [97 v. 265 § 5.]

Sec. 4663. [Proceedings if building does not comply with law.] If such officers find upon examination or inspection that such building is not properly arranged as provided by law, they shall notify the owner, lessee, officer having control, agent or otherwise of such building of such fact, and such mayor with the aid of the police, or the prosecuting attorney with the aid of the sheriff, shall prohibit the use of such building for the assemblage of people until the necessary changes have been made, whereupon such certificate shall be issued. These provisions shall not apply to open air or summer theatres located in parks or other public places, in which all the seats are upon the first or ground floor and in which the auditorium is entirely open at the sides. [97 v. 265 § 5.]

Sec. 4664. [Power of council to regulate.][1] The council of a municipal corporation may make such further regulations as it may consider necessary for public safety. [97 v. 266 § 6.]

(1) **Action by neighboring property owner.** — The violation of municipal building regulations gives no ground of civil action to a neighbor claiming to be injured thereby. Board of Trustees v. Tipling, 17 C. C. (N. S.) 117.

CHAPTER 3.

GENERAL PROVISIONS.

CITIES AND VILLAGES.

Right of Visitation.

Sec. 4665. [Right of visitation.] The general assembly of the state, by a committee, the governor of the state, the council of the corporation, by a committee, the mayor or police judge of a corporation, the board of health of the corporation, the judge of any court of this state, and the grand jury[1] of the county, may at any time visit and inspect any of the benevolent or correctional institutions established by any municipal corporation, and examine the books and accounts thereof. [R. S. Sec. 1544; 66 v. 272.]

(1) Implied authority is granted in this section to pay expenses of grand jurors incurred in making inspection of certain institutions. Op. Atty. Gen. (1915), p. 353.

Official Oath and Bond.

Sec. 4666. [Qualifications; oaths.][1] Each officer[2] of the corporation, or of any department or board thereof, whether elected or appointed as a substitute for a regular officer, shall be an elector[3] within the corporation, except as otherwise expressly provided, and before entering upon his official duties shall take an oath to support the constitution of the United States and the constitution of Ohio, and an oath that he will faithfully, honestly and impartially discharge the duties of the office.[4] Such provisions as to official oaths shall extend to deputies, but they need not be electors. [R. S. Sec. 1737; 92 v. 68; 66 v. 162.]

(1) **Other provisions.**—Compare provisions in Art. XV., § 4 Const., requiring all officers to be electors; § 2 G. C. requiring all officers, including deputies, to take oath of office.

(2) **Who is an officer.**—Definition of office, see Shaw v. Jones,

4 N. P. 372; State v. Jennings, 57 O. S. 415.

A fireman appointed by proper municipal authorities and having no control over fire department or property, but merely subject to the fire chief, and paid by the month, is not an officer. State v. Jennings, 57 O. S. 415.

So it was held an employe of a city to trim lights in its electric light department is not an officer. State v. Anderson, 57 O. S. 429.

And an engineer employed to run an engine in electric light department is not an officer. *Ib.*

Clerk of waterworks board or clerk of department of public service, not an officer. Hutchinson v. Lima, 27 C. C. 545; 6 C. C. (N. S.) 529.

Workhouse matron not an officer, but an employe. Jameson v. Cincinnati, 28 C. C. 41; 7 C. C. (N. S.) 100.

Deputy is held not to be an officer within Art. XV., § 4, of Constitution. Warwick v. State, 25 O. S. 21; nor within the meaning of the penal laws relating to officers, State v. Meyers, 56 O. S. 340, 349; but a deputy is required by § 4666 G. C. above, to take an oath of office. There is no requirement that he give bond, and he would not, according to the cases above, be an officer mentioned in the statute requiring "officers" to give bond.

(3) **Officers must be electors.**—Persons not citizens of the United States, and therefore not electors, cannot be officers. State *ex rel.* v. Collister, 27 C. C. 529; 6 C. C. (N. S.) 33. And a person disqualified at the time of his election cannot thereafter, by removing the disqualification, hold the office. *Ib.*

Policeman; must be an elector of municipality.—A policeman is a public officer and must therefore be an elector of the municipality from which he receives his appointment and derives his authority. Deromedis v. Yorkville, 21 N. P. (N. S.) 340.

Prior to the Federal Constitutional amendment forbidding sex distinctions in the qualifications of electors it was held that females were ineligible to office, not being electors. State *ex rel.* v. Rust, 4 C. C. 329; State v. Adams, 58 O. S. 612; State v. McKinley, 57 O. S. 627. But since a deputy is not an officer a female may be a deputy. Warwick v. State, 25 O. S. 21.

De facto officers defined.—*Ex parte* Strang, 21 O. S. 610; Ermston v. Cincinnati, 7 N. P. 635; State v. Gardner, 54 O. S. 24; Gitsky v. Newton, 17 C. C. 484, aff'd 60 O. S. 605; State v. O'Brien, 47 O. S. 464; Brenier v. Becker, 37 O. S. 72; State v. Alling, 12 O. 16; State *ex rel.* v. Constable, 7 O. (pt. 1) 7

Mandamus does not lie at instance of a *de facto* assessor to enforce his claims to be invested with evidence of legal title to the office. Davies v. State, 30 C. C. 527; 11 C. C. (N. S.) 209.

Where a *de facto* officer has been paid the salary attaching to such office, the *de jure* officer can enforce payment to him of the amount falling due while he was excluded from the office. Cleveland v. Luttner, 92 O. S. 493.

Acts of de facto officers valid.—Heck v. Findlay, etc., 16 C. C. 111, aff'd 62 O. S. 654; State v. Bingham, 14 C. C. 245; Ickes v. State, 16 C. C. 31; State *ex rel.* v.

Constable, 7 O. (1st pt.) 7; Smith v. Lynch, 29 O. S. 261; Kirker v. Cincinnati, 48 O. S. 507; Guernsey Co. v. Cambridge, 7 C. C. 72; Molitor v. State, 6 C. C. 263, aff'd 29 B. 152.

An officer holding under an unconstitutional law is a de facto officer, and his acts cannot be collaterally attacked. *Ex parte* Strang, 21 O. S. 610; Heck v. Findlay, 16 C. C. 111 (aff'd 62 O. S. 654); State v. Gardner, 54 O. S. 24; Gitsky v. Newton, 17 C. C. 484; State ex rel. v. Bingham, 14 C. C. 245; Bruggeman v. Cleveland, 24 C. C. (N. S.) 594.

As to validity of acts of officers or boards under an unconstitutional statute or ordinance, see Findlay v. Pendleton, 62 O. S. 80; Kirker v. Cincinnati, 48 O. S. 507; Smith v. Lynch, 29 O. S. 261.

(4) **Necessity of oath.**—All officers must take an oath of office, no matter whether the statute prescribes an oath or not. If an office is created in any way, before the person to occupy it enters upon his official duties, he must take an oath of office. State *ex rel.* v. Kennon, 7 O. S. 546.

But it has been held that members of a board of review having taken an oath of office as members of such board, need not take another oath when acting as the decennial board of equalization. N. C. Harmony Lodge v. Hagerty, 28 B. 66.

As to person appointed temporarily to assist officer, see Martin v. State, 16 O. 364.

To be entitled to a salary an officer must take the oath and qualify according to law. State v. Eshelby, 2 C. C. 468.

One elected to the office of mayor who fails to take the oath of office before some official authorized to administer oaths and fails to present his bond to council for approval as required by statute, but instead thereof appears before the incumbent mayor who refuses to administer the oath or receive the bond, must be regarded as having refused to accept the office, and a petition in mandamus praying that the incumbent mayor whose term of office has in the meantime expired be ousted, does not lie and will be dismissed. State, ex rel. v. Bimler, 32 O. C. A. 225.

See further notes under § 4242 G. C., *ante*.

FORM OF OATH OF OFFICE.

.....County, }
State of Ohio, } ss.

I, ..., do solemnly swear [*or* affirm] that I will support the Constitution of the United States and the Constitution of the State of Ohio, and that I will faithfully, honestly and impartially discharge the duties of the office of ..... of the city [*or* village] of ....., State of Ohio, during my continuance in said office.

Sworn to [*or* affirmed] before me and subscribed in my presence this .... day of ....., 19.....

.....
Notary Public.

Sec. 4667. [Approval of such bonds.] The official bonds of all municipal officers shall be prepared by the solicitor. Except as otherwise provided in this title, they shall be in such sum as the council prescribes by general or special ordinance [1] and be subject to the approval of the mayor, except that the mayor's bond shall be approved by the council, or, if it is not legally organized, by the clerk of the court of common pleas of the county in which the corporation or the larger part thereof is situated. [R. S. Sec. 1738; 74 v. 142; 66 v. 163.]

(1) **Ordinance** fixing bonds, see §§ 4214 and 4219, *ante*, and notes to those sections.

Sec. 4668. [What facts shall not invalidate.] In each such bond, the condition that the person elected or appointed shall faithfully perform the duties of the office shall be sufficient.[1] The fact that the instrument is without a seal, that blanks like the date or amount have been filled subsequent to its execution but before its acceptance, without the consent of the sureties, that all the obligees named in the instrument have not signed it, that new duties have been imposed on the officers or that any merely formal objection exists shall not be available in any suit on the instrument.[2] [R. S. Sec. 1738; 74 v. 142; 66 v. 163.]

(1) **Condition in bond.**—As to sufficiency of condition, compare § 6 G. C. under OFFICERS in Part II.

An official bond conditioned for the faithful discharge of the duties of an office "according to law" embraces duties required by laws in force during the term of the officer, whether enacted at or after the execution of the bond. Dawson v. State, 38 O. S. 1; King v. Nichols, 16 O. S. 80.

If bond omits the condition requiring officer to pay over all moneys received by him, it is immaterial, as it would be cured by § 6 G. C. State *ex rel.* v. Slough, 12 C. C. 105.

Acceptance of bonds.—Formal acceptance of officers' bond is not necessary. Receiving the bond without objection is sufficient. Barret v. Reed, 2 O. 409, 413; Rogers v. Pugh, 1 Disney, 443.

Where proper bond is tendered, it must be accepted, and no discretion to refuse it is allowed. State v. Cincinnati, 11 O. S. 544; and mandamus will lie to compel acceptance. *Ib.;* State *ex rel.* v. Lewis, 10 O. S. 128; O'Connell v. Boyle, Ohio Dec. (Dayt.) 280.

Rejection of bond may be shown

by parol. Westerhaven v. Clive, 5 O. 136.

Character of bond.—See § 9571 G. C., in Part II, under "Officers".

Validity.—Bond may be good in part and bad in part, and though defective under the statute, it may be a good bond at common law. State v. Findley, 10 O. 51.

The bond will be valid though the name of surety is omitted from body of bond. McClain v. Simington, 37 O. S. 484; Partridge v. Jones, 38 O. S. 375.

Mistake in name of obligee, does not invalidate the bond. Barret v. Reed, 2 O. 409.

(2) **Liability of sureties.**—*Defective bond.*—Sureties who execute a bond may be liable on a bond reciting the name of the officer, though the officer has not signed it. State v. Bowman, 10 O. 445.

Extent of liability.—*General principles.*—Sureties are liable for acts of the official *virtute officii* within his official authority but unfaithfully or improperly done, but not for acts of the official *colore officii* with pretense of official authority. Storey v. Jennings, 4 O. S. 418; Drolesbaugh v. Hill, 64 O. S. 257; nor where the official has been guilty of misconduct wholly outside of the line of his official duty as prescribed by law. State v. Medary, 17 Ohio 554; State v. Griffiths, 74 O. S. 80 (51 B. 259; State v. Cottle, 8 C. C. (N. S.) 120.)

Officer acting beyond duty.—Interest arising from money deposited by treasurer, is covered by his bond, whether the deposit was authorized or not. Eshelby v. Bd. of Education, 66 O. S. 71; Glenville v. Englehart, 19 C. C. 285.

But where a clerk performed an act which was beyond the duties of his office, it was held his sureties were not liable. Carpenter v. Sloane, 20 O. 327.

It was held the sureties on a county treasurer's bond were liable for taxes collected by him and misapplied, though the levy of the taxes was illegal. Feigert v. State, 31 O. S. 432.

They are liable for sums drawn by clerk when not authorized by council or larger than allowed by council, and appropriated to his own use, and money received from cashing and appropriating to his own use claims allowed by council and belonging to other persons. Greenville v. Anderson, 58 O. S. 463.

Acting as other officer.—Bond for faithful performance of duties by member of a board, will not cover defalcations of such officer while acting as an appointee of the board (such as commissioner appointed by board) even though members of the board only are eligible to such appointment. State v. Medary, 17 O. 554.

Acts during other term.—A bond given for the first term does not cover acts of the officer during his second term, no valid bond being given for the second term. State v. Crooks, 7 O. (2nd pt.) 221; State v. Corey, 4 W. L. M. 563.

Whether the sureties on the bond of an officer holding over until his successor qualifies, would be liable during the time of such holding over, *quere.* State *ex rel.* v. Killits, 8 C. C. 30.

Where the officer's bond was not accepted until part of his term had expired, and he had collected money both before and after the bond was

accepted, the sureties will be liable for peculations from all sums collected, if not shown from what particular fund the money was stolen by the officer. Reed v. Board of Education, 30 O. S. 635.

The defalcation is presumed to have occurred during the term for which the last bond was given. Pummill v. Baumgartner, 3 N. P. 40; Kelly v. State, 25 O. S. 567; State v. Corey, 4 W. L. M. 563.

Where new duties imposed.—The surety is liable for default in connection with new duties imposed on the officer since giving of bond, if such duties are appropriate to his office, but not if the duties are not appropriate to the office. St. Marys v. Rowe, 15 Dec. 687; 2 N. P. (N. S.) 645. The new duty imposed by ordinance on clerk of council to collect special assessments is not appropriate to his office, and will not make his sureties liable for default in this connection. *Ib.*

After death of principal.—Sureties are liable for failure of personal representative of officer to pay over money that came into officer's hands officially. Peabody v. State, 4 O. S. 387.

Defenses of surety.—Negligence of the treasurer in paying warrants drawn by the city clerk does not relieve sureties on clerk's bond. Greenville v. Anderson, 58 O. S. 463.

Omission of principal to take the oath of office does not relieve sureties of liability. State v. Findley, 10 O. 51; Gage v. Payne, Wright, 678.

It is no defense that the money was not demanded from the principal until after his term expired. King v. Nichols, 16 O. S. 80; nor that demand was not made until after death of principal. Peabody v. State, 4 O. S. 387.

The sureties may have any defense that the principal could set up, including the statute of limitations. State v. Blake, 2 O. S. 147; State v. Conway, 18 O. 234. As to the limitations of actions on official bonds, see State v. Blake, 2 O. S. 147.

It was held no defense to a suit on a county treasurer's bond, that the money was stolen from him without any fault of his own. State v. Harper, 6 O. S. 607.

The rule that an act by the creditor, prejudicial to the surety, discharges him, does not apply to sureties on official bonds for faithful performance. State v. Alden, 12 O. 59.

Blanks in bond filled after execution. See § 5 G. C. under OFFICERS in Part II.

Pleading and practice.—In action against obligors on bond the personal representative of principal is not a necessary party. Hunt v. Gaylor, 25 O. S. 620.

Petition on an official bond must aver the condition of the bond, and not merely that it was given according to law. Bisack v. Pape, 1 B. 126; it must aver also, the office and the appointment or election to it. Court of Common Pleas v. Seargent, W. 482; but it need not aver that the officer qualified. State v. Piatt, 15 O. 15.

FORM OF OFFICIAL BOND.

Know all men by these presents; That we .....principal, and ..... and ....., sureties, are held and firmly bound unto the city [*or* village] of ....., State of Ohio, in the sum of $..... to be paid to the said city [*or* village], for the payment whereof well and truly to be made we jointly and severally bind ourselves, our heirs, executors and administrators firmly by these presents.

Witness our hands this ..... day of ....., 19.....

The condition of the above obligation is such that, Whereas, the said ..... was, on the ..... day of ..... elected [*or* appointed] to the office of ..... of the city [or village] of ....., State of Ohio, for the term of ..... years and until his successor is elected [*or* appointed] and qualified,

Now therefore, if the said ..... faithfully performs the duties of the said office during his continuance therein then this obligation shall be void and of no effect; otherwise to be and remain in full force, effect and virtue.

.....
.....
.....

Executed in presence of
.....
.....
.....

Sec. 4669. [Additional bond; where bonds recorded and kept.] Each officer required by law or ordinance to give bond shall do so before entering upon the duties of the office, except as otherwise provided in this title.[1] In its discretion council at any time may require each officer to give a new or additional bond.[2] Except that of the auditor or clerk, each bond upon its approval shall be delivered to the auditor or clerk, who shall immediately record it in a record provided for that purpose and file and carefully preserve it in his office. The bond of the auditor or clerk shall be delivered to the treasurer, who shall in like manner record and preserve it. [R. S. Sec. 1739; 74 v. 142.]

(1) **Failure to give bond,** effect of, see § 4242, *ante.*

(2) **Additional bonds.**—Where an officer is required to give an additional bond, either or both sets of bondsmen are liable for his defaults. State v. Crooks, 7 O. (2nd pt.) 221; but both cannot be joined in same action. *Ib.* And the additional bond covers defalcations during the entire term. Thorne v. Megrue, 3 Rec. 140.

Misconduct in Office.

Sec. 4670. [Charge filed with probate judge; proceedings.] When complaint under oath is filed with the probate judge of the county in which the municipality, or the larger part thereof is situated, by any elector of the corporation, signed and approved by four other electors thereof, charging any one or more of the following: That a member of the council has received, directly or indirectly, compensation for his services as councilman, committeeman, or otherwise, contrary to law; or that a member of the council or an officer of the corporation is or has been interested, directly or indirectly, in the profits of a contract, job, work or service, or is or has been acting as commissioner, architect, superintendent or engineer in work undertaken or prosecuted by the corporation, contrary to law; or that a member of council or an officer of the corporation has been guilty of misfeasance or malfeasance in office, such probate judge shall forthwith issue a citation to the parties charged in such complaint for his appearance before him within ten days from the filing thereof, and also furnish the accused and city solicitor with a copy thereof, but, before acting upon such complaint, such judge shall require the party complaining to furnish sufficient surety for costs.[1] [R. S. Sec. 1732; 68 v. 113.]

(1) **Character of power** of removal, and exclusiveness of procedure, etc., see notes to § 4263, *ante*.

Councilman, removal of, for bribery, see Cleveland, etc., Co. v. Hitchens, 3 N. P. (N. S.) 57.

Mayor, removal of, see Dorgan v. Columbus, 12 Dec. 121.

Sec. 4671. [What counsel shall appear; jury.] On the day fixed by such judge for the return of the citation, the solicitor shall appear on behalf of the complainant to conduct the prosecution, and the accused may also appear by counsel. A time shall be set for hearing the case, which shall be not more than ten days after such return. If a jury is demanded by either party, the probate judge shall direct the summoning of twelve men in the manner provided for the appropriation of property by the municipality. In municipalities having no solicitor, or in case the solicitor is accused of any misfeasance or malfeasance in his office, the prosecuting attorney of the county

shall appear on behalf of the complainant to conduct the prosecution. [R. S. Sec. 1733; 68 v. 113.]

Sec. 4672. [Challenge of jurors.] On the day fixed for trial, if a jury is impaneled, either party, in addition to the peremptory challenges allowed by law in other cases, may object for good cause to any juryman, summoned, and vacancies occurring for any cause may be filled by the probate judge from the bystanders until the panel is full, unless the party charged, or his counsel, demands a special venire to fill such vacancy. [R. S. Sec. 1734; 68 v. 113.]

Sec. 4673. [Proceedings on the trial.] On the day designated for the trial, it shall take place, unless continued on affidavit for good cause to another time not exceeding ten days. On the trial, the solicitor shall appear for the prosecution, examine witnesses designated by the complainant, and such others as he may discover, and either party may have process from the probate judge to compel the attendance of witnesses. [R. S. Sec. 1735; 68 v. 114.]

Sec. 4674. [Removal of officer if found guilty.] If, on the trial, the charges in the complaint are sustained by the verdict of the jury, or by the decision of the probate judge, when there is no jury, such judge shall enter the charges and findings thereon upon the record of the court, make an order removing such officer from office, and forthwith transmit a certified copy thereof to the presiding officer of the council, whereupon the vacancy shall be filled as provided by law. [R. S. Sec. 1736; 68 v. 114.]

Sec. 4675. [How costs shall be paid.] The costs and expenses of such trial shall be charged upon the party filing the complaint, the accused, or the municipal corporation, or apportioned among them, as the judge may see fit to direct, and collected as in other cases. No costs or expenses shall be charged to the accused, if upon trial, he is acquitted. If proceedings in error are instituted by the officer complained of, to reverse or vacate the order of the probate court, such officer

shall not exercise the functions of his office until such order is finally reversed or vacated. [R. S. Sec. 1736; 68 v. 114.]

Publication.

Sec. 4676. [Publication of notice.] Where in this title a notice is directed to be published in a newspaper and no such newspaper is printed at the place mentioned, as defined in section sixty-two hundred and fifty-five of the General Code or if the publisher of such newspaper refuses,[1] on tender of the legal charge for printing such notice, to insert it in his newspaper, a publication thereof in any newspaper of general circulation at such place shall be sufficient. Nothing in this section shall be construed to dispense with posters where they are provided for. [106 v. 492, 494; R. S. 1537.]

(1) See Op. Atty. Gen. (1914), p. 1511.

Interpretation of this Title.

Sec. 4677. [Enlarged meaning of certain words.] In the interpretation of this title, unless the context shows that another sense was intended, the word "village" shall mean incorporated village, the word "municipality" shall mean a municipal corporation; "person"[1] includes a private corporation; "writing" includes printing; "oath" includes affirmation; "insane" and "lunatic" include every species of mental derangement; "property" includes real, personal, and mixed estates and interests; and "land" and "real estate" include rights and easements of an incorporeal nature;[2] but this enumeration shall not be construed to require a strict construction of any other words in this title.[3] [R. S. Sec. 1536.]

(1) **Person** would not ordinarily include corporation. State v. Cincinnati Fertilizer Co., 24 O. S. 611. But see Norris v. State, 25 O. S. 217; see also Allen v. State, 10 O. S. 287; Garder v. Fayette Co., 16 O. S. 353; Burke v. State, 34 O. S. 79; Hamilton v. State, 34 O. S. 82.

(2) **Land and Real Estate.**—Meaning of, see Dodson v. City, 34 O. S. 276; Valley Ry. Co. v. Pouchot, 4 C. C. 187, 192; Winton v. Cornish, 5 O. 477, 478; Kerlin Bros. v. Toledo, 20 C. C. 603.

(3) **Construction.**—General words are sometimes, by construction, limited in their scope, when taken in conjunction with their subject matter. Aultman v. Seiberling, 31 O. S. 201, 204; Brigel v. Star-

buck, 34 O. S. 280, 285; see also Board of Education v. Board, 46 O. S. 595; Goodall v. Gerke Brewing Co., 56 O. S. 257.

Sec. 4678. [Unconstitutionality of one section of title not to affect validity of any other section.] If any section or part of a section included within the provisions of this title shall be held by any court to be invalid or unconstitutional, such decision shall not be held to invalidate or impair the validity, force or effect of any other section or part of a section of this title, except the section or part of a section so held invalid or unconstitutional.[1] [96 v. 95 § 229.]

(1) **Effect of unconstitutionality of part of an act.**—The rule as to the effect of the unconstitutionality of a particular section or part of an act upon other sections of the same act, is that if the unconstitutional part is so inseparably connected with other sections as to raise a presumption that the legislature would not have passed the latter without the former, all sections so connected are void. State v. Perry Co., 5 O. S. 497; Monroe v. Collins, 17 O. S. 665, 684; Bowles v. State, 37 O. S. 35; Exchange Bank v. Hines, 3 O. S. 1; Taylor v. Ross Co., 23 O. S. 22; R. R. v. Commissioners, 31 O. S. 338; Treasurer v. Bank, 47 O. S. 503; State v. Frame, 39 O. S. 399; State v. Buckley, 60 O. S. 273. See also Stevens v. State, 61 O. S. 597; State v. Kinney, 56 O. S. 721; Pump v. Commissioners, 69 O. S. 448.

The rejection of some of the provisions of a statute for unconstitutionality, will not vary the sense or meaning of its remaining provisions, which are to be construed as well in the light of those rejected, as of those which remain. State v. Dombaugh, 20 O. S. 167.

WEINLAND'S EDITION OF

ELLIS' ANNOTATED OHIO MUNICIPAL CODE.

PART II.

RELATED STATUTES,

NOT CONTAINED IN TITLE XII, PART FIRST,
OF THE GENERAL CODE.

I.

STREETS AND PUBLIC GROUNDS.[1]

COUNTY BRIDGES IN MUNICIPALITIES.[2]

Sec. 2421. [Construction and repair.] The commissioners shall construct and keep in repair necessary bridges over streams and public canals on state and county roads, free turnpikes, improved roads, abandoned turnpikes and plank roads in common public use, except only such bridges as are wholly in cities and villages having by law the right to demand, and do demand and receive part of the bridge fund levied upon property therein. If they do not demand and receive a portion of the bridge tax, the commissioners shall construct and keep in repair all bridges in such cities and villages. The granting of the demand, made by any city or village for its portion of the bridge tax, shall be optional with the board of commissioners.[3] [R. S. Sec. 860; 91 v. 19; 83 v. 29; 69 v. 61, § 1; 36 v. 51; (S. & C. 193).]

(1) For special act for condemnation of avenue of avenue companies in Cincinnati, see § 14820, Appendix to General Code.

For act providing for platting of lots which extend into the bed of navigable rivers, see §§ 14575, 14576, Appendix to General Code.

For special act providing for park commissioners for Cleveland, see §§ 14741-14758, Appendix to General Code.

For special act for parks in Columbus, see §§ 14759-14768, Appendix to General Code.

(2) **Application of sections.**—§§ 2421 and 2422, carried here, are contained in the General Code, Part I, Title 10, Division 2, Chapter 1 relating to the duties of county commissioners.

(3) **Bridges in municipal limits.**—*Rights of county.*—County commissioners cannot recover for damages to bridge in municipality which receives part of the bridge fund. Commissioners v. Ry. Co., 45 O. S. 401. See further Perry Co. v. R. R. Co., 43 O. S. 451.

County cannot by mandamus compel municipality to assume control of bridge. State *ex rel* Commissioners v. Cincinnati, 4 N. P. 313.

Duty and liability of county.—County not required to make or repair bridges in municipalities having right to part of bridge fund. State *ex rel.* Commissioners v. Cin-

cinnati, 4 N. P. 313. See further, note to § 3714. As to duty where municipality receives no part of bridge fund, see Piqua v. Geist, 59 O. S. 163; Newark v. McDowell, 16 C. C. 556, and see § 7557, *post.*

Rights of municipality as to control over such bridges, see note under § 3714, in Part I.

Municipality not permitted to recover the cost of repairing such bridge. Cincinnati v. Railway, 18 N. P. (N. S.) 553; (aff'd by the Supreme Court without report).

When county commissioners or municipal corporations are required to keep in repair certain bridges within cities. See Op. Atty. Gen., 1919, p. 1622; *Ib.* (1916), p. 1167.

Duty and liability of municipality.—As to the liability of municipality for injuries on such bridges, see note "Where duty of county to repair," under § 3714, in Part I.

Construction of section.—In connection with §§5635, 5636 (relating to tax levies for bridge purposes), see State *ex rel.* v. Commissioners, 4 N. P. 343.

In connection with § 7557 G. C., see Commissioners v. Ry. Co., 45 O. S. 401.

Sec. 2421-1. [County's portion of bridge fund may be turned over to municipality; procedure.] When the council of any city having a population not exceeding fifteen thousand or of a village shall cause to be filed in the office of the county auditor of the county in which such corporation is situated in whole or in part a certified copy of a resolution of such council demanding some portion of the county bridge fund levied upon property within such corporation, the county commissioners of such county may, by resolution, authorize the county auditor to draw his warrant upon the county treasurer in favor of such corporation for not to exceed sixty per cent of the county bridge fund then levied or collected, or in process of collection, upon the property in such corporation. Such fund so received by such corporation shall be used by it for the construction, repair and maintenance of any bridges and viaducts within such corporation. [108 v. 259.]

Sec. 2422. [Approaches to bridges.] Except as therein provided, the commissioners shall construct and keep in repair, approaches or ways to all bridges named in the preceding section. But when the cost of the construction or repair of the approaches or ways to any such bridge does not exceed

fifty dollars, such construction or repair shall be performed by the township trustees. [R. S. Sec. 861; 73 v. 32, § 1.]

Sec. 7556. [Permission to erect swing or lift bridge crossing canal; consent in writing from board public works.] The council of a city or village, or the commissioners of the county in which such city or village is situated, having lawful authority to construct or erect a bridge on a road, street, or public highway, crossing a canal or feeder thereof, if deemed necessary, may erect and maintain for public use a swing bridge, or self closing bridge, or lift bridge, upon such street, road, or public highway, at such place. Such bridge shall not be constructed or erected without first obtaining, for the model and location thereof, the consent, in writing, of the board of public works; and said board may grant permission to any city or village or the commissioners of any county to narrow the channel of any canal or feeder thereof, if deemed necessary, in the erection, construction and maintenance of any such bridge, providing, however, that said channel is not narrowed to a width of less than twenty-five (25) feet; and, providing further that said board in granting any such permission shall sell no canal lands of this state, but simply grant an easement for the use of such bridge or its approaches or parts.[1] [102 v. 86; R. S. Sec. 4937; 71 v. 84 § 1.]

(1) **Application of sections.**— §§ 7556 and 7557, carried here, are contained in Part II, Title 4, Chapter 14 relating generally to public ways, and especially to bridges.

Sec. 7557. [Commissioners must build certain bridges.] The county commissioners shall cause to be constructed and kept in repair, as provided by law, all necessary bridges in villages and cities not having the right to demand and receive a portion of the bridge fund levied upon property within such corporations, on all state and county roads, free turnpikes, improved roads, transferred and abandoned turnpikes and plankroads, which are of general and public utility, running into or through such village or city.[1] [R. S. Sec. 4938; 69 v. 61 § 1.]

(1) See notes to §§ 3714 and 2421, *ante*.

Validity.—See State *ex rel.* v. Wright, 9 N. P. (N. S.) 321.

Scope of authority.—The commissioners have authority under this section to construct a viaduct or high level bridge. State ex. rel. v. Eirick, 14 C. C. (N. S.) 577.

TOWNSHIP ROADS PARTLY IN MUNICIPALITY.[1]

Sec. 7177. [If road is a boundary line.] If a road is established as a part of the line or boundary of a township or municipal corporation, the trustees of such adjoining townships and council of such corporation, shall meet at a convenient place as soon after the first Monday of March as convenient, and apportion such road between the townships, or township and corporation, as justice and equity requires. The trustees of the respective townships, and council of the corporation, shall cause the road to be opened and improved accordingly, and shall thereafter cause their respective portions to be worked and kept in proper repair. [R. S. Sec. 4747; 65 v. 14 § 30; 94 v. 184; 98 v. 339.]

(1) **Township roads.**—For other provisions relative to township roads, see Act to provide a system of highway laws, etc., 106 O. L. 574, and acts amendatory thereto.

COUNTY ROADS PARTLY IN MUNICIPALITY.

Sec. 1193. [Certified resolution and agreement must accompany application.] Each application for state aid[1] in the construction, improvement, maintenance or repair of inter-county or main market roads shall be accompanied by a properly certified resolution of the county commissioners or township trustees, stating that the public interest demands the improvement of the inter-county or main market roads therein described, which may include any portion of a highway in the limits of any village when the same is a continuation of the proposed improvement or which may cover any portion of a highway in the limits of any village when the same is a continuation of an inter-county highway or main market road already improved, and the consent of the village has been obtained, which consent shall be evidenced by the proper legislation of the council of said village en-

tered upon its records. Provided, however, that when all the inter-county highways within the county have been improved to the standard specified by the state highway commissioner, then said state highway commissioner shall designate additional inter-county highways or main market roads in said county, in the manner provided in this chapter. Each application for state aid shall also contain an agreement on the part of the county commissioners or township trustees to pay one-half of the cost and expense of surveys and other expenses preliminary to the construction, improvement, maintenance or repair of said highway. [107 v. 69, 123; 106 v. 574.]

(1) **Application for state aid.**—See §§ 1191 and 1192 G. C.

Sec. 1193-1. [Improvement may be made without village assuming any part of cost, or village by agreement may assume part of cost; tax levy.] When, upon the application of county commissioners or township trustees and under the supervision of the state highway department, the improvement of an inter-county highway or main market road is extended into or through a village, or an improvement constituting an extension of an improved inter-county highway or main market road is constructed within a village, it shall not be necessary for the village to assume any part of the cost and expense of the proposed improvement. If no part of the cost and expense of the proposed improvement is assumed by the village, no action on the part of the village, other than the giving of its consent, shall be necessary: and in such event all other proceedings in connection with said improvement, including the making of assessments, shall be conducted in the same manner as though the improvement was situated wholly without a village. The village may, however, by agreement of its council made with the county commissioners or township trustees, assume and agree to pay all or any part of the cost and expense of that part of the improvement within the village assumed in the first instance by the county commissioners or township trustees and to be paid by general taxation. A village agreeing to pay any portion of the cost and expense of the improve-

ment is hereby authorized to levy taxes upon all the taxable property of such village under the same conditions and restrictions imposed by law in the case of taxes levied for the purpose of providing funds for the payment of the village's share of the cost of street improvements under the exclusive jurisdiction and control of the council of a village and is further authorized to sell its bonds in anticipation of the collection of such taxes under the same conditions and restrictions imposed by law in the sale of bonds for street improvements under the exclusive jurisdiction and control of the council of a village. The village shall pay to the county or township treasury, as the case may be, its proportion of the estimated cost and expense of said improvement as fixed in the agreement between the council and the county commissioners or township trustees, and after the completion of said work and the payment of the cost and expense thereof any balance of the funds contributed by said village shall be refunded to it to be disposed of according to law. All special assessments shall be made by the county commissioners or township trustees upon whose application the improvement is constructed. This section shall apply where the council of a village does not desire to improve all or any part of said road within such village to a greater width than is contemplated by the proceedings for said improvement by the state highway commissioner and the county commissioners or township trustees; and shall also apply to so much of said road as it was designed to improve by the state highway commissioner and county commissioners or township trustees in cases where the council of said village desires to improve all or any part of said road within such village to a greater width than is contemplated by the proceedings of the state highway commissioner and county commissioners or township trustees. [107 v. 69, 123.]

Sec. 1193-2. [Procedure when village desires improvement of greater width.] Whenever any portion of a road to be improved by the state highway commissioner in co-operation with the county commissioners or township trustees lies within the corporate limits of a village, and the council of

said village desires to improve all or any part of said road within such village to a greater width than is contemplated by the proceedings for said improvement by the state highway commissioner and county commissioners or township trustees, such council shall at any time before the surveys, plans, profiles, cross-sections, estimates and specifications for such improvement are approved by the county commissioners or township trustees, determine by resolution the additional width to which it desires such road, or part thereof, to be improved, and shall cause copies of such resolution to be filed with the county commissioners or township trustees and with the state highway commissioner. The state highway commissioner shall thereupon cause to be prepared the necessary surveys, plans, profiles, cross-sections, estimates and specifications for improving such road, or part thereof, to said additional width. The estimates shall set forth the probable cost and expense of so much of said improvement as is made necessary by the proposed increase of width thereof. Copies of such surveys, plans, profiles, cross-sections, estimates and specifications shall be filed with the village council and upon the approval of the same by such council the improvement shall be constructed to such additional width. The village shall first pay to the county or township treasurer, however, the estimated cost of improving the road to such additional width out of any funds available therefor. The council of said municipality may assess against abutting property owners all or any part of the cost and expense of improving said road to said additional width, which assessments shall be made in any one of the methods provided for in the case of street improvements wholly within a municipality and under the exclusive control of the council. For the purpose of providing by taxation a fund for the payment of all or any part of the cost and expense of improving said road to such additional width, said village is authorized to levy taxes upon all the taxable property of such village under the same conditions and restrictions imposed by law in the case of taxes levied for the purpose of providing funds for the payment of the village's share of the cost of street improvements under the

exclusive jurisdiction and control of the council of a village. In anticipation of the collection of assessments to be made against abutting property as hereinbefore provided and in anticipation of the collection of taxes levied for the purpose of providing for the payment by general taxation of all or any part of the cost and expense of improving said street to such additional width, said village is authorized to sell its bonds under the same conditions and restrictions imposed by law in the sale of bonds for street improvements under the exclusive jurisdiction and control of the council of a village. After the completion of the work and the payment of the cost and expense thereof, any balance of the funds contributed by said village shall be returned to it to be disposed of according to law. [107 v. 69, 124.]

Sec. 1231. [Purchase of equipment and material and employment of labor; co-operation with local authorities.] The state highway commissioner, subject to the provisions of law governing the state highway department shall have power to purchase such equipment and materials, and employ such labor as may be deemed necessary, to execute any work upon said main market roads, or he may let contracts for the execution of any work upon said roads; and all such power shall extend to cases wherein county, township and villages, or any of them, cooperate, as herein authorized, as well as to cases wherein such local sub-divisions do not cooperate. The state highway commissioner shall be authorized to cooperate with a county, township or village in the improvement of any main market road, or in the doing of any part of the work incident to such improvement, upon any basis of the division of the cost of such work between the state and such county, township or village which he may deem just. He shall be authorized to do the grading at the expense of the state and cooperate with such county, township or village in constructing the pavement; or he may cooperate with such county, township or village in doing the grading, and construct the pavement at the expense of the state. He shall be authorized generally to do any part of the work at the expense of the state, and cooperate in doing any other part of the work upon any basis of division of cost between the state and the county,

township or village which he may deem just. Counties, townships and villages shall be authorized to cooperate with the state highway commissioner in the doing of any work upon such main market roads upon any basis of the division of the cost thereof between the state and the county, township or village approved by the state highway commissioner, and the procedure shall be the same, except as may be otherwise provided herein, as in the case of cooperation in constructing an intercounty highway. The state highway commissioner is hereby authorized to sell, either at private sale, or at public sale after such notice as he may deem proper, any machinery, tools or equipment that through wear have become unfit for use. The proceeds of such sale shall be paid into the state treasury to the credit of the state highway improvement fund. The state highway commissioner is also authorized to exchange such machinery, tools and equipment for new equipment and pay the balance of the cost of such new equipment from any funds available for that purpose. When contracts are let for the construction of main market roads, the provisions of sections 1178 to 1231-11, General Code, relating to the letting of contracts for intercounty highways, shall apply in all respects to letting of contracts for such main market roads. County commissioners, township trustees and village councils in addition to the special powers herein conferred shall have the same power and authority to cooperate in the construction, improvement, maintenance and repair of main market roads as is granted to them by law in the construction, improvement, maintenance and repair of intercounty highways; and in case the commissioners of any county, the trustees of any township, and the council of any village, or any such authorities, determine to cooperate in the construction, improvement, maintenance or repair of any main market road, the procedure, except as herein otherwise authorized, shall be the same as in the case of cooperation by such authorities, in the construction, improvement, maintenance and repair of intercounty highways, as provided in sections 1178 to 1231-11, General Code. The funds appropriated or available for main market roads shall be used in carrying out the provisions of this section. [109 v. 299; 107 v. 69; 106 v. 574.]

Sec. 1231-3. [Extension of improvement through village; procedure.] The state highway commissioner may extend a proposed road improvement into or through a village when the consent of the council of said village has been first obtained, and such consent shall be evidenced by the proper legislation of the council of said village duly entered upon its records, and said council may assume and pay such proportion of the cost and expense of that part of the proposed improvement within said village as may be agreed upon between said state highway commissioner and said council. The state highway commissioner may also enter into an agreement with the council of said village to improve any part of the road within said village to a greater width than is contemplated by the proceedings for said improvement, and the state highway commissioner and the council of said village shall be governed as to all matters in connection with said improvement within said village by the statutes relating to road improvements through municipalities, by boards of county commissioners. [106 v. 574, 645.]

Sec. 6949. [Improvement through municipality; procedure; cost.] The board of county commissioners may construct a proposed road improvement into, within or through a municipality, when the consent of the council of said municipality has been first obtained, and such consent shall be evidenced by the proper legislation of the council of said municipality entered upon its records, and said council may assume and pay such proportion of the cost and expense of that part of the proposed improvement within said municipality as may be agreed upon between said board of county commissioners and said council. If no part of the cost and expense of the proposed improvement is assumed by the municipality, no action on the part of the municipality, other than the giving of the consent above referred to, shall be necessary; and in such event all other proceedings in connection with said improvement shall be conducted in the same manner as though the improvement were situated wholly without a municipality. [107 v. 69, 107; 106 v. 574.]

Sec. 6950. [Copy of surveys, plans, etc., filed with council; examination; resolution; agreement by council with commissioners as to proportion of cost; notice of consent and agreement.] If any part of the cost and expense of the proposed improvement is assumed by the municipality, the county commissioners, after the approval by them of the surveys, plans, profiles, cross-sections, estimates and specifications for said improvement, shall cause a copy of the surveys and profiles to be filed with the council of the municipality. It shall thereupon be the duty of the council of such municipality to examine said surveys and profiles, and if after such examination council is satisfied that the public convenience and welfare require that said improvement be made, it shall by resolution so determine, and shall approve said surveys and profiles. After the consent of said council has been obtained, and the agreement entered into by said council with the county commissioners determining what proportion of the cost and expense of said improvement is to be paid by said municipality, and after said council has determined that the public convenience and welfare require that said improvement be made, and has approved said surveys and profiles, the said council shall cause to be published once in a newspaper published and of general circulation within said municipality, if there be any such newspaper published in said municipality, but if there be no such newspaper published in said municipality then in a newspaper having general circulation in said municipality, a notice that said consent has been given and said agreement entered into, and that said surveys and profiles have been approved. Said notice shall fix a time by which claims for compensation and damages on account of the proposed improvement shall be filed with the council. Said notice shall be published at least one week before said time fixed for the filing of such claims. Claims for compensation and damages shall be in writing, and shall be filed with council not later than the time fixed in said notice, and all claims not so filed shall be barred, except as to minors and other persons under disability. If any claims for compensation or damages are filed and the council is not able to agree upon the amount

of the same with the persons filing such claims, they shall order proceedings to be instituted in a court of competent jurisdiction to inquire into such claims for compensation and damages in the manner provided for the assessment of damages in the case of street improvements wholly under the control and jurisdiction of the municipality. All compensation and damages on account of said improvement shall be paid by the municipality. For the purpose of providing by taxation a fund for the payment of the proportion of the cost and expense of said improvement to be paid by the municipality and also the compensation and damages incident thereto, said municipality is authorized to levy taxes upon all the taxable property of such municipality under the same conditions and restrictions imposed by law in the case of taxes levied, for the purpose of providing funds for the payment of the municipality's share of the cost of street improvements under the exclusive jurisdiction and control of the council of a municipality. The council of said municipality may assess against abutting property owners all or any part of the proportion of the cost and expense of said improvement and the compensation and damages to be paid by it. Said assessments shall be made in one of the methods provided for in the case of street improvements wholly within the municipality, and under the exclusive control of the council. [107 v. 69, 107; 106 v. 574.]

Sec. 6951. [Payment into county treasury by municipality; bond issue.] The municipality shall pay to the county treasurer its estimated proportion of the cost and expense of said improvement as fixed in said agreement between the council and the county commissioners, out of any funds available therefor, and in anticipation of the collection of assessments to be made against abutting property as hereinbefore provided, and in anticipation of the collection of taxes levied for the purpose of providing for the payment of the municipality's share of the cost and expense of such improvement, said municipality is authorized to sell its bonds under the same conditions and restrictions imposed by law in the sale of bonds for street improvements under the

exclusive jurisdiction and control of the council of a municipality. [107 v. 69, 108; 106 v. 574.]

Sec. 6951-1. [Improvement by assessment against property benefited.] The board of county commissioners may provide for an improvement within a municipality by levying against the property benefited in the same manner as is herein provided for in sections 6919, 6920, 6922, 6923 and 6925 of this act and as provided in section 6924 of the General Code. In such proceedings, however, the municipality shall pay all damages and compensation for land affected or taken by reason of such improvement. The municipality shall pay to the county treasurer its estimated portion of the cost and expense of such an improvement to be borne by the municipality as a whole as fixed in the agreement between the council and the county commissioners, out of any funds available, and may issue such bonds therefor and under such conditions as provided for in section 6951. [107 v. 69, 108.]

Sec. 6952. [Letting contract; payment of cost and expense.] The county commissioners shall thereupon receive bids and let the contract for improving such portion of said road as lies within the municipality, either in connection with the remainder of said improvement or separately, as such board of commissioners may determine. The total cost and expense of said work shall be paid on the allowance of the county commissioners, by the warrant of the county auditor, and after the completion of said work and the payment of the cost and expense thereof, any balance of the funds contributed by said municipality shall be refunded to it to be disposed of according to law. The word "road," as used in sections 6906 to 6953 inclusive of the General Code, shall be construed to include any state or county road or roads, or any part thereof, or any state or county road or roads, and any city or village street or streets, or any part thereof, which form a continuous road improvement. [107 v. 69, 109; 106 v. 574.]

Sec. 6953. [Proceedings by municipality when greater

width desired.] Whenever any portion of a road to be improved by the county commissioners lies within the corporate limits of a municipality and the council of said municipality desires to improve all or any part of said road within such municipality to a greater width than is contemplated by the proceedings for said improvement by the county commissioners, such council shall at any time before it approves the surveys and profiles for such improvement determine by resolution the additional width to which it desires such road, or part thereof, to be improved and shall cause a copy of such resolution to be filed with the county commissioners. The county commissioners shall thereupon cause the county surveyor to prepare the necessary surveys, plans, profiles, cross-sections, estimates and specifications for improving such road or part thereof to said additional width. The estimates for the improvement shall set forth the probable cost and expense of so much of said improvement as is made necessary by the proposed increase in the width thereof. After such surveys, plans, profiles, cross-sections, estimates and specifications have been completed by the county surveyor he shall file with the county commissioners a copy thereof and all subsequent proceedings shall be conducted in the manner hereinbefore provided. The council of the municipality may assume all that part of the estimated cost and expense of such improvement rendered necessary by the increased width thereof, or such part of said additional expense as may be agreed upon between the council and the county commissioners. [107 v. 69, 109; 106 v. 574.]

Sec. 6954. [Improvement through municipality by commissioners; legislation by council.] The board of county commissioners of any county may repair that portion of a county road extending into or through a municipal corporation, or a part of a county road and a city or village street or streets extending into or through a municipal corporation and forming a continuous road improvement, when the consent of the council of said municipal corporation has been first obtained and such consent shall be evidenced by the proper legislation of the council of said municipal corporation entered upon its records. [108 v. 478, 503.]

LABOR OF PRISONERS ON ROADS AND STREETS.

Sec. 7504. [Workhouse prisoners may be used upon streets.] Any city, having a workhouse located therein, shall have full power and authority to use the prisoners confined in said workhouse upon the streets of said city, or in the manufacture of any material required in the repair of said streets. [106 v. 574, 657.]

Sec. 7505. [Magistrate may sentence prisoner to work on streets.] Any magistrate of a city or village not having a workhouse located therein, shall have full power and authority to sentence prisoners convicted therein to work upon the streets of said city or village, or in the manufacture of any material required in the repair of said streets. [106 v. 574, 657.]

Sec. 7506. [Cost of transporting, maintaining, etc., prisoners; how paid.] The county, city and village authorities having charge of such roads and streets may lawfully expend any moneys available for the repair and maintenance of such roads or streets to meet the cost of transporting, maintaining and disciplining such prisoners while so employed upon such roads or streets. [106 v. 574, 657.]

Sec. 7507. [Provision for use of prison labor on contracts of private individuals.] The state highway commissioner, the county commissioners, or the authorities having charge of the streets of any city or village may provide for the use of prison labor in connection with contracts let to private individuals for the construction, maintenance and repair of such roads and streets, in which case the specifications for such improvement shall clearly set forth the amount of money to be deducted from the price paid for such improvement in lieu of the designated amount of prison labor employed on such improvement by the state, county or municipality. The discipline and legal custody of such prisoners shall, at all times during such work, remain under the control of the respective institutions furnishing such prisoners. If any prisoner does not perform his work to the satisfac-

tion of the authorities employing such labor, such prisoner shall be taken from the road force at the request of the proper authorities and another substituted. [106 v. 574, 657.]

Sec. 7514. [Power of state, county and city authorities to make provisions effective.] The authorities of the various institutions having custody and control of prisoners as hereinbefore referred to, and the various authorities of the state, counties, cities and villages having charge of the roads and streets of the same shall have full power and authority to do all things necessary to make the provisions of this act effective, for the use of prison labor upon the highways and streets of this state, and the authorities having charge of such roads and streets shall have power to expend any of the moneys provided therefor in any way necessary to make this act effective. Nothing herein shall be held to repeal or modify any other provision of law applying to prisoners, and prison labor, unless such provisions shall be entirely inconsistent herewith. [106 v. 574, 658.]

NATIONAL ROADS PARTLY IN MUNICIPALITY.

Sec. 7533. [Use of national road by city or village as street.] The council of a city or village through which the national road passes, after filing with the county commissioners an agreement, in writing, authorized by the council, and signed by the president thereof, binding itself to keep the road in such repair as is contemplated by the act or acts of congress ceding to the state of Ohio the jurisdiction and control of such portion of said road as lies within this state, may take under its care and control so much of the road as passes through the corporate limits of such city or village, and use and occupy it as a street or streets for such city or village.[1] [R. S. Sec. 2649; 70 v. 194.]

(1) **Agreement with State** by municipality to keep national road in repair in consideration of the abandonment of toll collections within the corporate limits, was held valid. Hollingworth v. State, 29 O. S. 552.

ROADS AND BRIDGES OF PRIVATE CORPORATIONS.

Turnpike Companies.

Sec. 9243. [Repair of roads in municipalities.] If such a company [1] fails to keep any part of its road within the limits of a municipal corporation in repair for five days successively, the proper municipal authority may pass a resolution requiring it to repair the road within ten days after the service of a copy thereof on the gate-keeper nearest the municipality, and the company shall declare its intention to abandon or repair it. On failure or refusal so to do within thirty days, or failure or refusal to repair in ninety days, the municipal corporation may file a complaint in writing, with a copy of the resolution, in the common pleas court of the county, describing the portion of the road required to be repaired. The court, or a judge thereof then shall appoint two disinterested persons as inspectors, who shall view the portion of the road complained of, and return their finding thereon, under oath, to the court, within ten days. If they find the complaint to be true, the court shall declare that such portion of the road is abandoned by the company, and the municipality may improve or repair it and assess and collect the costs of the improvement or repairs in the way provided by law for the improvement of streets.[2] (R. S. Sec. 3482; 51 v. 464 § 1; (S. & C. 333).]

(1) **Company,** refers to turnpike or plank road company. §§ 9229 G. C., *et seq.*, provide the powers of such companies.

(2) See Madisonville v. Tp. Co., 17 B. 30.

Sec. 9244. [Proceeding to enforce repairs.] Notice of the complaint, and of the appointment and time of meeting of the inspectors, shall be served on the president or other officer of the company, or at its principal office, five days before the meeting. If such service be made by a person other than the sheriff, it shall be verified by the oath of the person making it. No toll shall be received at the gates for the portion of the road so declared abandoned, and if the keeper of any gate demands and receives such toll, he shall pay the sum of five dollars to the party injured, to be recovered by civil action before any justice of the peace having jurisdiction. [R. S. Sec. 3483; 51 v. 464, § 1; (S. & C. 334.)]

Sec. 9245. [Costs.] Costs of the proceeding on the complaint shall be paid by the company, if the action be sustained, but if not sustained by the municipal corporation, and execution shall issue therefor as in other cases. [R. S. Sec. 3483; 51 v. 464, § 1; (S. & C. 334.)]

Sec. 9254. [No toll-gate to be erected in city or village.] No such company [1] shall erect a toll-gate, or collect tolls within a city or village, or within eighty rods thereof. When by the creation of a village, or extension of the limits of a city or village, a toll-gate is brought within the limits or within eighty rods thereof, the company shall remove the toll-gate to a point on its road not nearer to such limits than eighty rods. So much of its road as is included within the limits of such city or village shall thereby become a public street, to be kept in repair as other such streets.[2] No toll shall be taken thereon.[3] [R. S. Sec. 3491; 66 v. 36 § 1; 75 v. 90 § 34; (S. & S. 841; S. & C. 339).]

(1) **Company,** refers to turnpike or plank road company. See note to § 9243, *ante.*

(2) **Other provisions.**—Power of council when turnpike comes within municipal limits, see § 3716 G. C., *ante.*

(3) **Rights of turnpike company.**—See notes under § 3716 G. C., and under § 3722 G. C., *ante,* in Part I.

Sec. 9255. [Compensation for removal of toll-gate and use of road.] Compensation shall be made to the company for the damages it sustains by reason of such removal of its toll-gate, and surrender of such part of its road. If the company and authorities of the city or village do not agree thereon, the damages shall be ascertained in proceedings which the municipal authorities shall commence, to appropriate the property to such use, in the manner provided by law for the appropriation of property by municipal corporations, or, in default of such agreement, or institution of appropriation proceedings, at any time after the removal of the toll-gate, the company may recover its damages from the city or village, by civil action.[1] [R. S. Sec. 3491; 66 v. 36 § 1; 75 v. 90 § 34; (S. & S. 841; S. & C. 339).]

(1) **Condemnation.**—A suit under this section by turnpike company, is in the nature of a condemnation. Tp. Co. v. Mt. Healthy, 66 O. S. 660 (unreported).

Municipality cannot condemn less than the whole of the turnpike lying within its limits. C. & W. Tp. Co. v. Cincinnati, 2 B. 126.

Municipality does not have right to lay water and sewer pipes under surface of turnpike, without condemning. C. & A. Tp. Co. v. Avondale, 17 B. 294.

Municipality may be mandamused at suit of one traveling over pike, to commence appropriation proceedings. Gates v. Tp. Co. 4 N. P. 235. But injunction will not lie to prevent collection of tolls. *Ib.*

As to method of ascertaining damages in such condemnation, see note under § 3716, *ante*, in Part I.

Sec. 9256. [May sell road or bridges to city or village.] Such company, a part of whose road or bridge becomes embraced within the limits of a city or village may contract with the proper authorities thereof, or of the township or county in which it is situated, for the disposal, release, and abandonment of such part of its road or bridge, upon terms agreed upon between the company and the authorities. Such a contract heretofore entered into shall be as valid as if made under this section. [R. S. Sec. 3492; 53 v. 180 § 1; (S. & C. 338).]

Bridge Companies.

Sec. 9306. [Sale of bridge.] The provisions of law as to the sale of a bridge to a municipality by a turnpike company shall apply to bridge companies.[1] [R. S. Sec. 3537; 69 v. 185 § 55; 53 v. 180 § 1; (S. & C. 338).]

(1) See § 9256, *ante*.

Sec. 9311. [Ohio river bridge companies; further powers.] In the manner provided by law, such company [1] may purchase or appropriate and hold such real estate as, in the opinion of its directors, will be required for the site of the bridge, and of suitable avenues or approaches leading thereto, and may locate it on, or construct it over, a public street, road, avenue, or alley. But in constructing it over a public street, road, avenue or alley, it must be at such height as not to interfere with travel passing on, over or along the bridge. No pier or other obstruction, shall be built upon such street, road, avenue

or alley, without the consent of the municipal or other authorities having charge or control of it. The company shall be responsible for injuries done to private property, adjacent or near to such bridge, by its elevation and construction, which may be recovered in a civil action brought by the owner, at any time within two years from the completion thereof. [R. S. Sec. 3542; 86 v. 25; 65 v. 55 § 5; (S. & S. 203).]

(1) **Ohio River bridge companies.**—By § 9310 G. C. a company organized to construct a bridge over the Ohio River is authorized to construct and maintain such bridge with suitable avenues and approaches leading thereto.

Avenue Companies.

Sec. 10163. [Avenue companies.] A corporation created for the purpose of constructing and maintaining a free public avenue shall construct and maintain its avenue at not less than fifty nor more than one hundred feet in width, of such materials as it deems proper. It shall not charge toll of any kind for the use thereof by the public, but may make and enforce all necessary and reasonable regulations for its use and preservation. If in laying out such avenue, it be necessary to enter upon and appropriate any lands or premises, the proceedings therefor shall be instituted and carried on as is provided by law for the appropriation of private property by municipal corporations. [R. S. Sec. 3823; 76 v. 62 § 1.]

Sec. 10165. [When consent of authorities necessary.] When in laying out such an avenue it becomes necessary to run through or along the line of any village, the board of directors of the avenue company shall obtain the consent of the council of the village to laying out the avenue through or along the territory over which they have supervision or control. [R. S. Sec. 3825; 53 v. 46 § 4; (S. & C. 343).]

Sec. 10166. [Authorities may surrender roads to company.] If, on application being made to the council of a village, they are of opinion that the public good demands the laying out of such avenue, they may give their written consent to the laying out and construction thereof, which shall have the force and

effect of a full and complete release of all authority over the avenue within their corporate jurisdiction. The directors may lay out and construct the avenue through the territory of such village, and control it as though the village did not exist. [R. S. Sec. 3826; 53 v. 46 § 5; (S. & C. 343).]

ROAD REPAIRS.

Distribution of Road Tax.

Sec. 5649. [Payment of road tax to county treasurer.] Any person charged with a road tax shall pay it in money to the county treasurer in like manner as other taxes are collected and paid. Road taxes paid to or collected by the county treasurer shall be paid over to the treasurer of the township or municipal corporation from which they were collected, and be expended on the public roads and in building and repairing bridges in the township and municipal corporation from which they were collected under the direction of the trustees of the proper township or council of such municipal corporation. All funds heretofore levied for road purposes and not expended, shall be expended by the trustees of the township or council of the municipal corporation from which the funds were collected as other taxes collected under the provisions of this title. [103 v. 489; 101 v. 113; R. S. Sec. 2830; 99 v. 439; 98 v. 333; 77 v. 184; 74 v. 92.]

TRAFFIC REGULATIONS.

Sec. 7246. [Maximum load permitted on public highway or street.] No traction engine or steam roller weighing in excess of twelve tons, or no trailer, semi-trailer, wagon, truck, automotive truck or other power vehicle, whether propelled by muscular or motor power, weighing in excess of ten tons, including weight of vehicle, object or contrivance and load, shall be operated over and upon the improved public streets, highways, bridges or culverts within the state, except as provided in this chapter. This provision shall not apply to vehicles run upon rails or tracks or to fire engines, fire trucks, or other vehicles or apparatus belonging to any municipal or volunteer fire department or used by

such department in the discharge of its functions. No object shall be moved over or upon such streets, highways, bridges or culverts upon wheels, rollers or otherwise, except as provided in this chapter, in excess of a total weight of twelve tons, including weight of vehicle, object or contrivance, and load. [110 v. 319; 109 v. 546; 107 v. 69; 106 v. 574.]

Sec. 7247. [Permission required when weight in excess of twelve tons.] The county surveyor of any county, upon application in writing by the owner or person having charge thereof, may grant permission for the moving of vehicles, objects or structures in excess of a total weight of twelve tons, including weight of vehicle, object or contrivance, structure and load, over the improved public highways, bridges or culverts within such county and located outside of any municipal corporation or corporations therein situated. Such permission shall be in writing and the county surveyor may grant the same subject to such conditions and restrictions as in his judgment are necessary for the preservation and protection of such highways, bridges and culverts. The director of public service of a city or mayor of a village may in like manner grant such permission as to the improved public highways, streets, bridges or culverts within such city or village. [107 v. 69, 140.]

Sec. 7248. [Weight of load on highways and bridges and width of tire prescribed.] No person, firm or corporation shall transport over the improved public streets, alleys, highways, bridges or culverts within this state, in any vehicle propelled by either muscular, motor or other power, any burden, including weight of vehicle and load, greater than the following:

In vehicles having metal tires three inches or less in width a load of five hundred pounds for each inch of the total width of tire on all wheels. When the tires on such vehicles exceed three inches in width an additional load of eight hundred pounds shall be permitted for each inch by which the total width of the tires on all wheels exceeds twelve inches.

In vehicles having tires of rubber or other similar sub-

stances, for each inch of the total width of tires on all wheels, as follows: For tires three inches in width, a load of four hundred and fifty pounds; for tires three and one-half inches in width, a load of four hundred and fifty pounds; for tires four inches in width, a load of five hundred pounds; for tires five inches in width, a load of six hundred pounds; and, for tires six inches and over in width, a load of six hundred and fifty pounds. The total width of tires on all wheels shall be, in case of solid tires of rubber or other similar substance, the actual width in inches of all such tires between the flanges at the base of the tires, but in no event shall that portion of the tire coming in contact with the road surface be less than two-thirds the width so measured between the flanges. And in the case of pneumatic tires of rubber or other similar substance, the total width of all tires on all wheels shall be the actual width of all such tires measured at the widest portion thereof when inflated and not bearing a load.

In no event shall the load, including the proportionate weight of vehicle that can be concentrated on any wheel, exceed six hundred and fifty pounds to each inch in width of the tread as defined above for solid tires; or each inch in the actual diameter of pneumatic tires measured when inflated and not bearing a load. [110 v. 319, 320; 109 v. 547; 108 v. 1238; 107 v. 69.]

Sec. 7248-1. [Maximum weight, thickness of tires, of vehicles.] No vehicle shall be operated upon the improved highways, streets, bridges or culverts within this state, having a gross weight, including load, greater than sixteen thousand pounds on both wheels of one axle, or no vehicle having more than eighty per cent of the permissive gross weight of vehicle and load concentrated on both wheels of one axle, or equipped with solid rubber tires of a thickness averaging less than the following: For three, three and one-half, four and five inch tires, seven-eighths inch; for six, seven and eight inch tires, one inch; and for ten, twelve and fourteen inch tires, one and one-eighth inch. Thickness of solid rubber tires as used herein shall be the average thickness of rubber meas-

ured from the top of the flanges of the tire channel. [110 v. 319, 320; 109 v. 548.]

Sec. 7248-2. [Maximum width, height and length of vehicles; exceptions.] No vehicle shall be operated upon the highways of this state whose width is greater than ninety-six inches, except traction engines whose width shall not exceed one hundred and thirty-two inches, and no vehicle shall be operated on the highways of a greater height than twelve feet six inches, or of a greater length than thirty feet, and no combination of vehicles coupled together shall be so operated whose total length, including load, shall be greater than eighty-five feet, provided that in special cases vehicles whose dimensions exceed the foregoing may operate under a written permit granted as provided in this chapter. Provided, that this section shall not apply to fire engines, fire trucks, or other vehicles or apparatus belonging to any municipality or to any municipal volunteer fire department or salvage company organized under the laws of Ohio or used by such department or company in the discharge of its functions. [110 v. 319, 321; 109 v. 548.]

Sec. 7249. [Maximum load and speed of commercial cars in closely built up municipalities and outside of municipal corporations.] No commercial cars of the kinds and weights enumerated in this section shall be operated in the business and closely built up portions of a municipality or in any other portions thereof, or outside of municipalities at a greater rate of speed than is reasonable and proper having regard for the width, traffic, use and the general and usual rules of such road or highway. A greater rate of speed than the following shall be prima facie evidence of a rate of speed greater than is reasonable and proper for general safety and the protection of the roadway.

1. For vehicles equipped with solid rubber tires whose maximum weight of vehicle and load does not exceed four tons, twelve miles an hour in the business or closely built up portions of a municipal corporation, fifteen miles an hour in other portions thereof, or twenty miles an hour outside of a municipal corporation, and whose maximum weight of

vehicle and load exceeds four tons, twelve miles an hour in the business or closely built up portions of a municipal corporation, fifteen miles an hour in other portions thereof, or fifteen miles an hour outside of a municipal corporation.

2. For vehicles equipped with pnuematic tires whose maximum weight of vehicle and load is three tons and not more than six tons, fifteen miles an hour in the business and closely built up portions of municipal corporations, twenty miles an hour in other portions thereof, or twenty-five miles an hour outside of municipal corporations.

For vehicles equipped with pneumatic tires whose maximum weight of vehicle and load is more than six tons, twelve miles an hour in the business and closely built up portions of municipal corporations, eighteen miles an hour in other portions thereof, or twenty miles an hour outside of municipal corporations.

3. For motor vehicles drawing more than one trailer or one semi-trailer, eight miles an hour.

4. For vehicles equipped with iron or steel tires whose maximum weight of vehicle and load exceeds six tons, ten miles an hour. [110 v. 319, 321; 109 v. 548; 107 v. 69.]

Sec. 7249-1. [Weight, carrying capacity and tire widths must be displayed plainly.] No commercial car shall be operated upon the improved streets, highways, bridges or culverts within this state which does not display on the side thereof in plain, legible letters and figures, the weight of the vehicle fully equipped, manufacturer's rated carrying capacity, or the passenger seating capacity and the tire widths of such vehicle. [110 v. 319, 322.]

Sec. 7251. [Liability for damages; prosecution; application of money.] Any person violating any provision of law relating to or regulating the use of the public highways shall be liable for all damages resulting to any street, highway, bridge or culvert by reason of such violation. In case of injury to a street, highway, bridge or culvert such damages shall be collected by civil action brought in the name of the state on the relation of the director of highways and public works and it shall be the duty of the at-

torney general or prosecuting attorney of any county to institute such action when so requested by the director of highways and public works and to prosecute the same to final judgment. In case of any injury to an improved public road, bridge or culvert of a county such damages shall be recovered by a civil action prosecuted by the county commissioners, and in the case of an injury to an improved public street, highway, bridge or culvert of a municipal corporation, it shall be the duty of the proper authorities of such municipal corporation to institute an action for the recovery of such damages. All damages collected under the provisions of this section shall be paid into the treasury of the state or proper political sub-division thereof, and credited to any fund for the repair of streets, highways, bridges or culverts. [110 v. 319, 322; 109 v. 546; 107 v. 69.]

COUNTY DITCHES IN MUNICIPALITY.[1]

(1) For proceedings relative to construction of ditch or drain on petition of a municipality or where a municipality is affected, see Act to codify, consolidate and clarify the ditch laws of the state, etc., 108 O. L., p. 926, as amended, 110 O. L. 161.

JOINT SEWERS AND SEWAGE DISPOSAL WORKS.

Sec. 6602-1a. [Board of county commissioners may lay out, establish and maintain sewer districts.][1] Whenever duly authorized by the council of any incorporated municipality, the board of county commissioners may, by resolution, lay out, establish and maintain one or more sewer districts within their respective counties to include a part or all of the territory within such municipality as the whole or a part of such sewer district. Such authority shall be evidenced by an ordinance or resolution of the council of said municipality, entered upon its records. [110 v. 338, 339.]

(1) **Water supply.**—For statutes authorizing counties to maintain water supply for sewer districts, see § § 6602-17 et seq. (110 O. L. p. 342.)

Sec. 6602-1b. [Authority of the board of county commissioners in regard to sewer districts; exceptions.] The authority of the board of county commissioners to provide

sewer improvements and to maintain and operate the same within sewer districts which include a part or all of the territory within one or more incorporated municipalities shall be the same as provided by law within sewer districts wholly outside of municipalities, including the levying of assessments, provided, however, that such authority, except as hereinafter provided, shall be limited to main works only, and shall not include construction and maintenance of lateral sewers for local service within such municipality.

At any time after a sewer district is established comprising or including a part or all of the territory within any municipality, the council of such municipality may by ordinance or resolution authorize the board of county commissioners to proceed with the construction or the maintenance, repair and operation of any sewer improvement for local service within such municipality. After such authority has been granted, the board of county commissioners may proceed with the construction, or the maintenance and operation of said improvement in the same manner as provided by law for improvements in sewer districts wholly outside of municipalities. [110 v. 338, 339.]

Sec. 6602-1c. [Jurisdiction remains with county commissioners until improvements are completed.] Whenever any portion of a sewer district is incorporated as a municipality or annexed to a municipality, the area so incorporated or annexed shall remain under the jurisdiction of the county commissioners for sewerage purposes, until all sewerage improvements for said area for which detailed plans have been prepared and the resolution declaring the necessity thereof has been adopted by the county commissioners, shall have been completed or until the county commissioners shall have abandoned such projects. Such incorporation or annexation of any part of a sewer district shall not interfere with or render illegal any issue of bonds or certificate of indebtedness made by the county commissioners to provide for the payment of the cost of construction and maintenance of any sewer improvement within such area, or with any assessments levied, or to be levied upon the property within such area

to provide for the payment of the cost of operation and maintenance. [110 v. 338, 339.]

Sec. 6602-10. [Joint construction and use of sewers and sewage disposal works.] That the board of county commissioners of any county in this state or the council of any city or village may enter into a contract, upon such terms and conditions, and for such period of time, as may be mutually agreed upon, with any other county, city or village, to prepare all necessary plans and estimates of cost, to connect any sewer or sewers of such county, city or village, with any sewer or sewers constructed, or to be constructed, by any other county, city or village, and to provide for the joint use by such contracting parties of such sewer or sewers and of any sewage treatment or disposal works of such county, city or village. [107 v. 59.]

Sec. 6602-11. [Provisions in regard to payment on contracts; exceptions.] All such contracts shall provide for payment, to the county, city or village owning, constructing, or about to construct a sewer, sewers, or sewage treatment or disposal works, to be jointly used, of the amount agreed upon, by the county, city or village so contracting for the joint use thereof; provided, however, that any such county, city or village owning, constructing, or agreeing to construct any such sewer improvement or sewage treatment works, as provided herein, and permitting the use thereof by such other county, city or village, shall retain full control and management of the construction, maintenance, repair and operation of such sewer improvement and sewage treatment or disposal works, except when conveyed to a municipality as hereinafter provided; and, provided, further, that any such contract, before going into effect, shall be approved by the Ohio state department of health. Any completed sewer improvement or sewage treatment works for the use of any sewer district, constructed under the provision of sections 6602-1 to 6602-13, inclusive, of the General Code, and located within any municipality or within any area which may be annexed to or incorporated as a municipality, may, by mutual agreement between the county commissioners and

such municipality, be conveyed to such municipality, which shall thereafter maintain and operate such sewer improvement or sewage treatment works. The county commissioners may retain the right to joint use of such sewers or treatment works for the benefit of the sewer district. The validity of any assessments which may have been levied or may hereafter be levied to provide means for the payment of the cost of construction or maintenance of such sewer improvement or sewage treatment works or any part thereof shall not be affected by such conveyance. (110 v. 338, 341; 107 v. 59.)

Sec. 6602-12. [Empowered to levy taxes or special assessments.] That the county, city or village so contracting for the joint use of any sewer, sewers or sewage treatment or disposal works, so constructed or to be constructed by another county, city or village, shall provide for payment of the agreed compensation by the levy of taxes or special assessments as now provided in the laws governing such county, city or village in the construction, maintenance, repair, or operation of a sewer improvement or sewage treatment or disposal works, and may issue bonds as provided by such laws in anticipation of such taxes or assessments. [107 v. 59.]

Sec. 6602-13. [Credit of amount to proper fund.] That the county, city or village receiving such compensation shall credit the amount so received to the proper fund to be used and applied towards the construction or maintenance, as the case may be, of such sewer and other works to be so jointly used. [107 v. 59.]

Sec. 1809-1. [Contract with municipality for sewer connections.] Any commission or board vested with authority to erect or manage a state institution, located outside of the corporate limits of a municipality and the council of such municipality may enter into a contract upon such terms and conditions as may be agreed upon, to connect the sewer system of such institution with that of such municipality. Such contract may include payment for the increased cost to such municipality occasioned by such connection and service ren-

dered, provided that such contract shall be made for a period of not less than ten years, and is approved by the governor and the attorney general. [103 v. 658.]

TELEGRAPH AND TELEPHONE COMPANIES.

Sec. 9178. [Appropriation proceedings by telegraph company.] When lands authorized to be appropriated to the use of such company [1] are subject to the easement of a street, alley, public way, or other public use, within the limits of a city or village, the mode of use shall be such as is agreed upon between the municipal authorities of the city or village and the company.[2] If they cannot agree,[3] or the municipal authorities unreasonably delay to enter into an agreement, in a proceeding instituted for the purpose, the probate court of the county shall, subject to the provisions of section eleven thousand forty-six of the General Code, direct in what mode the telegraph line shall be constructed along such street, alley, or public way, so as not to incommode the public in the use of it.[4] [101 v. 289; R. S. Sec. 3641; 62 v. 72; (S. & S. 154).]

(1) **Company referred to** is a magnetic telegraph company, powers of which are defined in Chap. 2, Div. II, Title IX, of Part II, G. C. The sections here printed are a part of that chapter.

A foreign telephone company cannot exercise the power of eminent domain in Ohio to condemn a right through the streets. Central Union Tel. Co. v. Columbus Grove, 28 C. C. 131; 8 C. C. (N. S.) 81.

(2) **Duration of right.**—Upon expiration of agreement with city the company's right to use the street ceases. State v. Telephone Co., 11 C. C. 55. But company cannot be ousted until a failure to agree as to further use and unreasonable delay in applying to Probate Court. State *ex rel.*, v. Telephone Co., 14 C. C. 273.

Extent of municipal power.—The right of the company to use the streets is given directly by the legislature and is independent of the municipality, except that the municipality may discharge the duty imposed upon it of keeping the streets in repair and free from nuisance and may fix the mode of use by telephone company under provisions of § 9178 G. C. The city's power is exhausted when it allows the company to occupy the streets and agrees as to the mode of using the streets. Macklin v. Telephone Co., 24 C. C. 446; 1 C. C. (N. S.) 373 (aff'd 70 O. S. 507); Fitzsimmons Tel. Co. v. Cincinnati, 2 N. P. (N. S.) 51; Farmer v. Telephone Co., 72 O. S. 526.

Municipality cannot fix telephone rates.—Municipality is without power to fix the rates to be charged or to require free tele-

phones to be furnished the municipality, and the telephone company is not estopped, by agreeing to such terms, from increasing the rates or refusing free telephones. Farmer v. Telephone Co., 72 O. S. 526. See also Mackin v. Telephone Co., 24 C. C. 446, 453; 1 C. C. (N. S.) 373 (aff'd 70 O. S. 507); but a different rule applies where municipality has granted rights to lay underground conduits. Columbus v. Telephone Co., 28 O. C. A. 102; and see notes to § 9197, *post*.

Revocation of right.—See Cincinnati v. Cin. Edison Co., 26 B. 104.

(3) **Failure to agree.**—A petition which shows no specific questions of difference between the corporation and the municipal authorities, but alleges in that behalf only that they have failed to agree on the mode of use of the streets, and prays for a general judgment directing in what mode plaintiff may construct its telephone lines along the streets, does not state facts justifying any order or judgment in its favor. Queen City Telephone Co. v. Cincinnati, 73 O. S. 64.

Failure to agree as to price to be charged patrons for instruments is not such failure to agree as to mode of use contemplated by this section. State *ex rel.* v. Telephone Co., 14 C. C. 273. As to what is unreasonable delay to enter into agreement, see Cincinnati Telephone Co. v. Cincinnati, 48 B. 986.

(4) **Validity.**—This section is not unconstitutional because it confers on the Probate Court the power to fix terms for use of streets by telegraph companies. Zanesville v. Telegraph & Telephone Co., 64 O. S. 67.

Probate court has jurisdiction to make order directing mode of use as provided in this section. *Ib.*

Use by another company.—See Hauss Elec. Co. v. Jones Bros. Elec. Co., 23 B. 137.

Franchise by Probate Court, cannot require telephone company to put its wires and apparatus in conduits under the streets, in the absence of consent by municipal authorities. Queen City Telephone Co. v. Cincinnati, 73 O. S. 64; *contra*, Cincinnati Telephone Co. v. Cincinnati, 49 B. 83; Cleveland Telephone Co. v. Chagrin Falls, 14 Dec. 449; Telephone Co. v. Middletown, 2 N. P. (N. S.) 455.

The function of the probate court is strictly limited to fixing the mode of use and it cannot fix the length of the grant or the extent of the use. Cleveland Telephone Co. v. South Newburgh, 4 N. P. (N. S.) 624, 52 B. 173. Nor can it fix the rates to be charged by the company. State *ex rel.* v. Toledo Home Telephone Co., 72 O. S. 60.

A company is not estopped to question validity of court's order fixing rates because the rates were fixed by court's order upon application of the company. *Ib.*

Company seeking franchise must prove incorporation and due and legal election of directors. Queen City Telephone Co. v. Cincinnati, 73 O. S. 64.

In proceeding in probate court to fix mode of use of streets by telephone company, a competing company is not a proper party, and has no right to intervene or prosecute error. Sidney Telephone Co. v. Farmers Telephone Co., 21 Dec. 241, 11 N. P. (N. S.) 424.

Sec. 9179. [Compensation only for damages.] Nothing in the preceding section shall authorize a municipal corporation to demand or receive compensation for the use of a street, alley, or public way, beyond what may be necessary to restore the pavement to its former state of usefulness. [R. S. Sec. 3461; 62 v. 72; (S. & S. 154).]

Sec. 9191. [Chapter applies to telephone companies.][1] The provisions of this chapter apply also to a company organized to construct a line or lines of telephone; and every such company shall have the powers and be subject to the restrictions herein prescribed for magnetic telegraph companies.[2] [R. S. Sec. 3471.]

(1) See note (1) to § 9178 G. C., *ante*.

(2) **The term "telegraph"** was held sufficient to embrace telephone company even without statutory provision. Railway v. Telegraph Ass'n, 48 O. S. 390, 423.

Sec. 9197. [Ordinances, validity of.] Any company organized under the laws of this or of any other state, and owning and operating a telephone exchange, or doing a telegraph business, in any city or village in this state, may construct and maintain under-ground wires and pipes, or conduits and other fixtures for containing, protecting and operating such wires in the streets and public ways of such city or village in the state, when the consent of such city or village has been obtained therefor.[1] Any ordinance of any village purporting to grant the right or privilege to any telephone or telegraph company to construct and maintain underground wires and pipes, or conduits and other underground fixtures for containing, protecting and operating such wires, in the streets and public ways of such village, and which grant has been accepted, or when money has been expended in good faith on account thereof, is hereby declared to be valid and effective, any law, or part of law, to the contrary notwithstanding. [100 v. 85, §§1, 1a.]

(1) **Conditions of grant.**— Municipality may require telephone company, as condition to consent to use the streets for sub-surface construction, to pay the municipality a percentage of gross earnings on

the company's business. Columbus v. Columbus Citizens Telephone Co., 21 Dec. 273; 10 N. P. (N. S.) 433.

The limitation on the power of the municipality to demand compensation for the use of the streets for overhead wires, does not apply to a right granted for underground construction under § 9197. Columbus v. Columbus Citizens Telephone Co., 21 Dec. 273; 10 N. P. (N. S.) 433.

Underground conduits. — Ordinance not accepted by the company or acted under by it, is subject to revocation. State ex rel. v. Norwood, 23 C. C. (N. S.) 145.

Controversy not determined by mandamus.—A controversy between a municipality and a telephone company as to the right of the latter to be granted a permit to lay conduits in certain streets can not be determined in a mandamus proceeding. State ex rel. v. Norwood, 23 C. C. (N. S.) 145.

Power to fix rate.—The use of the streets of a municipality by a telephone company, including the use of the subsurface for a conduit system, constitutes a sufficient consideration to render binding a provision in the franchise ordinnance which fixes telephone rates within the corporate limits, and such a provision is enforcible both on behalf of the city and of private consumers located within its limits. Columbus v. Telephone Co., 28 O. C. A. 102; 13 Oh. App. 32; 39 O. C. C. 297; but where the conduit system has been extended under orders from an authorized officer of the municipality, the company may equitably increase its rates within the limits permitted by the franchise ordinance in the event of conduit extensions. *Ib.*

For extended discussion on the rights of company and municipality under such a grant bearing on right to increase rates, see Columbus v. Pub. Util. Com., 103 O. S. 79.

Company bound by all terms of franchise.—A company which has accepted a franchise, including a provision as to rates, will not be permitted to retain the favorable provisions and at the same time eliminate one which unanticipated cost and unprofitable operation has rendered burdensome. Columbus v. Telephone Co., 28 O. C. A. 102.

To same effect see Columbus v. Pub. Util. Com., 103 O. S. 79.

Sec. 9198. [Consent, by whom to be given.] Consent of a city or village to the construction and maintenance of underground wires and pipes, or conduits and other fixtures therefor, by a company owning and operating a telephone exchange or doing a telegraph business, shall be given by the council in cities or villages. [100 v. 85 § 2.]

SEWERAGE COMPANIES.

Sec. 10157. [Sewerage companies.] A company organized for the purpose of draining the streets, alleys, lots, commons, wharves, landings, or buildings of a city or village in this state, may construct and maintain sewers and drains, and lay conductors or pipe for conveying water and other liquid matter from the lots, houses, and streets, through and under the streets, sidewalks, public highways, alleys, commons, wharves, or landings of any such city or village. Upon application by such company the council of any city, or village, may grant to it the privilege of exercising its corporate powers within the limits thereof, for such term of years, and upon such conditions and limitations, as may be deemed expedient. The city council, or the council of the village, may require from the company such reasonable security as it deems necessary for the faithful performance of the duties imposed upon such company by law. [R. S. Sec. 3871; 53 v. 137 § 5; (S. & C. 341).]

Sec. 10158. [Grants and privileges prohibited.] No grant shall be made to such a company, and no power or privilege be conferred upon or exercised by it, which will interfere with the rights of any other corporation, or any person, nor shall any person be taxed without his consent for drainage or sewerage constructed by such company. Such companies shall be liable for all damages occasioned by their acts, neglects, or defaults to the rights of persons and other corporations. [R. S. Sec. 3871; 53 v. 137 § 5; (S. & C. 341).]

Sec. 10159. [When municipality must purchase property of company.] When a city or village which has granted to such a company, for any term, the rights and privileges herein mentioned, and, at the expiration of the term, upon petition of the company, fails or refuses to renew the grant, the city or village shall purchase of the company its property, consisting of sewers, drains, and pipes actually laid and constructed, with the appurtenances, and the materials and fixtures appertaining thereto, on hand at the time of the expiration of such term, at a price not exceeding the actual cost thereof, for the use and

benefit of the city or village. [R. S. Sec. 3872; 53 v. 137 § 5; (S. & C. 341).]

Sec. 10160. [Municipality may contract with company.] The council of any city, or village, in which such company is organized, may contract with it for the construction and use of such sewers or drains, for draining the streets, alleys, lots, commons, wharves, or grounds within the limits of the municipal corporation. The city or village shall not use the sewers or drains in any manner except by and with the consent of the company, and in the manner, and upon the terms and conditions, which are mutually agreed upon by the company and the city or village. [R. S. Sec. 3873; 53 v. 137 § 6; (S. & C. 342).]

Sec. 10160-1. [Owners outside municipalities permitted to use sewers.] The council of any city or village may permit the owners or association of owners of lots and lands abutting on roads or other highways entering such city or village to connect with and use the sewers of such city or village for carrying off sewage and drainage from such outside lots or lands upon such terms as may be agreed upon between such council and the owners or association of owners of such outside lots or lands. [102 v. 192.]

Sec. 10161. [Company may prescribe rates.] Such companies may prescribe the terms upon which owners and occupants of houses or lots may obtain the use of their sewers and drains for private purposes, and the rate of charge annually for such use, and also the terms upon which the city or village may use the sewers and drains for public purposes. [R. S. Sec. 3874; 53 v. 137 § 7; (S. & C. 342).]

Sec. 10162. [Powers of municipalities not limited.] Nothing in the five preceding sections shall prevent any city or village from constructing sewers, or establishing and maintaining a system of sewerage, under the direction and by the authority of the municipal authorities thereof, not interfering, however, with the work of such company. [R. S. Sec. 3875; 53 v. 137 § 8; (S. & C. 342).]

ADVERSE POSSESSION OF STREETS.

Sec. 11220. [Real estate dedicated to public uses.] If a street or alley, or any part thereof, laid out and shown on the recorded plat of a city or village, has not been opened to the public use and occupancy of the citizens thereof, or other persons, and has been enclosed with a fence by the owner or owners of the inlots, lots or outlots lying on, adjacent to or along such street or alley, or part thereof, and has remained in the open, uninterrupted use, adverse possession and occupancy of such owner or owners for the period of twenty-one years, and if such street, alley, inlot or outlot is a part of the tract of land so laid out by the original proprietor or proprietors, the public easement therein shall be extinguished and the right of such city or village, the citizens thereof, or other persons, and the council of such city or village and the legal authorities thereof, to use, control or occupy so much of such street or alley as has been fenced up, used, possessed and occupied, shall be barred, except to the owners of such inlots or outlots lying on, adjacent to or along such streets or alleys who have occupied them in the manner aforesaid.[1] [R. S. Sec. 4977; 86 v. 300; 83 v. 74; 77 v. 303; 51 v. 57 § 9.]

(1) See note "adverse possession" under § 3714, *ante*, in Part I.

OBTRUCTIONS, DISTURBANCES, ETC., IN STREETS.

Sec. 12634. [Unlawful use of air guns, etc.] Whoever shoots, forces or throws by the means of an air gun or other arm or implement, a lead, iron or other hard substance upon a street, alley, lane or public place, shall be fined not less than one dollar nor more than twenty-five dollars. [91 v. 86; Bates, 6980-1.]

Sec. 12635. [Racing or shooting on streets.] Whoever runs a horse, or shoots or fires a gun or pistol at a target within the limits of a municipal corporation, shall be fined not less than five dollars nor more than fifty dollars. [R. S. Sec. 7007; 29 v. 161 § 6; (S. & C. 448).]

Sec. 12636. [Firing cannon or exploding gunpowder on street.] Whoever, except in case of invasion by a foreign enemy, or to suppress insurrection or mob, or for the purpose of raising the body of a person drowned, or for the purpose of blasting or removing rock, fires a cannon, or explodes, at one time, more than four ounces of gunpowder upon a public street or highway, or nearer than ten rods thereto, shall be fined not less than five dollars nor more than fifty dollars. [R. S. Sec. 7004; 43 v. 17 § 1; (S. & C. 451).]

Sec. 12639. [Obstructions on public sidewalks.] Whoever sets up a table, stand, tent, wagon or other article, to use or let for profit, on a public footwalk or sidewalk constructed according to law by a person, board of education, the council of a municipal corporation, the trustees of a cemetery association, the trustees of a township or an agricultural or religious society, or rides, drives, leads or hitches a horse or other animal on such footwalk or sidewalk, or obstructs it or digs up or removes any of the material of which it is composed, shall be fined not less than five dollars nor more than twenty-five dollars, or imprisoned not more than ten days, or both. [R. S. Sec. 6884; 89 v. 234, 70; 79 v. 131; 77 v. 145; 71 v. 105 § 2.]

Sec. 12644. [Unlawfully stringing wires, etc., for conducting electricity.] Whoever places, strings, constructs or maintains a line, wire, fixture or appliance of any kind for conducting electricity for lighting, heating or power through a street, alley, lane, square, place or land in a city or village without the consent of such city or village, shall be fined not less than one hundred dollars nor more than five hundred dollars. This section shall extend to all levels above, below and along the surface of public ways, grounds or places, but shall not apply to rights which have been received and exercised heretofore through proceedings in a probate court. [R. S. Sec. 3471a; 92 v. 204; 84 v. 7.]

Sec. 12645. [Erecting poles in cities having subways.] Whoever erects a telegraph or telephone pole within that portion of a city or village where subways have been constructed, unless such pole is required for the purpose of distributing

wires from such subways to subscribers' stations and is located in an alley if practicable, or, within such city or village, constructs or maintains underground wires, pipes, conduits and other fixtures for containing, protecting and operating such wires in the streets and public ways thereof, without obtaining the consent of such city or village, shall be fined not less than fifty dollars nor more than two hundred dollars. This section shall not apply to existing telegraph companies until they shall have had authority and sufficient time to construct subways. [100 v. 85, § 1.]

Sec. 13421. [Obstructing street, alley, etc.] Whoever obstructs or incumbers, by fences, buildings, structures or otherwise, a public ground, highway, street or alley of a municipal corporation, shall be fined not more than five hundred dollars.[1] [R. S. Sec. 6921; 30 v. 22 § 1; 54 v. 130 § 1; 72 v. 112 § 1; 32 v. 38 § 1; (S. & C. 441; S. & C. 878; S. & C. 880).]

(1) **Adverse possession** of streets by the erection of fences, buildings, etc., see note under § 3714, *ante*, in Part I.

What obstructions constitute violation of this section, see Nagle v. Brown, 37 O. S. 7 (felling tree, fallen across highway); Selden v. Columbus, 12 Dec. 650 (maintenance of fence); Walker v. Springfield, 3 Dec. Re. 567 (excavation). But every excavation in a street is not necessarily a nuisance. R. R. Co. v. Morey, 47 O. S. 205, 215.

Overhead sign is not an obstruction in violation of this section. Reese v. Cleveland, 18 Dec. 12; 5 N. P. (N. S.) 193.

Construction of railroad tracks in a street without proper authority would be a violation of such section. R. R. Co. v. Commissioners, 35 O. S. 1, 8; see also R. R. Co. v. Commissioners, 31 O. S. 338, 348.

As to right to adverse possession of part of street by encroachment when such encroachment is a violation of this section, see Heddleston v. Hendricks, 52 O. S. 460, 467.

Sufficiency of indictment.—See Matthews v. State, 25 O. S. 536.

Sec. 13421-12. [Operating traction engines upon improved highways; terms "traction engine" and "tractor" defined.] Whoever drives over the improved highways of the state, or any political subdivision thereof, a traction engine or tractor with tires or wheels equipped with ice picks, spuds, spikes, chains or other projections of any kind extending beyond the cleats, shall be fined for each offense not less than ten dollars nor more than one hundred dollars. The

terms "traction engine" or "tractor" as used in this act, shall apply to all self-propelling engines equipped with metal-tired wheels operated or propelled by any form of engine, motor or mechanical power, used for agricultural purposes. No city, county, village or township shall adopt, enforce or maintain any ordinance, rule or regulation contrary to or inconsistent with the terms of this act; or require of any person any license tax upon or registration fee for any traction engine, tractor, or trailer, or any permit or license to operate. Operators of traction engines or tractors shall have the same rights, upon the public streets and highways, as the drivers of any other vehicles unless some other safe and convenient way is provided, and no public road open to traffic shall be closed to traction engines or tractors. [107 v. 652; 106 v. 574.]

ANIMALS RUNNING AT LARGE.

Sec. 5809. [Certain animals not to run at large.][1] A person, firm or corporation being the owner or having the charge of horses, mules, cattle, sheep, goats, swine, dogs or geese, shall not permit them to run at large[2] in the public road, highway, street, lane or alley, or upon uninclosed land or cause such animal to be herded, kept or detained for the purpose of grazing on premises other than those owned or occupied by the owner or keeper thereof, except as provided in section fifty-eight hundred and eleven. [110 v. 119; R. S. Sec. 4202; 93 v. 129; 78 v. 18; 62 v. 185, § 1; 56 v. 77, §§ 1, 2, 3; (S. & S. 7; S. & C. 76).]

(1) **Common-law rule not adopted in Ohio.**—The common-law rule required the owner to restrain domestic animals, but this rule was not adopted in Ohio. Railroad v. Stephenson, 24 O. S. 48.

For further provisions, see §§ 5811 *et seq.*

Object of this statute is to prevent trespasses, and it does not make owner liable to person injured by horse taking fright at animal at large in highway contrary to the statute. Marsh v. Koons, 78 O. S. 68.

(2) **No breach without negligence.**—The owner of domestic animals mentioned in this section, is not guilty of any breach if they be at large without the omission on his part of reasonable care. *Ib.;* Railway v. Howard, 40 O. S. 6; Rutter v. Henry, 46 O. S. 272; Rudi v. Lang, 12 C. C. 529. But see Morgan v. Hudnell, 52 O. S. 552.

And one finding an animal at

large without negligence of the owner, cannot confine said animal until the owner tender compensation. Rutter v. Henry, 46 O. S. 272; Rudi v. Lang, 12 C. C. 529. *Contra*, Holtzkemper v. Langloth, 8 C. C. 520.

Liability of owner.—Owner of domestic animal not generally liable for injury committed by such animal while in a place where it rightfully may be, unless owner knew of vicious propensities. Morgan v. Hudnell, 52 O. S. 552.

Nor is the owner of unenclosed land liable for injuries to cattle straying on same. Ferguson v. Miami Powder Co., 9 C. C. 445.

Sec. 5810. [Penalty.] Whoever violates the provisions of the next preceding section shall forfeit and pay for each violation not less than one dollar nor more than five dollars. Continued violation, after notice of prosecution, shall be an additional offense for each day of such continuance. [R. S. Sec. 4202; 93 v. 129; 78 v. 18; 62 v. 185 § 1; 56 v. 77 §§ 1, 2, 3.]

Sec. 5817. [Animal running at large may be treated as estray.] A person finding an animal, mentioned in section fifty-eight hundred and nine, at large,[1] contrary to law, may, and a constable of a township, road superintendent in a township or village, or marshal or constable of a city or village, on view or information, shall take and confine it, forthwith giving notice thereof to the owner, if known, and, if not known, by posting notices describing such animal therein, in at least three public places within the township. If the owner does not appear and claim the animal, and pay all charges for so taking, advertising and keeping it, within ten days from the date of such notice, the animal may be proceeded with under the laws regulating estrays. [R. S. Sec. 4207; 72 v. 170 § 6; 81 v. 105; 98 v. 334; (S. & S. 8).]

(1) **Cattle at large.**—Under provision of former act cattle running at large, with or without permission of the owner could be taken up. Sloan v. Hubbard, 34 O. S. 583.

And the right to take up animals running at large is not affected by failure of township trustees to establish a pound. *Ib.*

A horse breaking out of an enclosed field, passing through an adjoining field and thence into another field, is not "at large" contrary to provision of § 5809; and no person is authorized to take up and confine it until the owner pay or tender compensation as provided by this section. Rutter v. Henry, 46 O. S. 272.

Sec. 5818. [What is prima facie evidence.] Such animal running at large in or upon any of the places mentioned in section fifty-eight hundred and nine, shall be prima facie evidence that it is running at large contrary to the provisions thereof. [R. S. Sec. 4207; 72 v. 170 § 6; 81 v. 105; 98 v. 334.]

Sec. 5823. [Pounds in incorporated villages.] The council of an incorporated village may procure or construct an inclosure or pound wherein animals, taken within such village under section fifty-eight hundred and seventeen or an ordinance of such village, may be confined, and like notices shall be given and like proceedings had in such case as are required by such section. Such council may appropriate not exceeding one hundred dollars from the general fund of the village for such purpose. [90 v. 19 § 1.]

MISCELLANEOUS.

Streets on State Lands.

Sec. 23. [Street, etc., over lands of public institution.] A street, alley or road shall not be laid out or established through or over the lands belonging to a public institution of the state without special permission of the general assembly. [R. S. Sec. 625; 49 v. 110, § 1; (S. & C. 181).]

Motor Vehicles.[1]

Sec. 6307. [Limitation on local authorities.] Local authorities shall not regulate the speed of motor vehicles[2] by ordinance, by-law or resolution, but, for a given time, they may set aside a specific public highway for speed tests or races. The term "local authorities," as used herein, means all officers, boards, and committees of counties, cities, villages or townships. [99 v. 538, 543 §§ 2, 23.]

(1) Section carried here is part of the State license law for motor vehicles, § § 6290 et seq.

(2) Distinction between automobile and motor vehicle, see Brown v. State, 10 N. P. (N. S.) 238; 20 Dec. 348.

Municipal regulations annulled, see Frisbie v. Columbus, 80 O. S. 686.

Held Unconstitutional. — This section is in direct conflict with the provisions of Section 3 of Article XVIII of the Constitution

of Ohio, authorizing municipalities to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws, and is therefore unconstitutional and void. Fremont v. Keating, 96 O. S. 469. And see Op. Atty. Gen. (1918), p. 426.

Sec. 12603. [Speed limits.] Whoever operates a motor vehicle in and upon the public roads or highways at a speed greater than is reasonable and proper having regard for the width, traffic, use and the general and usual rules of such road or highway, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined as hereinafter provided. A rate of speed greater than fifteen miles an hour in the business or closely built-up portions of a municipal corporation or more than twenty-five miles an hour in other portions thereof, or more than thirty-five miles an hour outside of a municipal corporation, shall be prima facie evidence of a rate of speed greater than is reasonable and proper. [110 v. 135, 138; 108 v. 471; 103 v. 161; 99 v. 541.]

(1) **Terms defined.**—Construing § 12604, repealed, it was held that the legislature intended to delegate to the municipality the definition of the words "business and closely built up portions." Weimer v. Rosen, 100 O. S. 361. See also Gillilan v. Spring, 20 N. P. (N. S.) 581.

Ordinance establishing rules of the road not in conflict with general laws, held within the powers of municipality, and held proper evidence in prosecution under this section. State v. O'Mara, 105 O. S. 94.

Sec. 12603-1. [Safety.] Whoever operates a motor vehicle on the public roads or highways without due regard for the safety and rights of pedestrians and drivers and occupants of all other vehicles, and so as to endanger the life, limb or property of any persons while in the lawful use of the roads or highways shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined as hereinafter provided. [110 v. 135, 138.]

Sec. 12603-2. [Penalty.] Any person upon being found guilty of violating section 12603 or section 12603-1 shall, for a first offense thereof, be fined not less than $10.00 or more than $100.00; and for a second offense, not less than $25.00

or more than $100.00, or imprisoned in the county jail or workhouse not more than ten days, or both; and for a third offense, shall be fined not less than $50.00 or more than $200.00, or imprisoned in the county jail or workhouse not less than ten days or more than thirty days, or both, provided, further, that when any person is found guilty of a first offense for violation of section 12603 upon a finding that he operated a motor vehicle faster than twenty-five miles an hour in the business or closely built up portions of a municipal corporation or faster than thirty-five miles an hour in other portions thereof, or faster than forty-five miles an hour outside of a municipal corporation, the court trying the same may, in addition to the penalty herein provided, sentence such offender to the county jail or workhouse for not more than five days. [110 v. 135, 139.]

Sec. 12608. [Municipality may not restrict provisions of law.] The provisions of section twelve thousand six hundred and three shall not be diminished, restricted or prohibited by an ordinance, rule or regulation of a municipality or other public authority. [108 v. 471; 99 v. 541.]

Motor Busses.

Sec. 614-86. [Jurisdiction vested with "the public utilities commission"; scope of jurisdiction.] The public utilities commission of the state of Ohio is hereby vested with power and authority to supervise and regulate each such motor transportation company in this state; to fix, alter and regulate rates; to regulate the service and safety of operation of each such motor transportation company; to prescribe safety regulations, and designate stops for service and safety on established routes; to require the filing of annual and other reports and of other data by such motor transportation companies; to provide uniform accounting systems; and to supervise and regulate motor transportation companies in all other matters affecting the relationship between such companies and the public to the exclusion of all local authorities in this state. The commission, in the exercise of the jurisdiction conferred upon it by this chapter, shall have the

power and authority to prescribe rules and regulations affecting such motor transportation companies, notwithstanding the provisions of any ordinance, resolution, license or permit heretofore enacted, adopted or granted by any incorporated city or village, city and county, or county, and in case of conflict between any such ordinance, resolution, license or permit, the order, rule or regulation of the public utilities commission shall, in each instance prevail; provided that such local subdivisions may make reasonable local police regulations within their respective boundaries not inconsistent with the provisions of this chapter. [110 v. 211, 214.]

Sec. 614-96. [Distribution of revenue.] The revenue collected under the provisions of section 614-94 of the General Code shall be distributed as follows:

(1) Fifty per centum of all taxes collected under section 614-94 of the General Code shall be for the use of the municipal corporations or counties into, through and along which the route of such motor transportation company runs and extends. Such moneys shall be paid into the treasury of the proper county as provided herein and the proper portions distributed to the municipal corporations in accordance with the miles of route in such municipal corporation. In the treasuries of such municipal corporations and counties, such money shall constitute a fund which shall be used for the maintenance and repair of public roads, highways and streets and for no other purpose, and shall not be subject to transfer to any other fund. "Maintenance and repair" as used in this section includes all work done upon any public road or highway or upon any street, in which the existing foundation thereof is used as the sub-surface of the improvement thereof, in whole or in substantial part.

(2) The "state maintenance and repair fund" shall be available for the use of the public utilities commission of Ohio in defraying the expenses incident to maintaining the bureau of the department for carrying out and enforcing the provisions of sections 614-84 to 614-102, inclusive, of the General Code, including the payment of salaries, traveling expenses, printing and other expenses, and for the use of the director of highways and public works in the manner pro-

vided by law. The General Assembly shall make appropriations therefrom for such purpose. [110 v. 211, 220.]

Canal Tow Path.

Sec. 6956-21. [Grant for public travel, constitutes public highway.] Whenever the board of public works under authority of any law of this state has granted or hereafter shall grant to any board of county commissioners, township trustees, or to the authorities of any municipal corporation in this state the use of any portion of the towing path of any canal of this state for public travel, such portion of such towing path, the use of which has been so granted shall be and hereby is constituted a public road or highway within the meaning of the sections of the general laws of Ohio providing for the improvement and repair of public roads and highways. Provided, however, that nothing herein shall be construed so as to authorize the abandonment of any portion of the towing path of any such canal; and the board of public works may at any time whenever any such portion of any such towing path shall be needed for canal or other purposes, upon six months' notice, revoke any such grant and order such use of such portion of such towing path to be discontinued. [102 v. 468.]

CONVEYANCE OF MUNICIPAL PROPERTY TO BOARD OF EDUCATION.

Sec. 7624-1. [Municipality may convey real property to board of education.] A municipal corporation may by ordinance duly passed authorize the transfer and conveyance by deed, of any real property owned by it and not needed for municipal purposes, to the board of education of any such municipality, to be used by said board of education as an athletic field, a play ground for children or for school sites, upon such terms and conditions as are agreed to between the municipal corporation and the board of education and when such property is so conveyed, the same shall be under the control and supervision of such board of education. [103 v. 466.]

II.

STREET RAILROADS IN MUNICIPAL LIMITS.[1]

STREET AND INTERURBAN RAILROADS.

Sec. 9100. [Authority to construct a street railway.] Street railways, with single or double tracks, side-tracks, and turnouts, may be constructed or extended within or without, or partly within and partly without, any municipal corporation. Offices, depots, and other necessary buildings therefor, also may be constructed. [R. S. Sec. 3437; 67 v. 10 § 1; (S. & S. 135).]

(1) **Other provisions.**—For provisions of Title XII "Municipal Corporations," relating to powers and rights of municipalities with reference to Street Railroads, see §§ 3768 to 3777 in Part I.

For discussion of definitions, character of occupation of streets, construction of ordinances, etc., see notes to § 3768 *et seq.*, *ante*, in Part I.

Consolidation.—See §§ 9121 and 9122 G. C.; §§ 9127 to 9129 G. C.

Street railroads outside municipalities.—See §§ 9117 to 9119 G. C.

Regulation of speed.—See § 3632, *ante*, in Part I.

Special acts.—For change of route law for Cincinnati, authorizing municipalities to agree with street railway company for percentage of gross receipts in lieu of car license fees, see 95 O. L. 502.

For act making valid certain routes in Cincinnati and providing for extensions, see 88 O. L. 303.

Sec. 9101. [Who to grant right to construct.][1] The right to construct or extend[2] such railway within or beyond the limits of a municipal corporation, may be granted only by its council,[3] by ordinance; the right to construct such railway without the limits of a municipal corporation may be granted only by the county commissioners, by an order entered on their journal. [96 v. 31 § 29.]

(1) **Old section.**—Municipal code § 29 (96 v. 31, § 29) was practically a rewriting of § 3438 R. S. (repealed) omitting all the references to grades and classes of cities and making the provisions general.

Construed with other laws.—It was held that § 3438 R. S. must be construed with other laws relating to the same subject. R. R. Co. v. Commissioners, 56 O. S. 1, 7. See also Hattersly v. Waterville, 26 C. C. 226, 229; 4 C. C. (N. S.) 242 (aff'd 74 O. S. 466).

It was held that §§ 3437, 3438, 3439 *et seq.* R. S. (9100-9105 G. C.), refer to street railways and extensions wherever located; §§ 2501 to 2505 R. S. (3768-3777 G. C.), relate wholly to lines and extensions within municipalities. Where there is a conflict as to municipal lines or extensions, the special provisions of §§ 3768 *et seq.* must govern. C. C. C. & St. L. Ry. Co. v. U. B. & N. Ry. Co., 26 C. C. 180; 5 C. C. (N. S.) 583 (aff'd 73 O. S. 364).

(2) **Extensions.**—For general discussion of subject, see notes to § 3777 in Part I.

(3) **Council.**—The grant by council must be made directly to the grantee, and power to make the grant cannot be delegated. State *ex rel.* v. Bell, 34 O. S. 194.

Council was held under the former laws to include trustees of hamlets. Annexation to Newburgh, 15 C. C. 78, 80.

Sec. 9102. [Grantee not to be released from obligation.][1] After such grant, or the renewal of any grant has been made, by general or special ordinance, or the order of county commissioners, neither the municipality nor commissioners shall release a grantee from any obligations or liabilities imposed by the terms of the grant, or renewal of any grant, during the term for which such grant or renewal was made.[2] [96 v. 31 § 29.]

(1) See note (1) under § 9101, *ante.*

(2) **Provision unequivocal.**—A provision such as this is unequivocal and forbids any release of what is due the city by its officers and in the face of such a statute neither the principles of account stated nor of accord and satisfaction based upon receipt of a less amount than is due have any application. Cincinnati Street Railway Co. v. Cincinnati, 8 N. P. 80.

A grant made in good faith by a board of county commissioners to an interurban company, wherein certain obligations relating to rates of fare and frequency of service imposed in a former franchise are relinquished, is not void by virtue of this section if the considerations supporting the second grant are substantial and advantageous to the public. State, ex rel. v. McClure, 107 O. S. 551.

Sec. 9103. [Right to occupy tracks of existing companies.][1] No right shall be given by such municipal or county authorities to occupy the track, single or double, or other structure, of existing street railways for more than one-eighth of the distance between the termini of the route, as actually constructed, oper-

ated and run over, of the company or person to whom such grant is made.[2] But in granting permission to extend existing routes in cities, the cities and companies owning such route shall have all the rights and powers which they possess under existing laws and contracts. [96 v. 31 § 29.]

(1) See note (1) under § 9101, *ante*.

Validity, See Street Ry. Co. v. Street Ry. Co., 50 O. S. 603.

(2) **Extension over other tracks.**—Before the limitation as to length of extension over other tracks, it was held municipality had general power to grant right to one company to run over tracks of other company, compensation being paid the company already occupying the street. Sims v. St. Ry. Co., 37 O. S. 556; Broadway St. Ry. v. Brooklyn St. Ry., 10 B. 72.

Consents of abutting owners not necessary in case of such extension. Lima v. Cramer, 17 Dec. 24; 5 N. P. (N. S.) 113.

The grant made by the municipality, as provided in the above section, does not of itself confer upon the grantee the right to enter upon occupancy of the tracks of the other company. To make effective the grant, it becomes necessary to obtain the consent of the other company or to appropriate the tracks under authority of § 9108. Street Ry. Co. v. Street Ry. Co., 50 O. S. 603.

As to the right of council to fix the compensation to be paid first company, when this power is reserved to council in the franchise of the first company, see Railroad Co. v. Railroad Co., 36 O. S. 239.

How determine length of track.—The trackage of a railway over its entire route and not merely that part within the city may be considered in determining the length of track of railway already in that city that may be used. State v. Electric Street Ry., 19 C. C. 79.

Right to "straddle" tracks of another company may be given, as well as right to occupy track, but compensation must be paid first company. H. G. & C. Traction Co. v. Transit Co., 69 O. S. 402.

Appropriation of track of other company for distance permitted in above section, see notes to § 9108, *post*.

Sec. 9104. [Extensions to be constructed as new.][1] No extension of a street railway located wholly outside of a city, or of one wherever located, which is built in pursuance of a right obtained from authority other than that of a municipal corporation, shall be made within the limits of such city, except as a new route.[2] [96 v. 31 § 29.]

(1) See note (1) under § 9101, *ante*.

(2) **Annexation of territory.**—As to whether the extension must be as a new route when the original grant was made by county commissioners, but the territory through which it ran was subse-

quently annexed to the municipality, see Belle v. Glenville, 27 C. C. 181; 5 C. C. (N. S.) 461 (aff'd 73 O. S. 392).

Sec. 9105. [Consent of owners of abutting property.] No such grant [1] shall be made until there is produced to council, or the commissioners, as the case may be, the written consent of the owners of more than one-half of the feet front of the lots and lands abutting on the street or public way, along which it is proposed to construct such railway or extension thereof,[2] and the provisions of all ordinances [3] of the council relating thereto, have in all respects been complied with, whether the railway proposed is an extension of an old or the granting of a new route. [R. S. Sec. 3439; 99 v. 102; 80 v. 173; 65 v. 112; (S. & S. 139).]

(1) **Grant referred to** is grant of right to construct or extend street railway, as formerly provided in § 3438 R. S., now superseded by § 9101 G. C.

(2) **Consents.**—See note under § 3770, *ante*, in Part I. Charter of municipality may dispense with requirement as to consent of owners of abutting property. Billings v. Railway Co., 92 O. S. 478.

Validity.—The consents called for by this law are in no sense a delegation of legislative authority and the law is valid and constitutional. Carpenter v. Cincinnati, 92 O. S. 473.

(3) **Provisions to be complied with.**—Section 3439 R. S., of which the above section is a revision, did not contain any requirement that "all *ordinances* of the council relating thereto" should be complied with, before any grant to a street railway company is made. The language of § 3439 R. S. was that "the provisions of §§ 2501 and of 2503 to 2505 inclusive, so far as they are applicable" should be observed in all respects, whether the proposed railway were an extension or a new route. §§ 2501 and 2503-2505 are now embodied in §§ 3768 and 3775-3777 G. C. and required application and ordinance before construction begun, and provided as to character of construction and permitted extensions on certain terms.

In C. C. C. & St. L. Ry. Co. v. U. B. & N. Ry. Co., 26 C. C. 180 (aff'd 73 O. S. 364) it was held, under former § 3439 R. S., that in case of extensions, only § 2505 R. S. was applicable and that the notice required by § 2502 R. S. was not necessary in case of extensions.

Sec. 9106. [When written consent not required.] But when such grant is made by the council of a municipal corporation, either for a new route or as an extension of an existing route, in case the number of tracks thereon or part

thereof is not increased beyond the number for which consents originally were obtained, on and along any part of a street or public way upon which a street railway has been operated within one year preceding under a grant or renewal of a grant which has expired or within two years will expire, or when such a grant is made by the council of a municipal corporation or the commissioners of a county on and along any part of a street or public way upon the order or finding of any court of competent jurisdiction, or a judge thereof, in a hearing upon or growing out of a grade crossing elimination proceeding, in which hearing such court or judge has determined that the reasonable and practical solution of the manner of eliminating a grade crossing requires that such a street or interurban railway shall be re-located or re-routed for a certain distance fixed by the court, it shall not be necessary to produce to the council or commissioners any written consents from the owners of the lots and land abutting on such part of a street or public way. [107 v. 533; 99 v. 102; R. S. Sec. 3439.]

Sec. 9107. [When property owner cannot withdraw consent.] Nothing contained in the preceding section shall permit a person owning property abutting on a street along, in or over which a street railway is about to be constructed, to withdraw his consent after an ordinance granting the right to construct and operate it has been read the second time, if at least thirty days elapsed since the first reading thereof, in the council or other body authorized to make the grant.[1] [R. S. Sec. 3439a; 95 v. 475.]

(1) **Validity.**—Section held constitutional in Hume v. Traction Co., 13 Dec. 70.

Sec. 9108. [Appropriation of property.] When the council or commissioners make such grant, the company or person to whom it is made may appropriate property necessary therefore, if the owner fails expressly to waive his claim to damages by reason of the construction and operation of the railway.[1] [R. S. Sec. 3440; 89 v. 349; 87 v. 178; 63 v. 55; 61 v. 53; S. & S. 136, 137.]

(1) **Appropriating tracks of another company.**—The provisions of this section are broad enough to authorize the appropriation of the use of the tracks of another company, subject to the restrictions in § 9103. Street Ry. Co. v. Street Ry. Co., 50 O. S. 603.

Appropriation proceedings are such as are provided for appropriation of property by private corporations. Street Ry. Co. v. Street Ry. Co., 50 O. S. 603.

Scope of hearing and measure of compensation, see Street Ry. Co. v. Street Ry. Co., 6 C. C. 362; Toledo Consolidated St. Ry. Co. v. Toledo Elec. St. Ry. Co., 12 C. C. 367.

Effect.—The appropriation of the right to use the track of another company, does not exhaust the franchise of such other company. Toledo, etc., Ry. v. Toledo, etc., Ry., 6 C. C. 362. The right of eminent domain not affected by motive power. State *ex rel.* v. Taylor, 55 O. S. 61, 66.

Scope of power.—The right to appropriate the use of track of another company is not interfered with by the sections giving companies power to make traffic arrangements for joint use of tracks. State v. Elec. St. Ry., 19 C. C. 79, 90. A second company may appropriate the right to "straddle" the tracks of the first company. H. G. & C. Traction Co. v. C. D. & T. Traction Co., 47 B. 854.

Use by third company.—Where a company has appropriated the right to use the tracks of another company, it cannot claim compensation from a third company which is given the use of the tracks by the original company. Toledo, etc., Ry. Co. v. Toledo and Maumee Valley Ry. Co., 10 C. C. 168.

Appropriation of additional track.—Second company, having already appropriated part of track of first company, may appropriate additional parts of such track, without new ordinance of council, if the total amount appropriated is still within the limitations as to the amount of track that may be used. Toledo v. Consolidated St. Ry. Co., v. Toledo Elec. St. Ry. Co., 12 C. C. 367.

Injunction against use of track after appropriation, see Metropolitan St. Ry. Co. v. Toledo, etc., Ry. Co., 9 C. C. 664.

Measure of damages, where private property is appropriated for street railway purposes, see Lorain St. Ry. Co. v. Sinning, 17 C. C. 649.

Sec. 9109. [Appropriation of property of turnpike or plank road.] Such power to appropriate may be exercised, for the purpose of constructing a street railway along a highway occupied by a turnpike or plank road company when the person, persons or company authorized to construct such railway cannot agree with the turnpike or plank road company on the terms and conditions upon which the highway may be occupied, and if such appropriation will not unnecessarily interfere with the reasonable use of the highway by the turnpike

or plank road company. Nothing in the foregoing provisions shall affect the rights of property owners to give or withhold their consent concerning the right of way for street railways upon any street or road. [R. S. Sec. 3440; 89 v. 349; 87 v. 178; 63 v. 55; 61 v. 53; S. & S. 136, 137.]

Sec. 9110. [Oath in appropriation proceedings.] In case of appropriation of property for such purpose, the oath to be administered to the jury shall be as follows: "You and each of you do solemnly swear that you will justly and impartially assess, according to your best judgment, the amount of compensation which is due to (here name the owner or owners), by reason of the appropriation of the street or avenue (as in the statement described), irrespective of any benefit from any improvement proposed by such (here name the company, individual, or company of individuals), and that you will in assessing damages that may accrue to (here name the owner or owners), by reason of the appropriation, other than the compensation, further ascertain how much less valuable the lot or lots of such (here name the owner or owners), will be in consequence of such appropriation." [R. S. Sec. 3442; 63 v. 55 § 5; S. & S. 138.]

Sec. 9111. [How compensation ascertained.] The jury, in ascertaining such compensation or damages, shall determine the amount thereof without reference to the distinction between a public and private nuisance, and the effect of such distinction upon the right of such owner or owners to claim compensation or damages, and, if requested, the court shall so direct the jury. [R. S. Sec. 3442; 63 v. 55 § 5; S. & S. 138.]

Sec. 9112. [Consent of authority controlling public road.] If the public road along which the railway is to be constructed is owned by a person or company, or is within the control or management of the board of public works or other public officer,[1] such person, company, or officer may agree with the person or company constructing the railway as to the terms and conditions upon which the road may be occupied.[2] [R. S. Sec. 3441; 67 v. 10 § 1.]

(1) **County commissioners included.**—See R. R. Co. v. Commissioners, 56 O. S. 1, 7.

(2) **Scope of power.**—The power to agree with authorities in control of road does not give the right to take the road, if no agreement is reached. The alternative is appropriation under § 9109. *Ib.*

Sec. 9113. [Terms and conditions of construction, etc.] Council, or the commissioners, as the case may be, may fix the terms and conditions upon which such railways may be constructed, operated, extended, and consolidated.[1] [R. S. Sec. 3443; 67 v. 10 § 1; 66 v. 140 § 1.]

(1) **Power of council.**—As to power of council to fix terms upon which one railway company may use portion of tracks of another railway company, see Railroad Co. v. Railroad Co., 36 O. S. 239.

The right to impose terms and conditions implies the right to agree upon the duration of the occupancy of the streets and limit the period of the grant. Louisville Trust Co. v. Cincinnati, 10 O. F. D. 112.

Sec. 9114. [Free transportation of police and firemen.] Upon the granting of franchises to traction companies throughout this state for the use of streets, roads and highways for the transportation of passengers, it must be provided, as one of the considerations for such use of the public highways, that such traction companies shall carry free as passengers on any and all regular cars, policemen and firemen, when on duty and in uniform. [100 v. 14 § 1.]

Sec. 9115. [Appropriation of property by directors.] When it is deemed necessary by a majority of the directors of a domestic or foreign corporation owning or operating a street railway in a municipality to appropriate private property therein, in order to avoid dangerous or difficult curves or grades, or unsafe or unsubstantial grounds or foundations or to extend or shorten its railway line, or to provide land on which to extend its power plant, such corporation may appropriate so much private property as is necessary for the extension of such power plant, or the construction, operation, and maintenance of the tracks, poles, supports, wires, cables and necessary appliances of such railway other than power houses, machine shops, stations or substations in the manner and sub-

ject to the provisions of law for the appropriation of private property by corporations.[1] [97 v. 106 § 1.]

(1) **Scope of power.**—For construction of similar statute allowing condemnation outside of municipalities, see Columbus, etc., Ry. Co. v. Cole, 47 B. 66.

Sec. 9116. [Change of location of any portion of railway.] For the purposes above provided such corporation may change the location of any part of its railway, and for the purpose of making such change, it shall have all the rights, powers, and privileges to enter upon private land and make surveys necessary to effect such change as fully as railroad companies are by law permitted to do. [97 v. 106 § 2.]

Sec. 9117. [Construction of street railroads outside of municipalities.] Companies incorporated under section eighty-six hundred and twenty-five, for such purpose, may construct, maintain and operate electric street railroads, or street railroads using other than animal power as a motive power, for the transportation of passengers, packages, express matter, United States mail, baggage and freight upon the highways in this state outside of municipalities, or upon private rights of ways. [R. S. Sec. 3443-8; 91 v. 286.]

Sec. 9118-1. [Crossings, other than steam railway; petition.] Whenever it is deemed necessary by a majority of the directors of any such railway company[1] to cross the streets, avenues, alleys, ways, or any part thereof, of any municipality, or any public highway outside of a municipality, whether the same be under the control of public authorities or a private company, or a person or persons, the council of such muncipality, or the public officers or authorities owning or having charge of such highways outside of municipalities, shall have power to agree with such company as to the manner and mode of such crossing and the compensation to be paid therefor; if the parties fail to agree, such company may file its petition in the common pleas court of the county in which the proposed crossing is situated, and in such cause if the crossing be within a municipality, such municipality, shall be defendant; if the crossing

be outside a municipality, the public authorities owning or having charge of such highway, shall be defendants. Summons shall be served and the rule days and the rights of the defendant to plead shall be the same as in civil actions in such court. Such petition shall set forth the action of the company declaring the necessity for crossing the highway and the inability of the company to agree with the council or other public officers or authorities owning or having charge of said highway; and the court of common pleas thereupon shall have jurisdiction[2] of the parties and of the subject matter of the petition and may proceed to examine the matter offered by evidence, by reference to a master commissioner or otherwise, and upon the final hearing of said cause the court shall enter its decree fixing the manner and mode of such crossing and the compensation, if any, to be paid therefor by the company, and upon compliance with the terms of said decree the company shall have the right to construct and maintain said crossing in accordance with the order in said cause. [101 v. 375.]

(1) This refers to companies provided for in § 9117, *ante*.

(2) **Validity.**—§9118-1, G. C., which provides that the court of common pleas shall have jurisdiction to fix the manner and mode of crossing streets in a municipality by electric street railroads and the compensation, if any, to be paid therefor, is constitutional. Rocky River v. Railway, 18 C. C. (N. S.) 354.

Sec. 9118-2. [Appropriation of real estate.] Where the tracks of any such road extend into or through any municipality and it is deemed necessary by such company to enter upon and use any private property within such municipality for the construction and maintenance of either passenger stations or freight depots to be used in the operation of such road, such company shall have the right to appropriate private property within municipalities for such purposes. [101 v. 375.]

Sec. 9120. [Leases, purchases and traffic arrangements.] Such companies[1] may lease, purchase, or make traffic arrangements with any other street railway company as to so much of its tracks and other property as is necessary or desirable to enable them to enter or pass through a city or village, upon the terms and conditions applicable to other street railways.[2] Any

existing street railway company, owning or operating a road shall receive the cars, freight, packages or passengers of any other road, upon the same terms and conditions as they carry for the general public. [91 v. 286 § 4; Bates, 3443-11.]

(1) **Companies** means companies incorporated for constructing street railroad outside of municipalities, as provided in § 9117, *ante*.

(2) **Joint use of tracks,** may be secured also under § 9108. State v. Elec. Ry. Co., 19 C. C. 79.

Interurban railway may make traffic arrangements with street railway in municipality, for carriage of merchandise for hire, as well as passengers. State v. Traction companies, 64 O. S. 272.

The words "same terms and conditions" do not mean the terms upon which the company owning the track operates, but the terms applicable to street railroads generally, in the municipality. Interurban Ry. & T. Co. v. Cincinnati, 75 O. S. 196; and interchange of transfers is not required. *Ib. Quaere*, whether a double fare can be charged—one on the track of an interurban road and a second fare on the tracks of the city line for a single continuous journey within the city limits. See Cincinnati v. Railway, 13 N. P. (N. S.) 265.

Sec. 9123. [Watchmen.] When street railways are operated by electricity, cable, compressed air, or motive power other than horses or mules, in a municipality, the council thereof by ordinance may require the owners or operators of such railways to place watchmen at street crossings, intersections or corners which such council deem dangerous; and also provide for the enforcement of such ordinances by penalties in the way of fine or imprisonment, or both, to be imposed upon the owner, officer, or operator of such railways, or by a penalty of not exceeding one hundred dollars per day, which may be recovered by such municipalities in a civil suit against the owners or operators of any such railway failing to place such watchman as is required.[1] [R. S. Sec. 3443a; 89 v. 346.]

(1) **When required.**—Flagmen could be required to be stationed at such crossings only as were dangerous. Akron, etc., Co. v. Erie R. R. Co., 7 C. C. (N. S.) 199; 28 C. C. 37.

Sec. 9124. [Repairs at crossings; stopping of cars at crossings.] When the tracks of two street railways cross each other or in any way connect at a common grade, when one or both such railways use other than horse power for propelling

their cars, the crossings shall be made and kept in repair at the joint expense of the companies owning the tracks. All cars used on such railways must come to a full stop, not nearer than ten feet nor further than fifty feet from the crossing, and not cross until the way is clear. When two or more cars approach the crossing at the same time the car or cars on the road first built shall have precedence. [88 v. 581 § 1; Bates, 3443-5.]

Sec. 9125. [Fullstop when approaching steam railroad crossing; exception.] When the tracks of a street railway cross the tracks of a steam railroad at grade, the company operating the line of street cars shall cause its cars to stop not nearer than ten (10) nor farther than fifty (50) feet from the crossing, and before they start to cross the steam railroad tracks, also cause a person in its employ to go ahead of the car or cars and see that the way is clear for the passage thereof and free from danger. Such street railway cars shall not proceed to cross until signalled to do so by such person so employed, or the way is clear for their passage over the tracks; provided, however, that when the tracks of a street or interurban railway cross the tracks of an industrial railroad or a switch track or a spur track of a steam railroad over which passenger cars or trains are not operated, the public utilities commission of Ohio may, upon application of the company owning or operating such street or interurban railway and notice to the company owning or operating such industrial railroad or switch track or spur track of the hearing of such application, permit such street or interurban railway to operate its cars over and across such industrial railroad or switch track or spur track without first causing its cars to stop or an employee to go ahead of the same, and may prescribe such duties upon the company owning or operating such industrial railroad or switch track or spur track for the protection of the public as shall be just and reasonable under the circumstances. [106 v. 541; 88 v. 582; Bates, 3443-6.]

(1) **Effect.**—Section does not relieve railroad company of operating gates at crossings so as to warn persons in charge of street cars. Kopp v. B. & O. S. W. Ry. Co., 25 C. C. 546.

Sec. 9126. [Forfeiture under preceding sections.] Every person in charge of a street car or cars who wilfully fails to comply with the provisions of the two preceding sections, or to bring the car or cars he has in charge to a stop, or before the way is clear, or signaled so to do, causes them to cross the steam railroad tracks, shall be personally liable to a person injured by reason of such failure to a penalty of one hundred dollars, to be recovered by civil action at the suit of the state, in the court of common pleas of a county wherein such crossing or connection is. The company in whose employ such person is, as well as the person himself shall be liable in damages to any person or persons so injured in person or property.[1] [88 v. 582 § 3; Bates, 3443-7.]

(1) **Liability of company,** when there is a violation of this section, see Cincinnati St. Ry. Co. v. Murray, 53 O. S. 570; Packard v. Traction Co., 22 C. C. 578.

Sec. 9127. [Consolidation of street railway companies.] When the lines or authorized lines of road of street railway corporations or companies meet or intersect, or conveniently can be operated from one power house, or a power house or houses owned, under lease or operated by one of such corporations or companies, or when such line of a street railway corporation or company, and that of an inclined plane railway or railroad company or corporation, or any railway operated by electricity conveniently may be connected, to be operated to mutual advantage, or when such line of a street railway corporation or company and that of an inclined plane railway or railroad company or corporation or the railway of any company operated by electricity conveniently can be operated from one power house or a power house owned, under lease or operated by one of such street railway corporations or companies or inclined plane railway or railroad companies or corporations or by any company or corporation, the railway of which is operated by electricity, such corporation or companies, or any two or more of them, if they are not competing lines, may consolidate themselves into a single corporation.[1] [95 v. 510 § 2; 92 v. 277; 89 v. 406; 88 v. 493; R. S. 2505b; Bates, 3443-16.]

(1) **Validity.**—See discussion of validity of Rogers Law in Cincinnati St. Ry. Co. v. Horstman, 72 O. S. 93.

Relation of consolidated to constituent companies.—A consolidated corporation holds property in its own right, and not in trust for the constituent companies. Green v. Woodland Ave., etc., St. R. R. Co. *et al.*, 62 O. S. 67.

But a consolidated company holds its stock in trust for members of the constituent companies. Fuller v. Railway, 8 N. P. 605.

Rights of pledgee of stock of old company, see Cleveland City Ry. Co. v. First Nat. Bk., 68 O. S. 582.

Terms of consolidation which may be prescribed, see *Ib.*

Liability for tort.—Consolidated company is liable for torts of original companies, and after a verdict against one of the constituent companies, pleadings may be amended to aver the consolidation. Cin. St. Ry. Co. v. Fullbright, 7 B. 187.

Delivery of new stock should be to stockholders and not to officers of original companies. Robinson v. Cleveland St. Ry. Co., 5 N. P. 293, 301.

Status of constituent companies.—On consolidation the old companies became extinct except for certain limited purposes. Cleveland City Ry. Co. v. First Nat. Bank, 22 C. C. 165 (rev. other grounds, 68 O. S. 582).

Sec. 9128. [To what companies provisions do not apply.] The above provision as to competing lines shall not apply to such companies or corporations whose lines are nearby or wholly situated in a city of this state, or road of any street railway company or corporation organized in this state is made, or is in process of construction to the boundary line of the state, or to a point within or without the state. Such corporation or company may consolidate its capital stock with that of any corporation or company, or corporations and companies in an adjoining state, the line or lines of whose road or roads have been made or are in process of construction to the same point or points, in the manner and with the effect provided by law for the consolidation of railroad companies. [95 v. 510 § 2; 92 v. 277; 89 v. 406; 88 v. 493; R. S. 2505b; Bates 3443-16.]

Sec. 9129. [Consolidation of electric road companies.] When the lines of a road of any street railway or railroad company, organized under the laws of this state are constructed or in process of construction, and are or will be operated by electricity, and connect, or will or can be made to connect with the lines of another street railway or railroad company formed by

the consolidation of companies organized under the laws of this state, or by the consolidation of a company organized under the laws of this state and a company organized under the laws of an adjoining state, whose lines of road are constructed or in process of construction, and are or will be operated by electricity, so that cars may pass over such lines of roads continuously, without break or interruption, such street railway or railroad company and such consolidated street railway company or railroad company, may consolidate themselves into a single company in the same manner and with like effect as is provided by law for the consolidation of railroad companies. Companies owning and operating competing lines of road shall not consolidate under the foregoing provisions, but this limitation does not apply to companies whose lines of road are nearly or wholly situated in a municipal corporation of this state.[1] [97 v. 570; § 2; Bates, 3443-16a.]

(1) See notes under § 9127, *ante*.

Sec. 9130. [Interurban road may contract for use of tracks in cities.] When a railway company is incorporated and organized under the laws of this state for the purpose of building, acquiring, owning, leasing, operating and maintaining a railway or railways to be operated by electricity or other motive power from one municipal corporation or point in the state, to another municipal corporation, corporations, or point in this state, it may agree with a street railway company, or companies, owning or operating a street railway or railways in such municipal corporation or corporations, and the street railway company or companies may so agree with such railway company that its passenger cars may be run and propelled over and along the track or tracks of such street railway company or companies, on such terms as may be agreed upon, in the manner, upon the conditions and for the length of time that the cars owned or operated by such street railway company or companies are operated in such municipal corporation or corporations.[1] [R. S. Sec. 2505c; 91 v. 379.]

(1) **Other provisions.** — See § 9120, *ante*, and notes thereunder. **Agreement with third company.**—When one company has

by proper proceedings obtained right of way over tracks of another company, it cannot recover compensation from a third company granted a right of way from first company. Toledo Elec. St. Ry. Co. v. T. & M. V. Ry., 10 C. C. 168.

Abutting owner cannot complain when one company, with tracks already laid, grants to a second company the use of its tracks. Sanfleet v. Toledo, 10 C. C. 460.

Construction. — §§ 2505 (3777 G. C.) and 2505*c* (9130 G. C.) were held not to conflict. State v. Dayton Traction Co. *et al.*, 18 C. C. 490, 497.

Transfers.—Interurban roads making traffic arrangements with urban roads are not required to exchange transfers, at least in the absence of ordinance requiring street railroads in the municipality generally, to exchange transfers. Interurban Ry. & T. Co. v. Cincinnati, 75 O. S. 196.

Liability of lessor company.—When such owning company makes such an agreement for the joint use of its tracks, it is liable for injuries caused by the actionable negligence of its licensee thereon. Quigley v. Toledo R. & L. Co., 89 O. S. 69.

Sec. 9131. [Privileges and obligations of the street railway apply.] While they are running and being operated over and along the track or tracks of such street railway company or companies in such municipal corporation, the cars of such railway company shall be entitled to the privileges and subject to the obligations enjoyed and imposed by and upon the cars of such street railway company or companies owning or operating its cars in such municipal corporation. They shall be operated only by the motive power which operates the cars of such street railway company or companies. When authorized by not less than two-thirds in amount of the stockholders of each company proposing to enter into such arrangement and agreement, ratified by a majority of the directors and executed by the proper officers thereof, such arrangement and agreement shall give to such railway company full authority to operate its cars on the tracks of such street railway company or companies in such municipal corporation or corporations. [R. S. Sec. 2505c; 91 v. 379.]

Sec. 9132. [Not necessary to obtain additional grant.] It shall not be necessary for such railway company, in case it uses in such municipal corporation or corporations, only the tracks of a street railway company or companies owning or

operating a street railway or railways therein, to obtain an additional grant, franchise or right, except by such agreement with such street railway company or companies. [R. S. Sec. 2505c; 91 v. 379.]

Sec. 9133. [Fare charged within city.] The fare charged by such railway company for transporting passengers within such municipal corporation or corporations, shall not be greater than that fixed in the franchise or franchises held or owned by such street railway company or companies. When there is a public park or cemetery on the line of such railway, within one mile of, and owned by, such municipal corporation, such company for such fare must so transport passengers to and from such park or cemetery the same as if either was within the limits of such corporation. [R. S. Sec. 2505c; 91 v. 379.]

Sec. 9134. [Lease or purchase electric, or gas light, heat, power or fuel company.] A corporation or company maintaining and operating a street railway, or a railroad operated by electricity, may lease or purchase all the property, and all the franchises, rights, and privileges of any company organized for the purpose of supplying electricity, or natural or artificial gas, or both electricity and natural or artificial gas, for power, light, heat or fuel purposes, or which has been engaged in such business in whole or part in any municipality within this state, the latter being hereby vested with corresponding power to let or sell, upon such terms and conditions as may be agreed upon between the corporation and company.[1] No such lease or purchase may be perfected until a meeting of the stockholders of each of the companies has been called for that purpose by the directors thereof, on thirty days' notice to each stockholder, at such time and place and in such manner as is provided for the annual meetings of the companies and the holders of at least two-thirds of the stock of each company in person or by proxy, at such meeting, or at any properly adjourned meeting assent thereto. [R. S. Sec. 2505e; 93 v. 139; 95 v. 391.]

(1) **Approval of Public Utilities Commission.**—See §§ 614-60 and 614-62 G. C.

Sec. 9135. [Dissenting stockholder.] A stockholder who refuses to assent to such lease or sale and so signifies by notice in writing to the lessee or purchaser within ninety days thereafter shall be entitled to demand and receive compensation in the manner provided for the compensation of stockholders dissenting from the sale or lease of a steam railroad. [R. S. Sec. 2505e; 93 v. 139; 95 v. 391.]

Sec. 9136. [Liabilities of the company leased or purchased.] A company so leasing or purchasing the property, rights and franchises of an electric light and power company, or natural or artificial gas company, or electric light and power and natural or artificial gas company, shall have all the rights, power and authority of the company whose property rights and franchises are so leased or purchased. But the liability of an electric light and power company, or natural or artificial gas company, or electric light and power and natural or artificial gas company, shall in no manner be affected by such lease or sale. [R. S. Sec. 2505e; 93 v. 139; 95 v. 391.]

Sec. 9137. [May acquire property of other companies.] A corporation or company organized for street railway purposes, may lease or purchase any street railroad, or railroads, or railroad operated as such and by electric power inclined railroad or railroads, together with all the property, and the franchises, rights and privileges respecting the use and operation of such railroad or railroads, situated or existing in whole or part in this state, constructed and held by any other corporation or company, corporations or companies, the latter being hereby invested with corresponding power to let or sell on such terms and conditions as are agreed upon between the corporations or companies.[1] [R. S. Sec. 2505a; 93 v. 214; 92 v. 277; 88 v. 493.]

(1) **Power of Public Utilities Commission.**—See § 614-60 G. C.

Sec. 9138. [Agreements with other companies.] Two or more of such corporations or companies may enter into any agreement for their common benefit consistent with and calculated to promote the objects for which they were created.

No such lease or purchase shall be perfected until a meeting of the stockholders of each of the companies has been called for that purpose by the directors thereof, on thirty days' notice to each stockholder at such place and in such manner, as is provided for annual meetings of the companies, and the holders of at least two-thirds of the stock of each company, in person or by proxy, at such meeting, or at any properly adjourned meeting, assent thereto. Any stockholder who refuses to assent to such lease or sale and so signifies by notice in writing to the lessee or purchaser within ninety days thereafter, shall be entitled to demand and receive compensation in the same manner and by such proceedings as are provided for the sale of stock of a stockholder dissenting to a sale or lease of a steam railroad. [R. S. Sec. 2505a; 93 v. 214; 92 v. 277; 88 v. 493.]

Sec. 9139. [Fare can not be increased.] When a lease or purchase is made as above provided, there shall be no increase of the existing rates of fare by reason thereof, nor shall any fare be charged upon any of the separate routes so leased or purchased in excess of the fare charged over such separate routes prior to the lease or purchase thereof. When a lease or purchase is made as herein provided, the fare charged for one continuous route or ride in the same general direction over all such leased or purchased lines within any municipal corporation, shall not exceed the maximum fare charged over any one of such lines prior to such lease or purchase.[1] [R. S. Sec. 2505a; 93 v. 214; 92 v. 277; 88 v. 493.]

(1) **Remedy for violation** of this section by charging unauthorized fares is by *quo warranto*. State v. Ry. Co., 23 C. C. 603; 3 C. C. (N. S.) 285; but see 73 O. S. 356.

INCLINED PLANE RAILROADS.

Sec. 9140. [Powers of inclined plane railway company.] An inclined plane railway company may construct, operate, and maintain an inclined plane railway, for the conveyance of passengers and freight, or either, with such offices, depots, and other buildings as it deems necessary, and also establish and

maintain a park or pleasure grounds, and for such purpose acquire and hold real estate. [R. S. Sec. 3444; 73 v. 229 § 2.]

Sec. 9141. [How street crossings to be made.] When the part of the railway of such company which is operated by steam power crosses a public street or highway, it must pass either over or under such street or highway, and shall be constructed in a manner and at such distance above or below it as not to obstruct the ordinary use of the street or highway. [R. S. Sec. 3445; 73 v. 229 § 10.]

ELEVATED RAILROADS.

Sec. 9142. [Elevated railroads.] A city owning or having charge of any public road, street, alley, way, or ground of any kind, or any part thereof, may grant to any railroad company, street railroad company, suburban railroad company or interurban railroad company the right to construct, maintain and operate by electricity, any elevated railroad along and over such public road, street, alley, way or ground, except a public landing, or across them subject to existing laws concerning crossings, so far as they are applicable, and to erect and maintain therein the necessary tracks, piers, stays, supports and stations, and the approaches therefor, which stations shall be on a level with the track, and when necessary to construct tunnels for such railroad under such roads, streets, alleys, ways or grounds or to construct, maintain and operate by electricity any underground railroad, along and under public roads, streets, alleys, ways or grounds, and to erect and maintain stations, stairways and approaches therefor, and also to construct suitable terminals and way stations. [R. S. Sec. 3283b; 100 v. 70; 99 v. 452.]

Sec. 9143. [Elevated structures and crossings must not obstruct travel; subways must not impair streets nor prevent use of sewers, etc.] Such elevated structures and crossings shall be of such height and construction as not to prevent substantially the ordinary use of, and traffic upon, such roads, streets, alleys, ways, or grounds, whether by pedestrians, vehicles, street cars or otherwise, except temporarily when necessary in

the construction of the elevated structures and crossings. Such tunnels for elevated railroads or subways for underground railroads shall be constructed as not to impair the stability of the roads, streets, alleys, or public grounds, or prevent the use of any sewers, street railway tracks and appliances, pipes, wires, and conduits used for any purpose in the streets, alleys, ways or grounds except temporarily when necessary in the construction of the tunnel or subways, except as hereinafter provided. And such elevated structures and crossings and such tunnels and subways shall be constructed in accordance with general plans approved by the director of public service of the municipality. All such work of construction shall be subject to the supervision and control of the director of public service. [102 v. 179; 100 v. 70; 99 v. 452; R. S. Sec. 3283b.]

Sec. 9143-1. [Changes and removals; filing of plans and specifications required; approval, notice, hearing, bond; director may modify or reject plans; sewer, water pipe, etc., may be located in subway without compensation; cost, damage and expense.] The council may grant to the company the right to move, change, elevate, depress, relocate and reconstruct at its sole expense any sewer, sewer connection, catch-basin, water pipe, water connection, natural or artificial gas pipes or connections, hydrants, conduits, pipes, wires, street railway tracks and appliances, poles, whether for street railway, electric lighting, heating, power, telegraph, telephone, signal service, or any other purpose, or any other obstruction, which may be encountered in the construction of the underground railroad.

Any such company shall before proceeding to move, change, elevate, depress, relocate, or reconstruct any such sewer, sewer connection, catch-basin, water pipe, water connection, natural or artificial gas pipes or connections, hydrants, pipes, wires, conduits, poles and street railway tracks or appliances, or other obstructions, file with the director of public service of the municipality detailed plans and specifications for all of said work. No such work shall be commenced unless such plans and specifications shall first be approved by the director of public service of such municipality, after notice and hearing, and unless such company shall file with the director of public

service a bond in such amount and with such sureties as the director of public service may determine, conditioned to indemnify and save harmless the owners of any such sewer, sewer connection, catch basin, water pipe, water connection, natural or artificial gas pipes or connections, hydrants, pipes, wires, conduits, poles or street railway tracks or appliances, and the owners of any other property situated in, on, under, or near any such road, street, alley, way, or public ground, from all cost and expense of such work and damages resulting from injuries done thereby. Such director of public service may change, modify or reject any such plans or specifications, and such work of construction shall be performed under the supervision and control of the director of public service.

If such plans and specifications shall locate any such sewer, sewer connection, catch basin, water pipe, water connection, natural or artificial gas pipe or connection, hydrants, pipes, wires, conduits, or any other structures within the gallery, subway or tunnel of such underground railroad, the owners of the same shall be entitled to use such space within such gallery, subway, or tunnel, without compensation for such use and occupancy, except a reasonable charge to defray the actual cost of maintenance; provided, however, that if any such sewer, pipe, conduit or other conductor shall be of greater capacity than that existing prior to the construction of such underground railroad, the underground railroad shall be entitled to charge for the increased capacity of such conductor and not otherwise. All cost, damage, and expense, incidental to the work of removing, supporting, readjusting and reconstructing any such sewer, sewer connection, catch basin, water pipe, water connection, natural or artificial gas pipes or connections, hydrants, pipes, wires, conduits, poles, street railway tracks or appliances, or other structures, and all cost of supervision by the city shall be borne by and paid for by such elevated or underground railroad. Nothing contained in this act shall authorize the permanent removal or exclusion from any such road, street, alley, way or ground of any such sewer, sewer connection, catch basin, water pipe, water connection, natural or artificial gas pipe or connections, hydrants, pipes, wires, conduits, poles, street railway tracks

or appliances, and other structures, authorized to be located therein, except when suitable facilities for such services have been otherwise provided for therein, or to prevent the practical construction, repair, operation and use of the same. [102 v. 179.]

Sec. 9143-2. [When the grant of such right and privileges deemed valid.] Any ordinance of any city purporting to grant the rights or privileges, or any of them, contained in this act to any company, and which grant has been accepted and on account thereof money has been expended in good faith, is hereby declared to be as valid and effective as if the power in said city to so grant such rights and privileges had been expressly enumerated in the general municipal corporation act. [102 v. 180.]

Sec. 9143-3. [Right to lease space in tunnel or subway.] The council may authorize the company to lease space in its tunnel or subway, for the purpose of placing pipes, conduits, tubes and wires for artificial or natural gas, water, sewer, heating, telegraph, telephone, signal service, United States mail, electricity for light, heat and power purposes, to any company which has been duly authorized by the municipality to engage in and which company is actually engaged in the business in connection with which the use of such space is to be made; provided that such lease shall be made and such space occupied in such manner and on such terms and conditions, as the council may determine and approve. And the council shall have the right to place, or cause to be placed in such tunnel or subway any pipes, lines and conduits for any of its service, including those above named, without charge, except for cost of construction, provided that such placing shall not interfere with the company's use of the subway. [102 v. 180.]

Sec. 9144. [Terms of grant.] Such grant shall only be made upon such terms and conditions as are agreed upon by the council of the city, and the company; and every such grant shall provide for the rate of fare within the limits of such municipality. [110 v. 70; R. S. Sec. 3283b; 100 v. 70; 99 v. 452.]

Sec. 9145. [Appropriation of property.] After such grant has been made such company may appropriate private property necessary for the use and enjoyment of the grant, including terminals and way stations, for the purpose of constructing and operating its road in the manner and upon the terms provided by law for the appropriation of private property by corporations. [R. S. Sec. 3283b; 100 v. 70; 99 v. 452.]

Sec. 9146. [Damages to other property.] Every company which constructs an elevated track upon or a tunnel or an underground railroad below such roads, streets, alleys, ways or grounds, shall be responsible for injuries done thereby to private or public property, lying upon or near such streets, alleys, ways or grounds, which may be recovered by civil action brought by the owner before the proper court at any time within two years from the completion of the road. [R. S. Sec. 3283b; 100 v. 70; 99 v. 452.]

Sec. 9147. [Purchase of road by city.] Every city making a grant as provided in the five next preceding sections, may provide in such grant, upon such terms and conditions as are agreed upon by the council of the city, and the company, for the ultimate purchase and ownership by the city of such road or any part thereof. [R. S. Sec. 3283c; 99 v. 452.]

Sec. 9148. [Company to notify authorities of acceptance or rejection of grant.] Every railroad, street railroad company, suburban railroad company or interurban railroad company, to whom a grant has been made as above provided shall notify in writing the authorities making the grant of its rejection or acceptance of the grant at a time fixed by them at the time of making the grant. If after a grant has been made as above provided, and accepted by any railroad, street railroad company, suburban railroad company or interurban railroad company, within sixty days after such acceptance there is filed with the mayor of the city making the grant a petition protesting against it and signed by such a number of the electors of the city qualified to vote at the last preceding general election, as equals ten per cent of the number of votes cast for mayor at the last preceding election for mayor, he shall certify such

fact to the proper election officials. [R. S. Sec. 3283d; 100 v. 70; 99 v. 452.]

Sec. 9149. [Submission of grant to electors.] The officials in charge of such general election, in accordance with the statutes relating to elections, shall arrange, provide for and conduct the submission of such question to such electors. The question whether the grant shall be made shall be submitted to the electors of such city at the next succeeding general election occurring more than thirty days after the expiration of such sixty days. The ballots at such election if the grant be for the construction of elevated tracks shall read "Elevated Railroad Grant—Yes". "Elevated Railroad Grant—No". If the grant be for the construction of underground tracks they shall read "Underground Railroad Grant—Yes". "Underground Railroad Grant—No". If the grant be for the construction of partly elevated and partly underground tracks, they shall read "Elevated and Underground Railroad Grant—Yes", "Elevated and Underground Railroad Grant—No". If at such election a majority of the votes cast on such question be against such grant, it shall be ineffective and void.[1] [R. S. Sec. 3283d; 100 v. 70; 99 v. 452.]

(1) **Blank ballots** cannot be counted as votes. Brush v. Orgill, 9 N. P. (N. S.) 633.

EQUIPMENT.

Sec. 9007-1. [Seats for conductor and motorman.] That it shall be unlawful to operate in Ohio any electric, street or interurban railroad car unless it be provided at all times during operation with seats for the motorman and conductor. [107 v. 590.]

Sec. 9007-2. [Penalty for failure to provide seats.] A violation of section 1 hereof shall constitute a violation thereof by the president, general manager, general superintendent, or other officer in charge of operation, and shall be punishable by a fine of not less than fifty dollars nor more than one hundred dollars, or by imprisonment for not less than ten nor more than thirty days for each offense. An offense

on any calendar day and as to any car shall be a separate and distinct offense from a violation on any other such day. [107 v. 590.]

Sec. 9007-3. [Prosecution.] It shall be the duty of the prosecuting attorneys of the various counties to prosecute violations of this act. [107 v. 590.]

Sec. 9149-1. [Air brakes required on urban and interurban cars.] That from and after January 1, 1924, it shall be unlawful in the state of Ohio, for any corporation, company, person or persons owning or controlling the same, to operate, use or run or permit to be run, used or operated for carrying passengers or freight on an urban or interurban railroad or street car line, any car propelled by electricity, or any car, cars or train of cars drawn by any car or cars propelled by electricity not equipped, in addition to the hand brake in use on such car, cars or train of cars with an air or electric power brake so that the same can be operated and controlled by the motorman in charge of and operating such car, cars or train of cars.

It shall be the duty of the public utilities commission of Ohio to enforce this act. [109 v. 142; 101 v. 209.]

Sec. 9149-2. [Penalty.] Repealed, 109 O. L., 142.

Sec. 9149-3. [Protection of third rails.] That every company or person having the control or management of an electric, interurban, or street railroad, which operates its cars by electricity conducted through or along a third rail, shall construct, or cause to be constructed, and maintain in good repair on each side of its right of way through which such third rail extends, a fence sufficient to turn stock; and such company or person shall cause to be maintained at every point where any public road, street, lane, or highway crosses such railroad, safe and sufficient crossings, and on each side of such crossings cattle-guards sufficient to prevent domestic animals from going upon said railroads; and every such company or person shall be liable for all damages sustained in person or property in any manner by reason of any neglect

or carelessness in the construction or maintenance of any such fence, crossing or cattle-guard, whether such damage be sustained from the contact of said domestic animals with said cars or from contact with, or by reason of, electricity passing through or along such third rail. Provided, however, that the provisions of this act shall not require the building and maintenance of such fence between the right-of-way of such electric, interurban, or street railway, and the right-of-way of any steam or electric railway where said rights-of-way are parallel and abut upon each other, and such steam or electric railway maintains a fence on the opposite side of its right-of-way. [103 v. 197.]

Sec. 9149-4. [Adjacent owners may build fence.] If any such company or person neglect or refuse to construct and maintain such fence as provided in the preceding section, the owner of any land abutting on the line of the right-of-way of such person or company may construct the fence thereon as herein provided for, so far as his lands abut on the right-of-way; and when he has completed the same, he may present for payment, to the ticket agent of the company at the station nearest the track so fenced, an itemized statement of the expenses thereof; and if such person or company neglect or refuse for thirty days to pay such account, such land owner may recover the reasonable cost of such fence from the owner of the road, in any court of competent jurisdiction. [103 v. 197.]

Sec. 9149-5. [Killing of animal as evidence.] If any domestic animal shall receive any injury or be killed upon such right-of-way, either by coming in contact with a moving car, or by reason of the electricity contained in or passing through a third rail of such railroad, such injury or death shall be prima facie evidence that the person or company operating said railroad has failed to comply with the requirements of this act. [103 v. 197.]

Sec. 9149-6. [Center aisle, length of car in street or interurban cars required.] That it shall be unlawful for each and every street or interurban railroad company in said

state, or its president, general manager, general superintendent, or other officer in charge of operation, to permit or cause to be operated in the state of Ohio any car for the carriage of passengers, or upon which passengers are carried, not having parallel with the tracks upon which such car is being operated a center aisle running the length of the car and suitable for quick and easy passage to and fro on the part of the employes of such company and the traveling public. [107 v. 602.]

Sec. 9149-7. [Certain officers deemed violators.] A violation of this act shall be deemed a violation hereof by the president, general manager, general superintendent, or other officer in charge of operation, of any such company. [107 v. 602.]

Sec. 9149-8. [Fine and imprisonment.] Any violation of this act shall be punishable with a fine of fifty dollars, coupled with imprisonment for not less than 10 days, nor more than thirty days, and each day's violation shall constitute a separate and distinct offense apart from violation on any other day or days. [107 v. 602.]

Sec. 9149-9. [Prosecution.] It shall be the duty of the prosecuting attorneys of the various counties to prosecute violations of this act. [107 v. 602.]

Sec. 9149-10. [When act shall take effect.] This act shall go into effect on and after April 1, 1920. Provided, however, that on and after ninety days after the filing of this act with the secretary of state, it shall be unlawful to put into the service of any street or interurban railroad, within the state, any car or cars other than those said railroad companies now have in service, unless they be constructed and equipped as provided in this act. And beginning with April 1, 1917, said companies shall reconstruct and equip each year thirty-three and one-third per cent of such of their cars as do not meet the requirements set out in this act, so that they will be in conformity with the said requirements, thus

having by April 1, 1920, no cars in service that do not meet the requirements of this act. [107 v. 602.]

Sec. 12788. [Screen for protection of motormen and conductors required; temperature of 60 degrees to be maintained.] Whoever, being an officer, agent, or employe in authority, of a corporation, individual, or association, directs or permits to be operated an electric car, other than a trail car (whether such electric car be a passenger car, a freight car, a sweeper or other car), unprovided at the forward end with a screen of glass or other material sufficient to completely protect from dust, wind and storm the motorman or other person or persons stationed there for guiding or operating such car, or who fails to maintain during the entire period succeeding October 31st of each year and ending on each succeeding April 15th, within any electric car so being operated, whether a passenger car, a trail car, or other car (except in freight cars) and (excepting in trail cars) within the space behind any such screen, a temperature at all times of not less than sixty degrees Fahrenheit, shall be fined not less than twenty-five dollars nor more than one hundred dollars, for each day during which at any time such a car is operated while so unprovided, or while such temperature is not so maintained. It shall be the duty of the prosecuting attorneys of the various counties of the state of Ohio to enforce the provisions of this act. [108 v. 161; 98 v. 5; 90 v. 220.]

Sec. 12788-1. [Operation of cars without closet and drinking water unlawful; penalty.] Whoever engages in the operating of interurban car or cars, for a greater distance than ten miles between the corporate limits of municipalities, shall be required to place and maintain within such car or cars, so run or operated, a water closet or dry hopper closet, properly and sanitarily constructed, and suitable drinking water for the use of the passengers of such car or cars. It shall be the duty of the public utilities commission of Ohio to enforce this act. [109 v. 234; 103 v. 64.]

TERMINAL DEPOTS.

Sec. 9169-3. [Powers.] [§ 3.] Such companies [1] shall have power to receive grants from the council of a municipality for the use of its streets or alleys upon the same terms as street railways and said grant shall continue as long as the grants and renewal or reletting thereof to any interurban or street railway connecting with the same; to construct, maintain and operate railway lines upon the streets or alleys of a municipality to connect its depot with other street or interurban railways; to build, keep, maintain and operate union electric interurban terminals and depots for electric cars and trains; to contract for the use of their tracks for the operation of the cars of any interurban, street or other electric railway company and for furnishing them terminal depot facilities; and any interurban, street or other electric railway company shall have power to contract with such union interurban terminal and depot company for the use of their tracks and for terminal depot facilities. [101 v. 168.]

(1) **Union Interurban Terminal Depot companies,** provided for by §§ 9169-1 G. C. *et seq.*, are referred to.

PUBLIC UTILITIES COMMISSION REGULATIONS.

Sec. 504-2. [Abandonment of track, depot, line, pumping station, etc.; forfeiture.] [1] No railroad as defined in section 501 of the General Code, operating any railroad in the state of Ohio, and no public utility as defined in section 614-2a of the General Code furnishing service or facilities within the state of Ohio, shall abandon or be required to abandon or withdraw any main track or tracks or depot of a railroad or main pipe line, gas line, telegraph line or telephone toll line, electric light line, water line or steam pipe line, or any portion thereof, pumping station, generating plant, power station, or service station of a public utility, or the service rendered thereby, which has once been laid, constructed, opened and used for public business, nor shall be closed for traffic or service thereon, therein or thereover except as provided in section 504-3. Any railroad or public utility violating the provisions of this section shall forfeit and pay

into the state treasury not less than one hundred ($100.00) dollars, nor more than one thousand ($1,000.00) dollars, and shall be subject to all other legal and equitable remedies for the enforcement of the provisions of this act. [108 v. 372; 107 v. 525.]

(1) **Validity.**—This section so far as it attempted to make the divisions thereof applicable "to all such service now rendered and facilities furnished" is unconstitutional. Gas Co. v. Cleveland, 106 O. S. 489. See Cleveland v. Gas Co., 15 Oh. App. 117.

Abandonment of interurban railroad.—See Commissioners v. Pub. Util. Com. 107 O. S., page 442.

Sec. 504-3. [Application to commission for abandonment; hearing upon abandonment.][1] Any such railroad or any political subdivision desiring to abandon, close, or have abandoned, withdrawn or closed for traffic or service all or any part of such main track or tracks, or depot, and any such public utility or political subdivision desiring to abandon or close, or have abandoned, withdrawn or closed for traffic or service all or any part of such line or lines, pumping station, generating plant, power station or service station, shall first make application to the public utilities commission in writing who shall thereupon cause reasonable notice thereof to be given, stating the time and place fixed by the commission for the hearing of said application. Upon the hearing of said application said commission shall ascertain the facts, and make its finding thereon, and if such facts satisfy the commission that the proposed abandonment, withdrawal or closing for traffic or service is reasonable, having due regard for the welfare of the public and the cost of operating the service or facility, they may allow the same; otherwise it shall be denied, or if the facts warrant, the application may be granted in a modified form. Provided, however, that should the application ask for the abandonment or withdrawal of any main track, main pipe line, gas line, telegraph line or telephone toll line, electric light line, water line or steam pipe line, pumping station, generating plant, power station, service station, or the service rendered thereby, in such manner as can result in the permanent abandonment of service between any two points on such railroad, or of service and facilities of any such public utility, no appli-

cation shall be granted unless the company or public utility shall have operated said track, pipe line, gas line, telegraph line or telephone toll line, electric light line, water line, or steam pipe line, pumping station, generating plant, power station or service station for a period of at least five years, and such notice shall be given by publication in a newspaper of general circulation throughout any county or municipality which may have granted a franchise to said company or public utility, under which said track, pipe line, gas line, telegraph line or telephone toll line, electric light line, water line or steam pipe line, pumping station, generating plant, power station or service station is operated or in which the same is located, once a week for four consecutive weeks before the hearing of said application, and notice of said hearing shall be given such county, municipality or public utility in the manner provided for the service of orders of the commission in section 614-71 of the General Code, and except that the provisions of section 504-2 and 504-3 shall not apply to a gas company when removing or exchanging abandoned field lines.

The provisions of this section shall apply to all such service now rendered and facilities furnished or hereafter built and operated, and an order of the commission authorizing the abandonment or withdrawal of any such service or facility shall not affect rights and obligations of a railroad or public utility beyond the scope of said order, anything in its franchise to the contrary notwithstanding. [108 v. 373; 107 v. 525.]

(1) **Validity.**—This section in so far as it attempted to make the divisions thereof applicable "to all such service now rendered and facilities furnished" is unconstitutional. Gas Co. v. Cleveland, 106 O. S. 489. See Cleveland v. Gas Co. 15 Oh. App. 117.

The public utilities commission by virtue of the powers conferred upon it by Section 504-3, General Code, may allow a gas company to discontinue service to a municipality, if satisfied that the gas company no longer has a supply of gas and is unable to procure by contract a supply from another gas company or pipe line company. St. Clairsville v. Pub. Util. Com., 102 O. S. 574.

Sec. 614-29. [Use of equipment over street, etc., by other public utility.][1] [§ 31.] Every public utility having any equip-

ment on, over or under any street or highway, shall, subject to the provisions of section 9103 of the General Code, for a reasonable compensation, permit the use of the same by any other public utility whenever the commission shall determine as provided in section 32 hereof [G. C. § 614-30] that public convenience, welfare and necessity require such use, or joint use, and such use or joint use will not result in irreparable injury to the owner or other users of such equipment, nor in any substantial detriment to the service to be rendered by such owners or other users. [102 v. 558.]

(1) Public Utilities which are owned or operated by a municipality are not included within the provisions of the public utilities act requiring one utility to use the poles or equipment of another utility. Op. Atty. Gen. (1912), p. 1783.

Sec. 614-30. [Application on failure to agree.] [§ 32.] In case of failure to agree upon such use or joint use or the conditions or compensation for such use or joint use, any public utility may apply to the commission, and if after investigation the commission shall ascertain that the public convenience, welfare and necessity require such use or joint use and that it would not result in irreparable injury to the owner or other users of such property or equipment, nor in any substantial detriment to the service to be rendered by such owner or other users of such property or equipment, said commission shall by order direct that such use or joint use be permitted and prescribe reasonable conditions and compensations for such joint use. [102 v. 558.]

Sec. 614-31. [Conditions and compensation.] [§ 33.] Such use or joint use so ordered shall be permitted and such conditions and compensation so prescribed shall be the lawful conditions and compensation to be observed, followed and paid, subject to recourse to the courts by any interested party as provided in this act. Any such order made by the commission may be revoked or from time to time revised by the commission. [102 v. 558.]

III.

STEAM RAILROADS IN MUNICIPAL LIMITS.

CROSSING REGULATIONS.[1]

Sec. 588. [Gates, bells, devices, or flagmen at crossing.] If, in its opinion,[2] the public safety requires that a gate or gates, automatic alarm-bell, or other mechanical device be erected and maintained at any place where a public road or street is crossed at the same level by a railroad, and the crossing has been declared by the commission to be dangerous, or the public safety requires that a flagman be stationed and maintained at such dangerous crossing, the commission shall give the superintendent, manager or other officer in charge of such railroad, a written notice of what is required, and such company, person or corporation owning or operating such railroad shall erect such mechanical device or station such flagman within the time prescribed by the commission.[3] [R. S. Sec. 247a; 91 v. 353; 86 v. 367.]

(1) **Speed regulations.**—Power of municipality to regulate speed of steam railroad locomotives and cars in corporate limits, see § 3781, *ante*, in Part I.

(2) **Public utilities commission.**—This section and §§ 590, 594 and 595 are part of the first chapter of Division 2, Title 3, Part First, relating to the railroad commission (later the public service commission, 102 O. L. 549), and now the public utilities commission, (103 O. L. 804 *et seq.*

(3) **Duties of flagman.**—See Ry. Co. v. Schneider, 45 O. S. 678.

Flagmen and railroad company are chargeable only with ordinary care. Street Ry. Co. v. Murray, 53 O. S. 570, 583.

Municipality has no power to require watchman at a crossing within the corporate limits. Ravenna v. Penn. Co., 45 O. S. 118.

Liability of company.—Persons crossing tracks have right to presume that gateman is exercising due diligence. Ry. Co. v. Schneider, 45 O. S. 678.

Company is liable in damages to person injured if it fails to exercise due care at crossings. *Ib.*

Street railway crossing track.—See § 9125, *ante*, under *"Street Railroads."*

Street railway company employes

are not relieved from duty of stopping the car and going forward, as required by § 9125 because the flagman has signalled that crossing is open. St. Ry. Co. v. Murray, 53 O. S. 570, 583. § 588 and § 9125 are not in *pari materia*. *Ib.*

Penalty is provided in § 589 G. C.

Expense of erection and maintenance of gates to be divided when two or more railroads cross a public highway or street. See § 591 G. C.

Sec. 590. [Regulations as to gates, bells, and devices.] All gates, bells or devices erected under the direction of the commission shall be built within the time, in the manner and of materials approved by the commission. Such gates shall be located in the highway or street on one or both sides of the railroad track or tracks, as the commission deems the public safety requires, and shall be so constructed that when closed, they shall obstruct or prevent passage across such railroad or railroads from the side on which a gate is located. Such bell must be so constructed that it will ring before the approach of every train of cars or locomotive within three hundred feet or more of such crossing, and continue to ring until such train or locomotive has reached the crossing. A person shall be in charge of such gate who shall close it at the approach of each train or locomotive, and keep it open at all other times. If an automatic bell or other mechanical device is required at such crossing, the railroad shall keep such bell or device at all times in good working order, and for every neglect of duty imposed by this section such railroad shall forfeit and pay the sum of twenty-five dollars. [R. S. Sec. 247b; 91 v. 353; 86 v. 367.]

Sec. 594. [Safety devices at grade crossings.] When two steam railroads, a steam railroad and an interurban, electric or street railway, two interurban railroads, or a steam or electric railroad and a street or highway cross at grade, if, in its opinion, public safety requires protection, the railroad commission, upon its own motion or upon complaint, after notice to the railroads interested and full investigation, may make an order requiring the railroads so intersecting and crossing to install such device or devices as in the opinion of the commission will properly protect such crossing. [99 v. 390 § 2; 92 v. 315; Bates, 247e.]

Sec. 595. [Commission may make order as to a crossing.] The railroad commission may make any further or other orders regulating the speed and running of trains or of cars and the switching of cars over such crossing or street, and it shall apportion the expense of installation or maintenance of such device or devices between the railroad companies whose tracks are thus protected. [99 v. 390 § 2; 92 v. 315; Bates, 247e.]

CONSTRUCTION.

Sec. 8745. [Six main tracks.] A railroad company may maintain and operate, or construct, maintain and operate a railroad, with such main tracks, not exceeding six and such side tracks, turnouts, offices, depots, round-houses, machine shops, water tanks, telegraph lines, and other necessary appliances, as it deems necessary, between the points named in its articles of incorporation, commencing at or within, and extending to or into any city, village, or place named as a terminus of its road.[1] [101 v. 323; R. S. Sec. 3270; 99 v. 71; 69 v. 203.]

(1) Railroad may be constructed with both terminals in the same municipality. State v. Railway, 72 O. S. 445; Cincinnati Interterminal Ry. v. Murray, 1 N. P. (N. S.) 301.

Sec. 8758. [Electricity as motive power.] Upon any railroad in this state, electricity may be used as a motive power in the propulsion of cars. But before a line of poles and wires may be constructed through or along the streets, alleys, or public grounds of a municipal corporation, plans of the construction must be submitted to and approved by its council. [91 v. 397, § 1; Bates, 3310-1.]

Sec. 8759. [Appropriation of land; entry upon for examination or survey.] A company, domestic or foreign, or municipal corporation which owns or operates a railroad may enter upon any land for the purpose of examining and surveying its railroad line, and appropriate so much thereof as is deemed necessary for its railroad, including necessary side-tracks, depots, workshops, round-houses, and water-stations, material for construction, except timber, a right-of-way over adjacent lands sufficient to enable it to con-

struct and repair its road and the right to conduct water by aqueducts and to make proper drains. [106 v. 347; R. S., § 3281; 91 v. 294; 50 v. 274.]

Sec. 8763. [Elevated track; use of public way.] If in the location of any part of a railroad owned or operated by a domestic or foreign corporation, it be necessary to occupy with a surface or elevated track, with the necessary supports therefor, any public road, street, alley, way or ground, of any kind, or part thereof, the municipal or other corporation or public officers or authorities, owning or having charge thereof, and the company, may agree upon the manner, terms and conditions upon which it can be used or occupied.[1] In the event of the occupancy of such ground with an elevated track, the agreement shall specify the number, character and location of all supports for the track, any part of which will be upon such public ground, and the vertical and longitudinal clearances between such supports.[2] [R. S. Sec. 3283; 99 v. 589; 54 v. 133 § 12; (S. & C. 278).]

(1) **Scope of section.**—The requirement that before a railroad company may occupy a street or public way it must agree with the authorities controlling the street or public way, or condemn, is not limited by § 8773 providing that the company may divert a road, etc., which it crosses, and in order to cross a street or public way section 8763 must be complied with. Youngstown v. Railroad, 3 C. C. 214; Cincinnati Northern R. R. v. Cincinnati, 8 B. 334.

The power to fix a terminus within a municipality does not imply the power to cross intervening streets, and before such crossing can be made section 8763 must be complied with. *Ib.*

The powers conferred on municipal corporations with respect to opening, improving and repairing streets and public ways, are held in trust for public purposes and are continuing in their nature, to be exercised from time to time as public interest may require; and they cannot be granted away or relinquished, or their exercise suspended or abridged except when, and to the extent legislative authority is expressly given to do so. Railroad v. Defiance, 52 O. S. 262.

As to power of council to grant longitudinal use of the street, practically excluding the public, see Cleveland, etc. Ry. Co. v. East Liverpool, 51 B. 599.

There is no power or authority in a municipal council to grant the right to a railway company, either by ordinance or agreement with the company, to occupy, incumber and use a street by crossing it with five tracks connecting with a railway yard and in reality becoming a part of the yard,

particularly where access to the yard can be had without thus occupying the street; nor could the right so to do be acquired by appropriation. Cincinnati v. Railway, 24 C. C. (N. S.) 305.

As to construction of this section in connection with statutes abolishing grade crossings, see further, Ritter v. Railway, 18 Dec. 846; 6 N. P. (N. S.) 161.

Under this section before amendment of 1908, it was held that the municipality had no power to agree with a railway company for the permanent and exclusive occupation of a part of a public street with abutments to support an overhead crossing of a railroad, and that such occupation could not be gained by means of appropriation. See Railroad Co. v. Defiance, 52 O. S. 263; L. S. & M. S. Railway Co. v. Elyria, 69 O. S. 414.

See further, L. & N. R. R. Co. v. Cincinnati, 76 O. S. 481.

As to the effect of § 8849, see Cincinnati v. L. & N. R. R. Co., 16 Dec. 628; 4 N. P. (N. S.) 217.

State board of public works cannot authorize a railroad, under powers conferred by this section, to construct a road on the berm bank of a canal. State *ex rel.* v. Railroad, 37 O. S. 157.

Power to lay a track across a street, conditioned that street be restored to its former state, does not authorize company to appropriate the highway so as to materially interfere with public travel. Railroad v. Comm'rs, 31 O. S. 338.

And a municipal corporation cannot grant the exclusive use of streets to one railway company to the exclusion of all others. Railroad v. Railroad, 36 O. S. 251.

The municipal corporation cannot fix the compensation to be paid for the use of a track belonging to another corporation. Such compensation must be fixed by a jury. *Ib.*

The city authorities may give permission to lay branch tracks for convenience of shippers. P. C. & St. L. R. R. v. Cincinnati, 16 B. 367 (aff'd no report 24 B. 416).

A court can not declare that the laying of five railway tracks in the street constitutes an unreasonable and unwarranted disregard of the rights of the public in the street and therefore should be enjoined, but the question is one of fact which must be determined from all the circumstances in the case. Cincinnati v. Railway, 15 N. P. (N. S.) 317; but see s. c., 24 C. C. (N. S.) 305.

A resolution passed by a village council providing that for certain consideration, a railway company should have the use and occupation of a specified street, is neither a grant to the company of the land within the bounds of the street, nor a vacation of the street, but at most is a permission to the company to occupy the street for railway purposes. Ry. Co. v. Hartford, 15 Ohio App. 305.

Occupation of streets by agreement.—An agreement by a municipality with a railroad granting use of streets, the company agreeing to make and gravel streets, cannot be rescinded without consent of railroad, and railroad is not released from making streets. Railway v. Carthage, 36 O. S. 631.

Railway company must make street in a reasonable time or a right of action accrues to municipality, and this without notice. *Ib.*

The manner of use may be prescribed by municipality and must be observed by court unless fraudulent. Sargent v. O. & M. R. R., 1 Handy 52.

But a condition cannot be attached by a municipality compelling the railroad to keep a watchman at a crossing. Ravenna v. Pennsylvania Co., 45 O. S. 118, 123.

The county commissioners are authorized by this section to contract with a railroad company as to the manner, terms, and conditions upon which said company shall occupy a portion of a public road. Megrue v. Comm'rs, 15 C. C. 242.

If a railroad company cannot agree with the authorities of a municipal corporation, it may resort to the courts, in accordance with the terms of the provisions of §§ 11038, *et seq.*, G. C. State *ex rel.* v. Railway, 37 O. S. 157, 170. See § 8764, *post.*

Validity.—This section is valid. Cincinnati v. L. & N. Ry. Co., 9 N. P. (N. S.) 433, 20 Dec. 440 (aff'd 82 O. S. 466).

(2) **Elevated structure,** under the section as amended in 1908, see Cincinnati v. L. & N. Ry Co., 9 N. P. (N. S.) 433, 20 Dec. 440 (aff'd 82 O. S. 466).

Sec. 8764. [Appropriation of property for elevated track.] If the parties are unable to agree thereon, and it be necessary in the judgment of the directors of such company, to use or occupy such road, street, alley, way or ground, or a part thereof, for surface tracks, or for crossing with an elevated structure when no piers, supports or obstructions are to be placed therein, the company may appropriate so much thereof as is necessary for the purposes of its road, in the manner and upon the terms provided for the appropriation of the property of individuals.[1] [R. S. Sec. 3283; 99 v. 589; 54 v. 133; (S. & C. 278).]

(1) **Object of appropriation** is to acquire such use of the street for surface tracks as could have been granted by agreement and no greater use can be obtained in the one mode than in the other; the right acquired in either case is limited to the use of so much of the street as may be necessary for the purposes of the railroad. Neither agreement nor appropriation withdraws the authority over any part of street from the control and supervision of the proper municipal officers. Railroad Co. v. Defiance, 52 O. S. 262, 309; 167 U. S. 88.

A railroad company has not the absolute right to appropriate public streets of a municipality for an unlimited number of tracks over and across the same, but the court in which the appropriation proceedings are commenced is required to determine the reasonableness of the appropriation sought to be made. Rockport v. Cleveland, etc., Ry. Co., 85 O. S. 73.

Appropriation of a street for

railroad yards is not authorized; necessity of use of street for such yards does not show necessity for appropriation within meaning of this section. *Ib.*

Appropriation of ground leased from municipality.—See Railway v. Cincinnati, 16 N. P. (N. S.) 587.

Occupying without appropriation. — Where company occupies street without agreement or appropriation, a property owner whose property is injured is not limited to the remedy in § 8765 but may bring an action to compel appropriation. Railroad Co. v. Williams, 35 O. S. 168; Railroad Co. v. O'Harra, 48 O. S. 343; Valley Ry. Co. v Pouchot, 4 C. C. 187.

And the limitation on such action to compel appropriation is twenty-one years. Railroad Co. v. O'Harra, 48 O. S. 343.

Determination of directors, necessity of, see Cleveland & P. Ry. Co. v. East Liverpool, 51 B. 599.

Character of crossing.—In condemnation proceeding, the right to cross only is determined; the court cannot determine whether the crossing shall be at grade or overhead; proceedings for determining the character of the crossing are elsewhere provided. Toledo v. Toledo E. etc., Ry. Co., 29 C. C. 656; 9 C. C. (N. S.) 399.

Determination by common pleas court of the right to cross, as provided in §§ 8898 *et seq.*, is a prerequisite to proceedings in probate court to condemn the crossing over a street or alley at grade. Youngstown etc. Ry. Co. v. East Liverpool, 10 N. P. (N. S.) 157; 55 B. 173.

Sec. 8765. [Limitation as to action for damages.] Every company which lays a track upon or over any such street, alley, road or ground, or part thereof, shall be responsible for injuries done thereby to private or public property lying upon or near to such ground,[1] which may be recovered by civil action brought by the owner before the proper court, at any time within two years from the completion of the track.[2] [R. S. Sec. 3283; 99 v. 589; 54 v. 133 (S. & C. 278).]

(1) **Rights of abutting owners.**—An abutting owner has a right of action for unlawfully interfering with travel on a street. Little Miami R. R. v. Naylor, 2 O. S. 235. See also Parrott v. C. H. & D. R. R., 10 O. S. 624.

But he has no right of action where he with others of the community are inconvenienced by noise, smoke, and vapors. A railroad is not a private nuisance. Parrott v. C. H. & D. R. R., 10 O. S. 624, Fliehman v. C. C. C. & St. L. Ry, 27 B. 302.

But substantial injury from smoke, noise, and vapors not common to the community may be considered. Railway v. Gardner, 45 O. S. 309. See also O., I., St. L. & C. Ry. v. Pfitzer, Goebel, 248; W. & L. E. R. R. v. McLaughlin, 15 C. C. 1.

Rights of abutting owner in street which must be compensated for, defined. See C. C. C. & St. L. Ry.

Co. v. Provision Co., 9 N. P. (N. S.) 572.

A person whose property is not on the same street as the railway may recover under this section. Shepherd v. B. & O. R. R., 130 U. S. 426; W. & L. E. R. R. v. McLaughlin, 15 C. C. 1; Railroad v. Mowatt, 35 O. S. 284.

Property situated fifty feet from railroad is "near to" such railroad within meaning of this section. Toledo Ry. & T. Co. v. Meinen, 27 C. C. 208; 6 C. C. (N. S.) 377.

Claim for damages is a personal one and is not assigned by a conveyance of the land. Railroad v. Campbell, 51 O. S. 328.

Where a main track has been in street for over thirty years, and then a new side track is constructed, the damages are limited to such as are caused by smoke, noise, etc., from operation on the side track. C. C. C. & St. L. v. Ruder, 6 C. C. 354.

Where grade of street has been changed by raising track, abutting owner is entitled to damages. Railroad v. Hambleton, 40 O. S. 496.

Where the damages which the abutting owner claims are not those incidental of the running and operation of the road as by noise, smoke, etc., but damages for the impairment or taking of his easement in the street, his remedy is an action to compel appropriation. Railroad Co. v. Campbell, 51 O. S. 328, 330; Hall v. Railway, 11 C. C. (N. S.) 97; 30 C. C. 718.

As to right of abutting owner to resort to action to compel appropriation of his rights in the street, see note under § 8764, *ante*.

As to abutting owner's right to enjoin construction of railroad in street, where his property rights are about to be taken see note "abutting owner's rights," under § 3714, *ante*, in Part I.

As to abutting owner's rights against the municipality for injury to his property abutting on the street caused by a railroad constructed under municipal authority, see note, "Use granted to railroad," under § 3714, *ante*, in Part I.

The section gives a right only where railway is constructed in street. No right is given where railway is on company's own right of way. Cincinnati, etc., R. R. Co. v. Burski, 4 C. C. (N. S.) 98; 26 C. C. 486. See also Ross v. Railway, 27 C. C. 135; 5 C. C. (N. S.) 565 (aff'd 74 O. S. 507).

(2) **Limitation of actions.**—The limitation of two years applies to incidental injuries. The limitation for taking property is twenty-one years. Railroad Co. v. O'Harra, 48 O. S. 343.

And the limitation begins to run when the track is completed and ready for use. Railway v. Gardner, 45 O. S. 309, 325.

Suit for damages for change of grade must be brought within two years. Railroad v. Mowatt, 35 O. S. 284.

Failure to begin suit within two years does not extinguish right of action, and unless the question is raised by answer or demurrer the lapse of time is waived. Railroad v. Lersch, 58 O. S. 639.

Limitation of two years does not apply when company is unlawfully in the street. Railroad v. Cobb, 35 O. S. 94.

See further as to limitation of actions, Railroad v. Hambleton, 40 O. S. 496.

Evidence.—It is error to allow a witness to testify how much less per year was received as rent for the property affected since, than before the track was laid in front of it. Railway v. Gardner, 45 O. S. 309.

The measure of damages is the difference in value of the property before and after the alleged injury from cinders, noise, smoke, etc. Toledo Ry. & T. Co. v. Meinen, 27 C. C. 208; 6 C. C. (N. S.) 377.

Sec. 8766. [Longitudinal occupancy of way unlawful.] Nothing herein shall authorize a grant of the right to occupy any public street, avenue, or alley, longitudinally by an elevated track, except in so far as that is necessary to accommodate a curve in the line of the elevated track, in which case no supports shall be placed in the roadway of the street, avenue, or alley between the curb lines thereof, nor shall such longitudinal occupancy of the street, avenue, or alley exceed three hundred feet in length. [R. S. Sec. 3283; 99 v. 589.]

Sec. 8767. [Appropriation of easement.] If in the judgment of the board of directors of any domestic or foreign corporation owning or operating a railroad wholly or partly within this state, it be necessary to use and occupy for an elevated track any portion of any public ground lying within the limits of a municipality and dedicated to the public for use as a public ground, common, landing or wharf, or for any other public purpose, excepting all streets, avenues, alleys or public road, such company may appropriate an easement over so much of such ground as is necessary for such purpose, including the right to maintain the necessary piers and supports for the elevated track. Such appropriation shall be limited to such an easement as is necessary for the construction, maintenance and uses of such elevated track, in accordance with the plan hereinafter provided for. Proceedings for appropriation shall be conducted in the manner and upon the terms provided for the appropriation of the property of individuals.[1] [R. S. Sec. 3283a; 99 v. 589.]

(1) **Proceedings.**—The judgment of the board of directors is primary and not final and subject to review by the courts as provided by § 6420 R. S. (§ 11046 G. C.) City of Cincinnati et al. v. The Louisville & Nashville R. R. Co., 88 O. S. 283.

An ordinance granting to a railway the right to condemn an easement across a public landing is void, if not based upon an

agreement between the railway company and the municipality wherein the discretion of council has been exercised as to the terms and conditions and limitations under which the grant is made. Railway v. Cincinnati, 12 N. P. (N. S.) 65; aff'd 88 O. S. 283.

Such ordinance where it deals both with streets and public landings, deals with two distinct subjects, and is invalid on that ground. *Ib.*

Sec. 8768. [Submission of plans to council.] Before such appropriation may be made, there shall be submitted to the council of the municipality general plans of the proposed structure showing the manner, character and location of all supports, any part of which will be upon public ground, common, landing or wharf, and also the vertical and longitudinal clearances between the supports. No right to appropriate shall accrue to the railroad company until after it and the council have agreed upon the manner, terms and conditions upon which the property may be used or occupied and the plans submitted have been approved by ordinance duly passed by a two-thirds vote of council.[1] Such ordinance shall be read on three separate days. The rules requiring such reading shall not be suspended. [R. S. Sec. 3283a; 99 v. 589.]

(1) **Vote of electors not necessary.**—After agreement with council it is not necessary under this section that question of franchise be submitted to vote of electors. Cincinnati v. L. & N. Ry. Co, 9 N. P. (N. S.) 433; 20 Dec. 440; (aff'd 82 O. S. 446).

Sec. 8769. [Control by public authorities.] Such appropriation shall not be restrictive of the control by the public officers or authorities over such public ground, common, landing or wharf, subject to the continued maintenance and use of such elevated track upon the terms and conditions agreed upon. [R. S. Sec. 3283a; 99 v. 589.]

Sec. 8770. [Piers or other supports in a public way.] When it is deemed and declared necessary by two-thirds of the members of the council thereof and the mayor approving, any municipal corporation may grant the right, by ordinance duly passed, to a railroad company operating a steam railroad in such municipality to place and maintain necessary piers, or other stays or supports, in any street or way thereof, when

they are provided for and included in the plans and specifications prepared for the abolishment of grade crossings therein under the provisions of an act to abolish crossings in municipal corporations, passed May 2, 1902, and all acts supplementary thereto and amendatory thereof. Every railroad to whom a grant has been made by any municipal authority as herein provided shall notify in writing the authorities making the grant of its rejection or acceptance of the grant at a time fixed by such authorities, when making it. After such a grant has been made, and accepted by a railroad, if within sixty days after such acceptance, there is filed with the mayor of the city or village making such grant a petition protesting against it, and signed by such a number of the electors of the city or village qualified to vote at the last preceding general election, as equals ten per cent. of the number of votes cast for mayor at the last preceding election for mayor he shall certify that fact to the proper election officials. [R. S. Sec. 3283-1; 99 v. 591.]

Sec. 8771. [Submission of questions to electors.] The officials in charge of such general election, in accordance with the statutes relating to elections, shall arrange and provide for and conduct the submission of such question to such electors. The question whether such grant shall be made shall be submitted to the electors of such city or village at the next succeeding general election occurring more than thirty days after the expiration of such sixty days. The ballots at such election shall read "Elevated Railroad Grant—Yes"; "Elevated Railroad Grant—No". If at the election a majority of the votes cast on such question is against the grant, it shall be ineffective and void. [R. S. Sec. 3283-1; 99 v. 591.]

Sec. 8773. [Diversion of road or stream.] When it is necessary in the construction of its road to cross a road or a stream of water, a company may divert it from its location or bed,[1] but without unnecessary delay it shall place such road or stream in such condition as not to impair its former usefulness.[2] [R. S. Sec. 3284; 50 v. 274 § 16; (S. & C. 279).]

(1) **Railway diverting road or stream.**—Under this section a railroad company may divert a highway, but it must put the same in

good condition and is liable for its failure to do so. Railway Co. v. Maurer, 21 O. S. 421; Potter v. Bunnell, 21 O. S. 150. This provision is substantially the common-law rule. Railroad v. Defiance, 52 O. S. 262, 314.

Opening of a new road, having effect of transferring travel thereto, is not a diversion of the old road. See Union etc. Co., v. Railway, 7 N. P. (N. S.) 497.

When it becomes necessary to divert a stream, a railroad company may appropriate land for the new channel. Railway v. Bohm, 34 O. S. 114. But the power to appropriate property for the purpose of diverting a stream is limited to necessities at time of construction of railroad, and may not be exercised afterwards in improving the railroad. C. A. & C. Ry. Co. v. Smith, 78 O. S. 10; *contra*, Commissioners v. L. S. & M. S. Ry. Co., 11 C. C. (N. S.) 418.

Railroad company may divert course of a highway for purpose of crossing with overhead bridge, where diversion of highway does not impair its usefulness. Brown v. Akron, etc. Railroad Co., 17 Dec. 418; 7 N. P. (N. S.) 529; (aff'd 79 O. S. 1.) Question of necessity of permanent diversion is for court to decide. *Ib.*

(2) **Restoring highway.**—When railroad company has restored highway it is not under obligation to keep the same in repair. Railway v. Maurer, 21 O. S. 421. But if railroad company has not restored the highway, it may be compelled to do so at any time during the existence of its franchise. State v. Railroad, 36 O. S. 434. The Attorney General may enforce the obligation and company may be enjoined from using highway which it has diverted and left in dangerous condition. *Ib.* And the right of the State is not affected by power given to County Commissioners by § 2424 G. C. *Ib.*

If the company occupying a street refuses to restore it, it may be compelled to do so by mandatory injunction without compensation for expense. L. S. & M. S. Railway Co. v. Elyria, 69 O. S. 414; and cannot claim that removal is taking of property without due process of law. *Ib.*

Railroad company cannot shift responsibility for negligence in restoring highway by employing independent contractor. Railroad v. Van Dorn, 1 C. C. 292; and where it agrees to keep a bridge in repair it is jointly liable with city for failure to do so. Toledo, etc. R. R. v. Sweeny, 8 C. C. 298; aff'd 52 O. S. 616.

Crossing highway.—The crossing of city streets without consent of municipal authorities was not intended by this section. Railroad v. Cincinnati, 8 B. 334; Youngstown v. Railroad, 3 C. C. 214; see also, Commissioners v. Penna Co., 18 Dec. 348; 6 N. P. (N. S.) 141.

Sec. 8824. [When tracks used in common.] When two or more companies have two or more tracks of the same gauge in the same street, alley, public way, or opening, through a city or village, the council thereof may require such companies

to use such tracks in common, and to pass their locomotives and cars over each track in one direction only. [R. S. Sec. 3339; 54 v. 133; S. & C. 325.]

RAILROAD CROSSINGS.

Sec. 8840. [One steam railroad crossing another within corporate limits.] When, within the corporate limits of a city, or village, it becomes necessary for the track of a steam railroad company to cross the track of another steam railroad company unless the manner of such crossings be agreed to between such companies, the common pleas court of the county wherein such crossing is located, or a judge thereof in vacation, on application of either party, shall ascertain and define by its decree the mode of such crossings which will inflict the least practical injury upon the rights of the company owning or operating the road to be crossed. If in the judgment of such court or the judge thereof, it is reasonable and practicable to avoid a grade crossing, by its process it shall prevent a crossing at grade.[1] [97 v. 538 § 1a; Bates, 3333-3.]

(1) **Construction.**—See Toledo Ry. & T. Co. v. Traction Co., 79 O. S. 136, as to interpretation of similar act relating to crossings outside municipalities and holding that a company may not choose a place of crossing where overhead construction would be impractical, where there is a practical place of crossing where separation of grades might be made.

See also Cincinnati Northern Traction Co. v. Railway Co., 79 O. S. 243; Lima & Toledo T. Co. v Toledo Ry. & T. Co. 30 C. C. 354; 11 C. C. (N. S.) 17.

Sec. 8841. [Change of grade.] In changing the grade of a steam railroad, no grade shall be required to exceed the established maximum or ruling grade governing the operations by engines of that division or part of the railroad on which the improvement is to be made, without the consent of the railroad company, nor shall the railroad company's tracks be required to be placed below high water mark. [97 v. 538 § 1a; Bates, 3333-3.]

Sec. 8842. [Right to appeal.] In its order, the court shall equitably apportion the initial expense of such construction or

crossing, and the expense of such construction or crossing, and the expense of maintenance thereof among the parties interested. A party feeling aggrieved by the decision of the court may appeal therefrom as in other civil cases. Nothing herein shall prevent any railroad company from laying additional tracks at existing crossings. [97 v. 538 § 1a; Bates, 3333-3.]

HIGHWAY CROSSINGS.

Sec. 8843. [Highway crossings, sidewalks, etc.] Companies operating a railroad in this state, shall build and keep in repair good and sufficient crossings over or approaches to such railway, its tracks, side-tracks and switches, at all points where any public highway, street, lane, avenue, alley, road or pike is intersected by such railway, its tracks, side-tracks or switches; also good and sufficient sidewalks on both sides of streets intersected by their roads, the full width of the right of way owned, claimed or occupied by them. Crossings and approaches outside of municipal corporations, the township trustees shall have power to fix and determine as to their kind and extent, and the time and manner of constructing them. [88 v. 261 § 1; Bates, 3337-3.]

Sec. 8844. [Powers of councils.] As to crossings, approaches and sidewalks within municipal corporations, the municipal councils may exercise the same powers as trustees concerning crossways and approaches outside of municipalities, and such crossways, approaches and sidewalks shall be constructed, repaired and maintained by the railroad companies as so ordered. [88 v. 261 § 1; Bates, 3337-3.]

Sec. 8845. [Service of notice.] The officer or officers having charge of a public highway, street or alley intersected by a line of railway, shall serve a written notice upon the nearest station agent or section foreman having charge of that portion of the railway where such intersection occurs, that the crossing, approach or sidewalk herein described must be built or repaired, setting forth its kind and extent and the time and manner of constructing it, as ordered by the council or trustees. [88 v. 261 § 2; Bates, 3337-4.]

Sec. 8846. [Failure to comply with notice.] A railway company so notified must comply with such notice within a period of thirty days after receiving it. On failure so to do, the township trustees, or council as may be the case, may cause such crossing, approach or sidewalk to be constructed or repaired as before ordered, and recover the cost of so doing with interest thereon, in a civil action against the railroad company, in the name of the trustees or municipality. [88 v. 261 § 3; Bates, 3337-5.]

Sec. 8847. [Crossings must be kept clear of snow.] All railway companies owning or operating a line of railway within this state, must keep public highway crossing such line of railroad clear of snow, for a distance of fifty feet each way from the center of its railroad along such highway, so that at all times they will be in safe and convenient condition for travel. [88 v. 261 § 4; Bates, 3337-6.]

Sec. 8848. [Forfeiture.] A railroad company which neglects to comply with the terms of the five next preceding sections, shall be liable to pay damage to the city, village, or township in which the highway is situated in the sum of thirty dollars for such neglect, and a further sum of ten dollars per day for each and every day such company fails to comply with the terms of such sections, to be recovered in an action brought in the name of the city, village, or township.[1] The prosecuting attorney of the county shall prosecute to judgment any claim arising under the foregoing provisions, without charge to the city, village, or township. [88 v. 261 § 5; Bates, 3337-7.]

(1) **Remedy not exclusive.**— Remedy provided in this section is not exclusive and public may sue for violation if city refuses. Alexander v. Ry. Co., 14 Dec. 102; 2 N. P. (N. S.) 59.

Sec. 8849. [Bridges over railroad crossings.] No person, company or corporation owning, or operating a railroad, crossing, or that may hereafter cross, over and above a street, less than seventy feet in width, in any city in this state, at an elevation above such street, sufficient to permit persons to pass and repass along such street beneath such crossing, shall

place or cause to be placed, or permit to be or remain in such street, beneath such crossing or bridge, any pier or other stay or support therefor, unless the placing or maintaining thereof be authorized by the city wherein the crossing is situated, by ordinance duly passed, or permit such crossing or bridge to be or remain in such condition, that iron, coal or other hard substance, or fluid or noisome matter, can fall or drop through such crossing or bridge, upon persons traveling or passing beneath it.[1] [97 v. 302 § 1; Bates, 3337-1; 86 v. 197.]

(1) **Viaduct in street,** even with consent of municipality, would be a nuisance unless authority of municipality to give such consent is shown. Alexander v. Ry. Co., 2 N. P. (N. S.) 59; 14 Dec. 102.

Sec. 8850. [Forfeiture.] A person, company or corporation owning or operating such railroad, that fails to comply with the requirements of, or violates any provision of, the next preceding section, for each and every day during the continuance of such failure or violation, and on account thereof, shall forfeit and pay to such city the sum of one hundred dollars, to be recovered in a civil action, in the city's name, against the owner or operator of such railroad, or both, as the city elects. Thereafter like recovery may be had for subsequent failures and violations. [97 v. 302 § 1; Bates, 3337-1; 86 v. 197.]

Sec. 8851. [Council may regulate use of bridge.] The council of a city may prohibit the switching of freight engines, trains, or cars, over or on such crossing or bridge, the sounding of locomotive steam whistles, thereon or near thereto, and the standing or stopping of a railroad engine over or on such crossing or bridge, and by ordinance, constitute a violation thereof an offense, and provide for the punishment of any person guilty thereof. [86 v. 197 § 2; Bates, 3337-2.]

Sec. 8852. [Signboards at road crossings.] At all points where its road crosses a public road, at a sufficient elevation from such public road to admit of the free passage of vehicles of every kind, each company shall erect a sign, with large and distinct letters placed thereon, to give notice of the proximity of the railroad, and warn persons to be on the lookout

for the locomotive. A company which neglects or refuses to comply with this provision shall be liable in damages for all injuries which occur to persons or property from such neglect or refusal. [R. S. Sec. 3323; 50 v. 274 § 18; (S. & C. 279).]

Sec. 8853. [Signals at railroad crossings.] Every company shall attach to each locomotive engine passing upon its road, a bell of the ordinary size in use on such engines, and a steam whistle. When an engine in motion and approaching a turnpike, highway or town road crossing or private crossing where the view of such crossing is obstructed by embankment, trees, curve or other obstruction to view, upon the same line therewith, and in like manner where the road crosses any other traveled place, by bridge or otherwise, the engineer or person in charge thereof, shall sound such whistle at a distance of at least eighty and not further than one hundred rods from such crossing, and ring such bell continuously until the engine passes the crossing. [R. S. Sec. 3336; 89 v. 331; 83 v. 153; 69 v. 49 § 1.]

Sec. 8854. [Not to interfere with city ordinance.] The provisions of the next preceding section shall not interfere with the proper observance of an ordinance passed by a city or village council regulating the management of railroads, locomotives and steam whistles thereon, within the limits of such city or village.[1] [R. S. Sec. 3336; 89 v. 331; 83 v. 153; 69 v. 49 § 1.]

(1) **Municipal regulations.**— Ordinance requiring the person in charge of a locomotive to ring the bell continuously through the entire corporate limits, regardless of any highway crossing, is void as attempting to enlarge upon the provisions of the statutes. Caskey v. Belle Center, 8 N. P. (N. S.) 153, 159.

Penalties imposed on engineer and liability of company, are provided in §§ 8855 and 8856 G. C.

Sec. 8857. [Crossing of highway to cemetery.] All railroads hereafter constructed, which cross an avenue or public highway leading from a city to a public cemetery thereof, situate within or without the limits of the city, shall be constructed so as to pass under or over such avenue or highway, at an elevation or depression as the case may be, that

will allow the unobstructed passage of all wagons, carriages, or other vehicles necessary for any person to use thereon. [R. S. Sec. 3284; 50 v. 274 § 16; (S. & C. 279).]

ABOLISHMENT OF GRADE CROSSINGS.

Sec. 8863. [Alteration or elimination of grade or other crossings; powers of commissioners with respect to roads lying within municipalities.] If the council of a municipal corporation in which a railroad or railroads, and a street or other public highway cross each other at a grade or otherwise, or the commissioners of a county in which a railroad or railroads and a public road or highway cross each other at grade, and the directors of the railroad company or companies are of the opinion that the security and convenience of the public require alterations in such crossing, or the approaches thereto, or in the location of the railroad or railroads or the public way, or the grades thereof, so as to avoid a crossing at grade, or that such crossing should be discontinued with or without building a new way in substitution therefor, and if they agree as to the alterations they may be made as hereinafter provided; provided, however, that the commissioners of a county shall have the same powers with respect to that part of a state, county or township road which lies within the limits of a municipal corporation as are conferred upon municipal corporations to alter or require to be altered, any railroad crossings, or to require any improvement in connection therewith to be made, and to apportion the cost thereof between the county and such railroad or railroads, as is provided in sections 8874, 8875, 8876, 8877, 8878, 8879, 8880, 8881, 8882, 8883, 8884, 8885, 8886, 8887, 8888, 8889, 8890, 8891, 8892, 8893 and 8894, of this chapter.[1] [106 v. 206; 90 v. 359, § 1; Bates, 3337-8.]

(1) As to exclusiveness of method provided in this and succeeding sections, see Ritter v. Railway Co., 6 N. P. (N. S.) 161.

A general plan for the elimination of dangerous grade crossings includes within its scope authority to remove tunnels and substitute therefor a bridge which will span the street and afford greater facilities and increased safety for the travel passing thereunder. Caldwell v. Cleveland et al., 12 N. P. (N. S.) 483.

Sec. 8864. [Resolution to alter or abolish.] When it is deemed necessary by a municipality or a county to join with any railroad company or companies in the alteration or abolition of a grade or other crossing, the council of the municipality, by a two-thirds vote of all the members elected thereto, or the commissioners of the county, by a unanimous vote, by resolution, shall declare such necessity and intent, and state therein the manner in which the alterations in the crossing are to be made, giving the method of constructing the new crossing with the grades for the railroad or railroads and the public way or ways; also what land or other property it is necessary to appropriate, and how their cost is to be apportioned between the municipality or county and the railroad company or companies; also by whom the work of construction is to be done and how its cost is to be apportioned between the municipality or county and the railroad company or companies. [90 v. 360 § 2; Bates, 3337-9.]

Sec. 8865. [Publication of resolution.] Such resolution shall be published and notice of its passage given to owners of property abutting on the proposed improvement, in the manner provided as to resolutions of a city council declaring the necessity of a contemplated public improvement, and claims for damages thereby caused, must be filed in the manner, and within the time prescribed in such cases.[1] [90 v. 360, § 2; Bates, 3337-9.]

(1) See §§ 3814 et seq., Part I.

Sec. 8866. [Ordinance or resolution, to proceed with improvement.] In not less than thirty nor more than ninety days after the passage of such resolution the council or commissioners shall determine whether it or they will proceed with the proposed improvement or not. If it is decided to proceed therewith, an ordinance by the council or resolution by the commissioners shall be passed, which ordinance or resolution must contain, in addition to the terms and conditions stated in such resolution, the plans and specifications of the proposed alteration and improvement, a statement of the damages claimed or likely to accrue by reason thereof, and

how their payment is to be apportioned between the municipality or county and the railroad company or companies; also who shall supervise the work of construction. Upon the acceptance of this resolution or ordinance by resolution by the railroad company or companies through their directors, it shall constitute an agreement, valid and binding on the municipality or county and the railroad company or companies respectively. Such agreement shall thereupon be filed in the common pleas court of the county in which the crossing is located, for entry upon the records, whereupon it shall have the same force and effect as a decree of the court.[1] [90 v. 360, § 3; Bates, 3337-10.]

(1) **Effect of contract; enforcement.**—The attempt to invest with the force and effect of a judicial decree an ordinance embodying an agreement between a municipality and a railway company relative to the elimination of grade crossings, is without constitutional warrant; but acting under this statute a court, upon being satisfied as to the action of council with reference to elimination of grade crossings and concurrence therein of the defendant railway company, may cause to be spread upon its journal a decree which shall have the effect of a judicial determination as to the execution of the agreement and its terms and conditions. Stockwell v. Railway, 18 N. P. (N. S.) 29; but an answer by the railway company, that owing to conditions developing subsequent to the agreement entered into between the company and the municipality it is unable to raise sufficient money to meet its share of the expense involved in such grade crossing eliminations, affords ground for the court to decline to take drastic action and is good against demurrer. *Ib.*

Sec. 8867. [Necessary property, how acquired.] The land or property required to make the alteration in the street or highway necessitated by the proposed improvement, shall be purchased or appropriated by the municipality or county in the manner provided by law for the appropriation of private property for public use, and the land or property required to make the alteration in the railroad or railroads necessitated by the proposed improvement, shall be purchased or appropriated by the railroad company or companies in the manner provided for the appropriation of private property by such corporation. [90 v. 361 § 4; Bates, 3337-11.]

Sec. 8868. [Apportionment of cost.][1] The cost of the construction of the improvement in the crossing, including the cost of land or property purchased or appropriated, and the payment of damages to abutting property shall be apportioned as follows: The railroad company or companies, if several railroads cross a public way at or near the same point, shall pay not less than sixty-five per cent. and the municipality or county not more than thirty-five per cent. of such cost. Within these limits the apportionment may be fixed by the agreement hereinbefore provided for. [90 v. 361 § 5; Bates, 3337-12.]

(1) **Apportionment of cost—widening street.**—Where a forty foot street is widened to sixty feet for the city's benefit solely, the railroad company is properly charged with only its statutory proportion of the cost of abolishment of the existing forty-foot grade crossing. Stock Yards v. Cincinnati, 14 N. P. (N. S.) 529. Aff'd by Court of Appeals, 20 C. C. (N. S.) 458; 1 Oh. App. 452.

Sec. 8869. [Cost of maintenance of bridge to be borne by county or state.] After the completion of the work, the crossings and approaches shall be kept in repair as follows: When the public way crosses a railroad or railroads, or railroad or roalroads and interurban railroad or interurban railroads, by an overhead bridge, the cost of maintenance must be borne by the county, or by the state of Ohio as may be provided by law. When the public way passes under a railroad or railroads, or railroad or railroads and interurban railroad or interurban railroads, the bridge and its abutments shall be kept and maintained by the railroad company or companies, or the railroad company or companies and interurban railroad company or companies, as the case may be, in such proportions as may be fixed by agreement between the parties or, in the absence of such agreement, in such proportions as may be fixed by the common pleas court of the county in which the improvement is located, and the public way and its approaches shall be maintained and kept in repair by the county in which they are situated, or by the state of Ohio as may be provided by law. [110 v. 241; 90 v. 361, § 6; Bates, 3337-13.]

Sec. 8870. [Bonds and tax.][1] For the purpose of raising money to pay its proportion of the cost of such improvement, the municipality or county may issue its bonds to the necessary amount, which bonds shall be of such denomination and payable at such place and times as the council or the commissioners determine, and bear interest not exceeding six per cent. per annum, but not to be sold for less than their par value. A tax on the taxable property of the municipality or county not exceeding one-half mill in each year may be levied to pay the principal and interest of the bonds as they mature. After the improvement is completed, a tax may be levied by the municipality or county to pay the cost of maintaining and keeping in repair that part of the work required to be maintained and kept in repair by it. [109 v. 530; 90 v. 361, § 7; Bates, 3337-14.]

(1) **Additional Crossings.**—The proceeds from an issue of municipal bonds, authorized for the purpose of abolishing grade crossings, may be applied so far as necessary to the elimination of crossings of streets not specifically named in the original ordinance, where these streets are within the scope of the grade crossing improvement as fully understood at the time the issue of bonds was authorized, and the omission has been remedied by specifically naming these streets in a supplemental ordinance as within the improvement. Caldwell v. Cleveland et al., 12 N. P. (N. S.) 483.

Sec. 8871. [Assessment and determination of damages.] All claims for damages by reason of such improvement, filed as hereinbefore provided, shall be assessed and determined as in other cases of public improvements within cities, wherein like claims are made, either before the beginning or after the completion of the proposed crossing improvement, as the council, or commissioners decide, when it is determined to proceed therewith. [90 v. 362 § 8; Bates, 3337-15.]

Sec. 8872. [If company fails to comply with agreement.] If a railroad company fails to comply with any provision of an agreement entered of record in a common pleas court, as above provided, on application of a city solicitor or prosecuting attorney, stating the nature of its failure, the court shall make such orders and decrees to enforce the terms of the agreement,

the requirements of law relating thereto, and to secure compliance therewith, by the railroad company, as it deems just and proper, and if necessary, may enjoin the company from the use of its track and the operation of its road on and over the crossing in question, until it complies with such order or decree as is made. [90 v. 362 § 9; Bates, 3337-16.]

Sec. 8874. [Powers as to grades above or below railroad tracks; erection of piers, etc.][1] Any municipal corporation may raise or lower, or cause to be raised or lowered, the grade of any street or way owned by it, either within or without its municipal limits, above or below railroad tracks, and may require any railroad company operating a railroad across such streets or ways to raise or lower the grade of its tracks and may construct ways or crossings above the tracks of any railroad, or require the railroad company to construct ways or crossings that are to be passed under its tracks. The word "railroad" shall include interurban railroads and the words "railroad company" shall include interurban railroad companies engaged in the operation of cars by electricity or other lawful motive power which said companies may adopt or use. Any municipality may require such railroad company to erect permanent piers, abutments or any other appropriate supports,[2] in the ways, crossings, streets, roads or alleys, whenever in the opinion of council, the raising or lowering of the grade of any such railroad tracks, or the raising or lowering of the construction of such ways, crossings or other supports may be necessary, upon the terms and conditions hereinafter set forth. [103 v. 501, 502; 102 v. 507; 100 v. 77, § 1; Bates, 3337-17a.]

(1) **Constitutionality** of this act declared. East End B. & T. Co. v. Cleveland, 14 Dec. 33, 1 N. P. (N. S.) 493; see also Quinby v. Cleveland, 16 O. F. D. 583.

Validity of former section 2 before amendment, see Cincinnati v. P. C. C. & St. L. Ry. Co., 19 Dec. 74; 7 N. P. (N. S.) 81.

(2) **Supports in street,** right to place, if necessary in changing grade, see Cincinnati v. P. C. C. C. & St. L. Ry. Co., 19 Dec. 74; 7 N. P. (N. S.) 81.

Evidence.—In case of injunction to prevent crossing at grade, court should not exclude testimony that crossing is a mere spur track and within the exception in section 6 of the act. Toledo v. Toledo, *et al.* Ry. Co., 29 C. C. 657, 9 C. C. (N. S.) 399.

Sec. 8875. [Changes in locations of public ways.] When the council of a municipality deems it necessary in the abolishment of such grade crossings to change the location of any street, alley, road or way, such council may relocate such street, alley, road or way or any part thereof, may vacate the whole or any portion of such street, alley, road or way abandoned by such relocation, and cause the improvements above contemplated to be placed in such relocated street, alley, road or way. [103 v. 268; 100 v. 77, § 1; Bates, 3337-17a; 95 v. 356.]

Sec. 8876. [Preparation of plans.][1] The council of such municipality, for the purpose of making or causing such an improvement to be made, by ordinance may require the railroad company, in co-operation with the engineer of the municipality, or the engineer designated in such ordinance, to prepare and submit to such council, within three months, unless longer time is mutually agreed upon in writing, plans and specifications for such improvement, specifying the number, character and location of all piers and supports, which are to be permanently placed in any street or way, therein, specifying the grades to be established for the streets, and the height, character and estimated cost of any viaduct or way above or below any railroad track, and the change of grade required to be made of such tracks, including the sidetracks and switches. But in changing the grade of any railroad, no grade shall be required to exceed the established maximum or ruling grade governing the operations by engines of that division or part of the railroad on which the improvement is to be made, without the consent of the railroad company, nor shall the railroad company's tracks, or such highway, street or way, be required to be placed below high water mark. [103 v. 501, 502; 100 v. 78, § 2; Bates, 3337-17b; 95 v. 357.]

(1) **Waiver.**—The provisions of Sections 8876 and 8877, requiring the preparation of plans within a limited period after the passage of an ordinance for abolishing dangerous crossings, is directory and not mandatory, and is a provision which may be waived by the parties for the purpose of giving more time for preparing the plans and for other purposes. Caldwell v. Cleveland et al., 12 N. P. (N. S.) 483.

Sec. 8877. [When common pleas court to determine manner of improvement.] If at the expiration of three months from the passage of such ordinance, the railroad company has refused or failed to co-operate in the preparation of such plans and specifications or if the engineer of the municipality or engineer designated in such ordinance by council, and the railroad company fail to agree upon the plans and specifications for such improvement, then either the railroad company or municipal corporation may submit the matter of determining the method by which the improvement shall be made to the court of common pleas having jurisdiction in the county in which the municipality is situated. [100 v. 78 § 2; Bates, 3337-17b; 95 v. 357.]

Sec. 8878. [Who may petition the court.] Either the municipality or company after the expiration of three months from the passage of the ordinance may apply to such court of common pleas by petition accompanied by the necessary plans prepared by the municipality or railroad company asking that any grade crossing or grade crossings be abolished. Such plans must show the grades to be established for such streets, the changes to be made in the location of streets, alleys, roads or ways; the height, character and estimated cost of any viaduct or way above or below railroad tracks, and the number, character and location of piers, abutments and supports to be permanently located in the streets, alleys, roads or ways, in the municipality, and the change of grade to be made in any railroad tracks, including side-tracks and switches. [103 v. 268, 269; 100 v. 78, § 2; Bates, 3337-17b; 95 v. 357.]

Sec. 8879. [Procedure.] Upon the filing of such petition, accompanied by plans, the railroad company or municipality opposed to the prayer thereof, or directly interested therein, shall have the right, within sixty days thereafter to file an answer to such petition and to present other plans for the abolition of such crossing or crossings. After the expiration of such period of sixty days the court shall proceed to a hearing upon the petition and any answers that have been filed, which hearing must be advanced upon the docket upon motion of either party. After examination of all plans presented to it

and after hearing the evidence, the court shall make a finding as to whether or not the security and convenience of the public require that alterations be made in the crossing or crossings or in the approaches thereto, or in the location of the railroad or railroads or the public way, or any grades thereof, so as avoid a crossing at common grade, or that such crossings, or any of them to be discontinued with or without building a new way in substitution therefor, and whether such plans or any of them are reasonable and practicable. [100 v. 78 § 2; Bates, 3337-17b; 95 v. 357.]

Sec. 8880. [Order of the court.] If the court finds that the public security and convenience require such changes to be made, and that the plans presented by the petitioner or any of the parties answering thereto are reasonable and practicable, it shall order the changes to be made in accordance with the most reasonable and practicable plan presented to the court.[1] The municipality shall be required to make such changes in the streets, roads or highways as may be necessary, and the railroad company or companies be required to make the changes necessary in the tracks and roadbed, in order to comply with the rulings of the court. If more than one railroad company own tracks on the crossing in question, the court shall apportion the part of the expense payable by the railroad companies between or among such companies. But if the court finds that the security and convenience of the public do not require that alterations be made in such crossing or crossings, or that none of the plans are reasonable or practicable, the improvement shall not be made upon such plans. [100 v. 78 § 2; Bates, 3337-17b; 95 v. 357.]

(1) Where it is impracticable to eliminate by a vertical raising of the tracks or depression of the street, the court may require a reasonable lateral diversion. Sandusky v. R. R. Co., 101 O. S. 225.

Sec. 8881. [Appeal and error.] Either party feeling aggrieved by the decision and order of the court may appeal or prosecute error as in other civil cases, the hearing of which shall be advanced upon the docket upon motion of either party. [100 v. 78 § 2; Bates, 3337-17b; 95 v. 357.]

Sec. 8882. [How orders of court enforced.] If a municipality, or railroad company refuses or neglects to comply with the orders or findings made by the court under the provisions hereof, the court may enforce its orders or findings by either mandamus or mandatory injunction or as for contempt of court, as the necessity of the case may require, upon the application of either party to such proceedings. [100 v. 78, § 2; Bates, 3337-17b; 95 v. 357.]

Sec. 8883. [Apportionment specified; written agreement.] The cost of constructing the improvement authorized, including the making of ways, crossings or viaducts, above or below the railroad tracks, and the raising or lowering of the grades of the railroad tracks and side tracks for such distance as may be required by such municipality and made necessary by such improvement, together with the cost of land or property purchased or appropriated, and damages to owners of abutting property,[1] or other property, shall be borne thirty-five per cent. by the municipality and sixty-five per cent. by such railroad company or companies. The municipality shall have a right of action against any such railroad company for the recovery of the sixty-five per cent. and such costs payable by it, with interest from the time they become due. Such municipality and railroad company may agree as to what part of the work shall be done by the railroad company, and also fix the amount to be allowed or credited to the company for doing the work.[2] Such railroad company shall be entitled to deduct from its sixty-five per cent. of the cost of the improvement the expense incurred by it in the change of its grade required by the municipality or made necessary by it under such specifications, but only in case the amount of expense has been agreed upon in writing between the municipality and the railroad company. If the amount of work done by the company, or made necessary by reason of such change of grade on lowering or raising its tracks, exceeds sixty-five per cent. of the cost of improvement, then it shall have the right to recover the amount with interest in excess of sixty-five per cent. of the expenses, in an action at law against the municipality. [101 v. 377; 98 v. 191 § 3; Bates, 3337-17c; 95 v. 358.]

(1) **Abutting property.**—Abutting property referred to in the statute is the property abutting the street and the statutes do not contemplate allowance of incidental damages to owners of property abutting the railroad. Quinby v. Cleveland, 16 O. F. D. 583.

(2) **Allowances** to railroad company, see Quinby v. Cleveland, 16 O. F. D. 583.

Sec. 8884. [Notice of intention to make improvement.] Before any work shall be done which may be required in the making of such proposed improvement, the council of such municipality shall by ordinance or resolution require notice of its intention to make such improvement in accordance with the plans and specifications to be given, after the manner provided by law, to the owner of each piece of property abutting upon any street, highway, or public place, the grade of which will be changed by the proposed improvement.[1] [98 v. 191 § 3; Bates, 3337-17c; 95 v. 358.]

(1) **Forms.**—See forms under §§ 3814 and 3818 which may be adapted.

Sec. 8885. [Claims for damages and judicial inquiry.] The provisions of law relating to the manner of service of such notices, the filing of claims for damages, and the effect of failure to file such claims, shall apply to the notice herein provided and to all claims for damages by reason of such proposed improvement.[1] After the expiration of the time provided by law for the filing of such claims, the council of such municipality, when claims have been filed within the time limited, shall determine by ordinance or resolution[2] whether such claims are to be judicially inquired into, as hereinafter provided, before commencing, or after the completion, of the proposed improvement. Thereupon, the mayor or solicitor shall make application for a jury, in the manner provided by law to the common pleas or probate court, of the county in which the municipality, or the larger part of it, is situated, either before commencing, or after the completion, of the improvement, as the council determines, and all proceedings upon such application shall be governed by the laws relating to the application provided for in other cases of city improvements. [98 v. 191 § 3; Bates, 3337-17c; 95 v. 358.]

(1) **Damages.**—An abutting owner injured by a municipal improvement under this section because of a depression of a street and erection of piers at the intersection of the railroad track, must look to the municipality for damages from change of grade and to the railroad company for damages from changes of abutments, etc. Quinby v. Cleveland, 16 O. F. D. 583.

Although an abutting property owner may be greatly inconvenienced by the conversion of the street in front of his property into a viaduct and may lose a portion of his land through appropriation for that purpose, and it is evident the damage he is about to sustain to his remaining property will be very great, yet the fact that he has a complete remedy by way of compensation deprives him of the right to an injunction against the carrying forward of the improvement, where it appears that it will be of great benefit to the community at large. Stock Yards Co. v. Cincinnati, 20 C. C. (N. S.) 458; 1 Oh. App. 452.

Where in the elimination of a grade crossing a part of a street is vacated and blocked with a fill, an action for damages by an abutting owner on that part of the street not vacated does not lie on a complaint of less convenient means of ingress and egress, where the same inconvenience is suffered, though perhaps in less degree, by the general public. Plow Co. v. Railway, 12 N. P. (N. S.) 81.

Necessity of filing claims under former law, see East End B. & T. Co. v. Cleveland, 1 N. P. (N. S.) 493.

(2) **Ordinance to proceed.**—For form, compare form under § 3825, *ante*, in Part I.

Sec. 8886. [Payment of railroad company's proportion of cost.] The council of such municipality, may by ordinance prescribe the manner and time or times of payment by such railroad company or companies of the proportion of the cost of such improvement which the railroad company or companies shall be required to pay. [98 v. 191 § 3; Bates, 3337-17c; 95 v. 358.]

Sec. 8887. [Height of viaduct.] Any way, crossing or viaduct so constructed over a railroad track or tracks in any municipality shall be of such height as not to be of less than twenty-one feet in the clear from the top surface of the rails in the railroad track to the lowest point of projection of such overhead way, crossing or viaduct, unless such company consents to, or the common pleas court orders a less height. But in no event shall such court order a less height than sixteen

feet and three inches. [100 v. 80 § 4; Bates, 3337-17d; 95 v. 358.]

Sec. 8888. [How necessary land acquired.][1] The land or property required to make alterations in the street, road, alley or other way or any right, title or interest in a public street, alley or other way, required for the erection of piers or supports in any municipality, necessitated by the proposed improvement, shall be purchased or appropriated by the municipality or company after the manner provided by law for the appropriation of private property for public use. The land or property required to make any alteration in a railroad or railroads or any right, title or interest in a public street, road, alley or way required to permit the erection of piers or supports in any municipality, and structure necessitated by the proposed improvements, shall be purchased or appropriated by the railroad company or companies after the manner provided for the appropriation of private property by such corporation. But the municipality shall not appropriate land held or owned by a railroad company and necessary for the use of the company in maintaining and operating this road. [103 v. 268, 269; 100 v. 80, § 5; Bates, 3337-17e; 95 v. 358.]

(1) As to right of abutting land owner to compensation and damages where property abuts on a vacated street adjacent to new street, see Port Clinton v. Fall, 99 O. S. 153.

Sec. 8889. [Cost of maintenance.] After the completion of the work the crossings and approaches shall be kept in repair as follows: When the public way crosses a railroad by an overhead bridge, the cost of maintenance must be borne by the municipality. When the public way passes under the railroad, the bridge and its abutments shall be kept and maintained by the railroad company, and the public way and its approaches be maintained and kept in repair by the municipality in which they are situated. [95 v. 359 § 6; Bates, 3337-17f.]

Sec. 8890. [Bond issue.] For the purpose of raising the money to pay the proportion of the cost of such improvement

payable by the municipality, the bonds of the municipality may be issued in the necessary amount and shall be of such denomination and payable at such place and times as the council determines, and bear interest not exceeding six per cent per annum, and shall not be sold for less than par value.[1] [109 v. 530; 103 v. 268, 269; 100 v. 80, § 7; Bates, 3337-17g; 95 v. 359.]

(1) **Bonds** issued to pay municipality's portion of cost were held subject to the limitations of the Longworth act. Cleveland v. Cleveland, 18 Dec. 619; 7 N. P. (N. S.) 249, (aff'd, 76 O. S. 594).

Sec. 8891. [Tax levy.] A tax on the taxable property of the municipality in addition to all other levies now allowed by law may be levied to pay the principal and interest of such bonds as they mature. After completion of the improvement, a tax in addition to all other levies allowed by law may be levied by the municipality to pay the cost of maintaining and keeping in repair that part of the work required to be maintained and kept in repair by the municipality. [100 v. 80 § 7; Bates, 3337-17g; 95 v. 359.]

Sec. 8892. [Street railway company to bear share of expense.][1] In case the track or tracks of any street railway company or companies within the limits of a municipality where the improvements hereinbefore authorized are made, cross at grade or otherwise a public street or the right of way of any railroad company or companies at a point where, under the plans and specifications above provided for, it has been determined to construct such improvements, the municipality by ordinance may require such street railway company or companies to bear a reasonable proportion of the cost assumed by it, in making the improvement, not exceeding one-half the portion payable by the municipality; and it shall have a right of action against such street railway company or companies for that part of the cost which the ordinance requires it or them to bear.[2] Such part of the cost also shall be a lien upon all the property, real and personal, of such company or companies situated in the same county with the

municipality from and after the date of the passage of such ordinance. [98 v. 192 § 8; Bates, 3337-17h; 95 v. 359.]

(1) **Validity.**—§§ 8892, 8893 and 8894 are constitutional. Traction Co. v. Akron, 23 C. C. (N. S.) 497; (aff'd 91 O. S. 382).

(2) **Right not limited by franchise.** — A street railway franchise in the street in no way limits the right of the municipality to change either the grade or the location of the street as the public necessity or convenience may require, particularly where the reasonableness of the change is not questioned, and the traction company must adapt its tracks to the changes so made. Cincinnati v. Traction Co., 25 C. C. (N. S.) 513.

Traction company not necessary party to contract.—A municipality in contracting with a steam railway company for the elimination of a grade crossing is not bound to make the traction company occupying the street a party thereto, but may proceed with the improvement without notice to such company. Cincinnati v. Traction Co., 25 C. C. (N. S.) 513.

Reasonable proportion. — The municipality may, by ordinance, fix the amount to be paid by the company and institute an action in court for its recovery, but the recovery in such case will not be as upon a judgment, but for such amount as the jury shall determine to be a reasonable portion of the cost of the improvement. Traction Co. v. Akron, 23 C. C. (N. S.) 497 (aff'd 91 O. S. 382).

A judgment, based upon a verdict, against the traction company occupying the street for its share of the cost of the improvement, which was fixed at $61,220.09, which was something less than one-half of the share paid by the city; held reasonable. Cincinnati v. Traction Co., 25 C. C. (N. S.) 513.

Sec. 8893. [Time and manner of payment of proportion.] The council of such municipality may by ordinance provide the mode and time or times of payment for the proportion of the cost of such improvement to be borne by such street railway company or companies. [98 v. 192 § 8; Bates, 3337-17h; 95 v. 359.]

Sec. 8894. [Repairs.] Such street railway company or companies shall keep in repair at its or their own expense all tracks affected by such improvement and all construction work of whatever character, necessary to support such tracks. [98 v. 192 § 8; Bates, 3337-17h; 95 v. 359.]

Sec. 8895. [Crossings to be above or below grade.] Except as hereinafter provided, all crossings, hereinafter constructed,

whether of highways by railroads, or of railroads by highways, shall be above or below the grade thereof.[1] [97 v. 546 § 1; Bates, 3337-17j.]

(1) **Applies to steam railroads only.**—Commissioners v. Traction Co., 75 O. S. 548; *In re.* A. B. & S. Ry. Co., 16 Dec. 87; 3 N. P. (N. S.) 561.

Power of court.—Determination by court does not dispense with agreement with municipality or condemnation. *Ib.*

Sec. 8896. [Railroad crossings.] Every railroad company building a new line of road, under its charter powers, across a highway, shall construct it above or below the grade of the highway, unless in the manner hereinafter provided, allowed to build it at grade. Such company may exercise the power contained in its charter and the general laws, for altering the grade and location of highways in order to avoid grade crossings. [97 v. 546 § 2; Bates, 3337-17k.]

Sec. 8897. [Highway crossings.][1] Every municipality or other authority hereafter building a highway across an existing railroad, shall construct it above or below the grade thereof, unless in the manner hereinafter provided allowed to build at grade. The cost of such work shall be paid, thirty-five per cent by such municipality or other authority, and sixty-five per cent by the company owning the railroad. The word "railroad" shall include interurban railroads and the words "railroad company" shall include interurban railroad companies engaged in the operation of cars by electricity or other lawful motive power which said companies may adopt or use. The method or procedure for the construction of such highway and the manner of construction thereof shall be governed by the statutes regulating the abolition of grade crossings. [103 v. 501, 502; 97 v. 546, § 3; Bates, 3337-17l.]

(1) **Validity.**—This and the succeeding two sections are valid and constitutional. They do not operate to supersede the provisions of section 3677 nor in anywise modify its provisions. Under proper pleadings all the questions to be determined under both sections may be tried in one proceeding by the court of common pleas. Railroad Co. v. Martins Ferry, 92 O. S. 157. Cincinnati v. Railway, 23 C. C. (N. S.) 289; reversing Cincinnati v. Railway, 13 N. P. (N. S.) 276.

Joint liability.—Where a rail-

way over which it is sought to carry a highway otherwise than at grade has passed under the control of another company which has acquired its privileges and assumed its liabilities and duties, the one-half of the cost of obviating such grade crossing which the law imposes on the railway becomes a liability of both companies. Cincinnati v. Railway, 23 C. C. (N. S.) 289.

Sec. 8898. [Grade crossings.][1] When it is desired by a railroad company constructing a new railroad, or in changing or in altering the location of one heretofore constructed, or by any municipality or authority constructing a new highway that the railroad or highway should be so constructed that the railroad and highway will cross each other at the same grade or if it is desired to divert, change or alter an existing public highway, a petition shall be presented by the party desiring such construction or diversion, to the common pleas court of the county within which the crossing or diversion is situated, and if it is a highway asking for the right to cross a railroad, the railroad company shall be the defendant. If it is a railroad company asking for the right to cross a highway, or divert, change or alter any existing public highway, in a municipality, such municipality shall be the defendant. If outside the municipality, the trustees of the township and the board of county commissioners of the county shall be the defendants. Summons shall be served and the rule days and the rights of the defendants to plead shall be the same as in civil actions in such court. [99 v. 58 § 4; Bates, 3337-17m; 97 v. 546.]

(1) **Validity.**—Held constitutional. Railway Co. v. Akron, 18 C. C. (N. S.) 250. Cincinnati v. Railway, 23 C. C. (N. S.) 289; reversing Cincinnati v. Railway, 13 N. P. (N. S.) 276.

Sec. 8899. [Petition, what to contain.] Such petition shall set forth the reasons that are supposed to make such change or alteration necessary or desirable; and the court of common pleas thereupon shall have the jurisdiction of the parties and the subject matter of the petition, and may proceed to examine the matter, either by evidence, by reference to a master commissioner or otherwise. If satisfied that such construction is reasonably required to accommodate the public, or to avoid

excessive expense, in view of the small amount of traffic on the highway or railroad, and considering the future uses to which the highway may be adapted, or in view of the difficulties of other methods of construction, or for other good and sufficient reasons, the court shall make an order or orders permitting such crossing at a grade or diversion to be established. In such order, or orders, in its discretion the court may prescribe that gates, signals, watchmen, or other safeguards shall be maintained by the railroad company, in addition to the signals and safeguards prescribed by statute, and all such orders shall be binding upon the parties and be observed by them. [99 v. 58 § 4; Bates, 3337-17m; 97 v. 546.]

Sec. 8900. [Costs and expenses.] All costs and expenses of the proceedings shall be ascertained and allowed by the court of common pleas and be paid by such party as it decides; or by it apportioned between the parties, and may be collected by execution out of such court. [99 v. 58 § 4; Bates, 3337-17m; 97 v. 546.]

Sec. 8901. [Appeals.] Appeals may be taken and error prosecuted from the decision of the common pleas court to the court of appeals in such proceedings, as in civil actions. The decision of that court shall be final and conclusive. In both the common pleas court and court of appeals proceedings brought hereunder shall be advanced over other civil causes. [103 v. 405, 425; 99 v. 58, § 4; Bates, 3337-17m; 97 v. 546.]

Sec. 8902. [Additional tracks and switches.] Nothing in sections eighty-eight hundred and ninety-five to eighty-nine hundred and one both inclusive, shall prevent a railroad company from laying additional tracks at previously existing crossings, or from constructing switches, sidings and branch lines from their lines of road to a mill, factory, or other manufacturing establishment, or other industrial plant, or an elevator, wharf or pier, or gravel, marl, or clay bed, or any mine, or from laying additional track to increase their yard facilities at terminal or other points across public highways at the grade thereof.[1] Such signposts and signals shall be employed for the protection of such crossings as are by law

prescribed for railroad crossings of public highways. [97 v. 547 § 6; Bates, 3337-17o; 97 v. 547.]

(1) **Spur-tracks.**—Where the proposed crossing is by a spur-track leading to manufacturing establishments, commercial houses and certain docks, it falls within the exception as to tracks for increasing "yard facilities at terminal or other points," and the company has the right under the statute to cross at grade. Toledo v. Toledo etc. R. R. Co., 9 C. C. (N. S.) 399; see also Cincinnati v. Railway, 15 N. P. (N. S.) 219. Aff'd by the Sup. Ct. without opinion. 89 O. S. 416.

Sec. 8903. [Height of over railroads.] Except cases in which the state railroad commission finds that such construction is impracticable, bridges, viaducts, overhead roadways, foot-bridges, wire or other structure hereafter built over the track or tracks of a railroad or railroads, by a county, municipality, township, railroad company, other corporation or person, shall be not less than twenty-one feet in the clear from the top of the rails of such track or tracks, to such wire or other structure or to the bottom of the lowest sill, girder or crossbeam, and the lowest downward projection on the bridge, viaduct, overhead roadway or foot-bridge. [94 v. 297 § 1; Bates, 3337-18; 91 v. 365.]

Sec. 8904. [Exceptions.] The exception in the next preceding section shall not apply to the structures therein named when built over the main tracks of railroads; and in cases wherein it is allowed, the railroad commission shall file in its office a written statement of the facts upon which it relied in finding the required construction impracticable. [94 v. 297 § 1; 91 v. 365; Bates, 3337-18.]

Sec. 8905. [Costs.] In case of the rebuilding of bridges or the other structures above provided for, if the structure is at or in line with a public street or highway, and a cross-street or streets, the cost of making such streets or highways conform to a new grade, with all damages to owners of property abutting thereon because of such change, shall be determined and paid, as follows: The railroad company or its assigns shall pay all costs or damages resulting from the

raising or building of its bridges or structures in the line of a street or highway at a greater height than heretofore was required. If such company is only part owner of such structure it shall pay its proportionate share of the cost of such change in grade and damages. Should a railroad company, or its assigns, hereafter raise the grade of its track or tracks under any of such structures not owned by it, thereby causing a bridge or structure to be put at a higher grade when rebuilt, the company shall pay all costs and damages thereby made necessary. [94 v. 297 § 1; 91 v. 365; Bates, 3337-18.]

Sec. 8906. [Plans and specifications to be filed with railroad commission.] Every railroad company, public or private corporation, or person building or permitting to be built, any such bridge, viaduct, overhead roadway, foot bridge, wire and other structure, before proceeding therewith, shall file with the state railroad commission, plans and specifications therefor, and have its permit for the erection of such structure or wire. [91 v. 366 § 2; Bates, 3337-19.]

Sec. 8907. [How enforced.] Observance of the provisions of the four next preceding sections may be enforced by an injunction on complaint of any person, corporation or board interested therein. [91 v. 366 § 2; Bates, 3337-19.]

UNION DEPOT COMPANIES.

Sec. 9163. [Use of streets, alleys, roads, etc.] The companies[1] whose boards of directors authorize the filing of the articles of incorporation, or assent thereto, shall each be held to own and be liable to pay an equal proportion of the capital stock, or when such union depot and terminal companies are organized by any number of persons, not less than five, the stock thereof may be acquired and held by such railroad companies as agree to use said union depot and terminals, in such proportions as said railroad companies may agree upon, and the provisions of the law authorizing railroad companies to enter upon and appropriate lands for depots, work shops, side tracks and materials therefor, shall be applicable to such union depot company, whether organized by the presidents of

two or more railroad companies or by not less than five individuals, as provided in this chapter; and any municipality in which such company is located, owning or having charge of any public road, street, alley, way or ground of any kind, except a public landing, may grant to such union depot and terminal company the right to construct, maintain and operate by elevated, surface and underground tracks, so far as may be necessary to carry out the purpose of said union depot and terminal company, along, over and under said public roads, streets, alleys, ways or grounds, subject to existing laws concerning crossings so far as the same may be applicable, and to erect and maintain therein the necessary tracks, piers, stays, supports and stations and the approaches for the same, and also to construct suitable terminals and way stations; provided that before making such grant said union depot and terminal company shall file with the city or village, maps showing the location and character of the construction, and said grant shall provide for such manner of construction so that the ordinary use of and traffic upon said roads, streets, alleys, ways or grounds, whether by pedestrians, vehicles, street cars or otherwise, except temporarily when necessary in the construction of such structure, shall not be interfered with; and said grant shall further provide that any tunnel construction shall not impair the stability of said roads, streets, alleys, ways or grounds, or prevent the use of any sewers, water pipes, gas pipes, and conduits used for such purposes, or for telephone or telegraph purposes in said streets, alleys, ways or grounds, except temporarily when necessary in the construction of said tunnels.

Said grant can only be made upon such terms and conditions as are agreed upon by the council of the city and the company; and said grants shall provide for its acceptance by such union depot and terminal company within the time to be fixed by the council of the municipality. [109 v. 78; 101 v. 71; R. S. Sec. 3448.]

(1) **Companies** referred to are Union Depot Companies provided for in § 9160 G. C.

Revocation of franchise.—Where such franchise is granted and a deposit made with the city pursuant to its terms which is to be forfeited if the franchise is forfeited, and thereafter the city undertakes to forfeit a franchise for non-compliance with its terms and orders the return of the deposit to the company, it was

held that under these facts the return of the deposit was not a gift by the city and its repayment was within the power of the city council. Depot Co. v. Cincinnati, 105 O. S. 311.

Control of depot property.— Depot company may grant exclusive privilege to transfer company for hack stand. State *ex rel.* v. Depot Co., 71 O. S. 379.

But an ordinance making it unlawful for the driver of any vehicle to permit his vehicle to stand in front of a certain railroad passenger station "unless the permission to stand has been granted by the person having the supervision over such passenger station" was held invalid. Cincinnati v. Cook, 107 O. S. 223.

Terminal railroad companies authorized under general railroad laws. See State *ex rel.* v. Union Terminal R. R. Co., 72 O. S. 455.

RAILROADS OWNED BY MUNICIPALITIES.

The Cincinnati Southern Railroad.

1. Act authorizing construction and bond issue of $10,000,000; trustees; appropriation of land, etc. 66 O. L. 80.

Held constitutional. Walker v. Cincinnati, 1 C. S. C. R., 121; affirmed, 21 O. S. 14. But see Ry. Co. v. Martin, 53 O. S. 386; Taylor v. Commissioners of Ross County, 23 O. S. 22; Wyscaver v. Atkinson, 37 O. S. 80; Counterman v. Dublin Tp., 38 O. S. 515.

2. Act authorizing city to advance funds to trustees. 67 O. L. 28.

This act was also involved in Walker v. Cincinnati, 21 O. S. 14.

3. Act relating to rights of bondholders and authorizing trustees to complete and lease the road. 70 O. L. 139.

4. Act authorizing trustees to borrow six million ($6,000,000) dollars more and to issue bonds therefor upon a vote of the people. 73 O. L. 13.

Upheld in Thoms v. Greenwood, 7 Am. L. Rec. 320½; affirmed by the Supreme Court 3 B. 157.

5. Act authorizing trustees to contract for completing and leasing the road. 74 O. L. 115.

6. Act authorizing trustees to borrow two million ($2,000,000) dollars more upon a vote of the people, and providing for terminal facilities right to use streets and lease of finished parts of road. 75 O. L. 115.

The vote on this question was against the bond issue, and thereupon the succeeding act of May 15, 1878 was passed.

7. Act authorizing trustees to borrow $2,000,000 more, upon a vote of the people, and to contract to complete the road. 75 O. L. 559.

In a suit to enjoin the performance of the contract made in pursuance of the above act and to enjoin the issuance of the bonds therein authorized, the constitutionality of the original Southern Railway act of May 4, 1869, and all subsequent acts supplementary thereto, was questioned. The constitutionality of all this legislation was sustained in Thoms v. Greenwood, 7 Am. L. Rec. 320½ (affirmed by Supreme Court 10 B. 1057). See reference to this affirmation in dissenting opinion of Judge Okey in State v. Pugh, 43 O. S., at page 139.

8. Act authorizing trustees to borrow $300,000 more, and to acquire land for terminal facilities without submission to a popular vote. 77 O. L. 153.

9. Act requiring the Southern Railway trustees to give new bonds and providing for the renewal of bonds. 77 O. L. 175.

10. Act authorizing trustees to lease or sell the Southern Railroad. 78 O. L. 58.

Repealed April 23, 1898 (93 O. L. 637).

Under this act a lease was made of the railway for twenty-five years to the Cincinnati, New Orleans & Texas Pacific Railway Company, October 11, 1881.

Held that the powers of the trustees did not cease with the making of a lease. Cincinnati v. Bishop *et al.*, 6 C. C. 247 (affirmed 52 O. S. 637).

11. Act providing for compensation of trustees. 80 O. L. 168.

12. Act giving power to fill and improve lands for terminal facilities. 82 O. L. 143.

13. Act amending section 3 of the act of February 24, 1876 (73 O. L. 13), as to actions against the trustees. 83 O. L. 38.

14. Act authorizing the city of Cincinnati to adjust claims growing out of construction of Southern Railway. 83 O. L. 152.

15. Act authorizing sale of The Southern Railway upon resolution of council and vote of the people. 84 O. L. 82.

In a suit brought to enjoin the proposed sale, the petition was dismissed on demurrer, and the judgment affirmed by the Supreme Court. Cincinnati v. Dexter, 55 O. S. 93.

The vote on the question was against said proposed sale.

This act was repealed April 23, 1898 (93 O. L. 637).

16. Act authorizing the railway trustees to extend lease of Southern Road and authorizing Sinking Fund Trustees to extend outstanding bonds. 86 O. L. 67.

No action was taken under this law, and it was repealed April 25, 1898 (93 O. L. 672).

17. Act authorizing modification and extension of Southern Railway lease conditioned on a vote of the people; also authorizing trustees to borrow $2,500,000 for terminal facilities. 93 O. L. 637.

Held constitutional and the action of the boards thereunder found to be in all respects regular and legal. Cincinnati v. Ferguson *et al.*, 12 Dec. 439; affirmed by Supreme Court 47 B. 220, 66 O. S. 658.

Held that bonds for terminal facilities and permanent betterments provided for in section 2 of this act could be issued only after execution of the supplemental agreement provided for in section 3 and a favorable vote of the people required in section 4. Cincinnati v. Ferguson *et al.*, 8 N. P. 361; affirmed by Supreme Court without report, 45 B. 443.

Held action of board in relocating terminals and modifying plan as to amount of property, regular and valid. Cincinnati v. Trustees, 1 N. P. (N. S.) 361; 14 Dec. 466 (aff'd Supreme Ct., 49 B. 220).

18. Act providing that net earnings of the road shall be paid into the

city treasury, and in case of sale, purchase money shall be paid into city treasury to the credit of the Sinking Fund and applied to the reduction of the bonded debt, etc. 93 O. L. 647.

19. Act authorizing Southern Railway trustee to extend outstanding bonds. 93 O. L. 672.

In Cincinnati v. Guckenberger, 60 O. S. 353, it was held that the Sinking Fund Trustees had not power without advertising and public bidding, to make a contract with Roberts & Company providing for the sale of city bonds to raise money with which to refund the bonded Southern Railway debt; and whether the above act of April 25, 1898, gave the power to extend the time of payment of Southern Railway bonds solely to the Southern Railway trustees or the Sinking Fund Trustees to be exercised by either, was not decided. For other decisions affecting Cincinnati Southern Railroad, see Felton v. City, 95 Fed. 336; Roberts and Co. v. Taft, 109 Fed. 825; Thomas v. C., N. O. & T. P. Ry. Co., U. S. Cir. Ct., S. D. Ohio, W. D., No. 4598.

20. Act relating to compensation of trustees. 80 O. L. 168.

21. Act authorizing expenditure for improving lands for terminal facilities. 82 O. L. 143.

22. Act authorizing Cincinnati to adjust claims growing out of construction of railway. 83 O. L. 152.

23. Act authorizing extension of lease to be voted on. 93 O. L. 637.

24. Act authorizing extension of time of payment of outstanding bonds. 93 O. L. 672.

25. Act providing for disposition of net earnings of railway. 93 O. L. 647.

26. Act authorizing bonds for terminal facilities. 102 O. L. 111.

Other Acts Authorizing Municipalities to Construct Railways.

For other acts authorizing railroads to be constructed by municipalities, see, as to Toledo, 66 O. L. 83; 75 O. L. 113; Zanesville, 66 O. L. 11; Mt. Gilead, 75 O. L. 110; 77 O. L. 91; 78 O. L. 45; 93 O. L. 679; Hillsboro, 76 O. L. 65; 79 O. L. 82; Georgetown, 76 O. L. 138; 88 O. L. 141; Ripley, 76 O. L. 149; St. Clairsville, 76 O. L. 180; Norwalk, 89 O. L. 323; Pomeroy, 87 O. L. 110; 89 O. L. 303; 90 O. L. 356; 94 O. L. 648; Salem, 88 O. L. 593 (held unconstitutional in Ry. Co. v. Martin, 53 O. S. 386).

IV.

TAXATION.

ASSESSORS.

Assessors of Personal Property.

Sec. 3349. [Election of assessors; assessment districts.] At the regular election to be held in November, 1915, and biennially thereafter, assessors shall be elected in the manner provided by law for the election of ward, district, city, village and township officers as follows: In municipal corporations divided into wards, one assessor shall be elected in each ward; in villages one assessor shall be elected; in cities not divided into wards, the board of deputy state supervisors of elections or the board of deputy state supervisors and inspectors of elections, as the case may be, shall, acting in conjunction with the county auditor, within ten days after this act shall become effective, divide such cities or such part or parts thereof as may be located in their county, into such number of assessment districts as in the judgment of the county auditor may be necessary in order to provide for the assessment of all the property therein; a division so fixed shall remain in effect for a period of four years, at the expiration of which and quadrennially thereafter a like division shall be made in the same manner and by the same authority. One assessor shall, at the time specified in this section, be elected in each assessment district so created; provided, however, that nothing therein shall be so construed as to require a division of any municipal corporation or part thereof into assessment districts when, in the judgment of the county auditor, such division is not necessary, in which event one assessor shall be elected in the entire municipal corporation or in that part thereof which may be located in one county as the case may be; in townships not having a municipal corporation therein, one

assessor shall be elected in such township; in townships composed in part of a municipal corporation, one assessor shall be elected in the territory outside such municipal corporation. An assessor shall be a citizen possessing the qualifications of an elector[1] of such ward, district, city, village or township. Such assessor shall take and hold his office for the term of two years from and after the first day of January following his election. Upon the election and qualification of such assessor, the right of the deputy assessor, theretofore appointed under any provision of law to exercise any powers or perform any duties as such deputy assessor shall cease and determine, and he shall turn over to the person so elected and qualified all the books, records, papers and furniture of said office. Such elected assessor shall be the successor of said appointed officer, with full power to take up, carry on and complete any and all of the unfinished business thereof, and he shall perform all the duties, exercise all the powers and be subject to all the liabilities and penalties devolved, conferred or imposed by law upon the deputy assessor so appointed. [106 v. 246, 250.]

(1) An elector of a municipal corporation located within a township is not an elector of said township as herein contemplated. Op. Atty. Gen. (1915), p. 2203.

Sec. 3350. [Appointment of assistant assessors; qualifications, oath, duties.] An assessor who is unable within the time prescribed to complete his work, may appoint such person or persons as the county auditor may in writing authorize and approve, as assistant assessors for his ward, district, city, village or township. An assistant assessor shall possess all the qualifications of an elected assessor, and after giving bond, and taking the oath prescribed by law, shall perform such services under the direction of the assessor, as he may require, in delivering notices, forms and blanks for the listing of property, and in procuring facts and information relative to the amount, character and description of all property which the assessor is required by law to list, as will aid such assessor in ascertaining the true value thereof in listing such property for taxation. He shall

also, under the direction of such assessor, administer to the proper persons listing property for taxation, the oath required by law, and shall deliver such tax lists, together with such information and description of property, to said assessor. The assessor shall examine the lists made and delivered to the assistant assessor by each person listing property to him, and if the assessor from such examination together with the facts relating thereto, obtained by such assistant, believes the return incorrect either in value or articles listed or omitted, he shall correct the same, and if he deems it necessary, may view the property, examine the owner under further oath, and determine its true value in money. [107 v. 29, 36; 106 v. 246.]

Sec. 3351. [Bond of assessors; form prescribed by tax commission; execution, approval, liability.] Each assessor and assistant assessor shall give bond, payable to the state, for the faithful performance of his duties. The form of such bonds shall be prescribed by the attorney-general and furnished by the tax commission of Ohio, and their execution shall be approved by the prosecuting attorney of the proper county. Each bond when executed shall be submitted, with the oath of office endorsed thereon, to the auditor of the county wherein the principal resides. If the auditor approves the surety thereon, he shall endorse his approval on the bond and file it in his office and there safely keep it. The sureties on such bonds may be released from liability thereon in the manner and subject to the limitations provided by sections twelve thousand one hundred and ninety-five to twelve thousand one hundred and ninety-seven, inclusive of the General Code. Each such bond, and the principal thereon, personally, shall be liable, in addition to any other liability growing out of the exercise of the powers and duties of his office by the principal, for any damage to any person caused by neglect, default, fraud, or unlawful act of the principal, of which he may be guilty while acting within the scope of his official duties or under color of his official authority. The bond of an assessor shall be in the sum of one thousand dollars, and that of an assistant assessor in the sum of five hundred dollars. [107 v. 29, 36; 106 v. 246.]

Sec. 3352. [Oath of assessor and members of board of revision.] Each assessor, before entering upon the discharge of the duties of his office, shall take and subscribe an oath, faithfully and impartially to assess the personal property in his district, and otherwise faithfully to perform the duties imposed upon him and impartially to exercise the powers vested in him by law. Each assistant assessor shall, before entering upon the discharge of the duties of his office, take and subscribe an oath, faithfully and impartially to perform the duties imposed upon him by law. Each member of a county board of revision shall, before entering upon the discharge of the duties of his office, take and subscribe an oath faithfully and impartially to discharge the duties of his office. [107 v. 29, 36; 106 v. 246.]

Sec. 3353. [Removal of assessors or assistants; causes.] The county auditor may summarily remove any appointed assessor or assistant assessor when, in his judgment, the public interest so requires. He may also remove any elected assessor for want of moral character, inefficiency, incompetency, neglect or breach of duty or malfeasance in office, giving to him a copy of the charges against him, and an opportunity to be publicly heard thereon upon not less than ten days' notice. The decision of the county auditor therein shall be final. The county auditor may suspend without pay such assessor during the pendency of such proceedings for his removal. [106 v. 246, 252.]

Sec. 3353-1. [Vacancies, how filled.] If there shall be a failure to elect an assessor in any ward, district, city, village or township, or if a person elected assessor fails to give bond and take the oath of office within thirty days after his election, or if after his appointment or election an assessor shall remove from the ward, district, city, village or township for which he was appointed or elected, the office shall be deemed vacant. Should there be at any time a vacancy in such office for any of the causes aforesaid, or from any other cause, the county auditor shall fill such vacancy by appointing any competent and suitable elector of such ward, district, city,

village or township, who will accept and perform the duties of such office. [106 v. 246, 252.]

Sec. 3354. [Listing and valuation under direction of county auditor.] Assessors, within their respective districts, shall, under the direction of the county auditor, list and value for taxation the property subject to taxation therein, except as otherwise provided by law. [107 v. 29, 36; 106 v. 246.]

Sec. 3355. [Shall administer an oath.] The assessor shall actually administer an oath, as required by law, to each person upon whom he calls to list property for taxation, and personally urges and insists upon a strict compliance with law in the making of such list. Should the assessor neglect to administer such oath, or knowingly omit the performance of any other duty, for every such offense he shall be fined not less than ten nor more than two hundred dollars, and stand committed until the fine and costs are paid. He shall not be liable for failure to administer it if the person declines to take such oath, or is unable from sickness or absence. [R. S. Sec. 1521; 86 v. 162; 77 v. 135; 58 v. 42.]

Sec. 3356. [Statistics to be gathered and returned by assessors.] Annually, at the time of taking the lists of personal property for taxation, the assessor shall require and take for each person, company and corporation in his township or precinct verified by oath, the statements for the preceding year following:

Agriculture. The number of sheep killed by dogs, their value, and the number of sheep injured by dogs, and the estimate of the amount of damages by such injury; the number of acres put in wheat, rye, barley, corn, oats, and buckwheat, and the number of bushels of each produced; the number of acres in timothy and other grass, except clover, and the number of tons of grass and bushels of seed produced therefrom; the number of acres in clover, the number of tons of hay made therefrom, the number of bushels of seed obtained therefrom, and the number of acres of clover plowed under for manure; the number of acres planted in tobacco, and the num-

ber of pounds obtained therefrom; the number of acres put in flax, the number of pounds of fiber gathered, and the number of bushels of seed obtained; the number of acres planted in sorgo, the number of gallons of syrup, and pounds of sugar manufactured; the number of pounds of maple sugar, and the number of gallons of maple syrup manufactured; the number of pounds, each, of butter and cheese manufactured; the number of acres planted in potatoes, and the number of bushels produced; the number of acres planted in sweet potatoes, and the number of bushels produced; the number of acres in vineyard, the number of acres planted within the year, the number of pounds of grapes gathered, and the number of gallons of wine produced; the number of pounds of wool shorn; the number of acres in orchard, and the number of bushels of apples, peaches, cherries, plums, and pears produced; the number of acres used for pasturage, and the number of acres not cultivated or pastured; the number of hives of bees, and the number of pounds of honey produced; the number of dozens of eggs shipped to places beyond the state; the number of acres sowed, planted or to be sowed in wheat, rye, barley, oats, corn, and potatoes, for the harvest of the then present year.

Manufactured. The number of tons each of cold-blast pig-iron manufactured from native ore smelted with charcoal, of hot-blast pig metal manufactured from the same material, and of pig metal made from native or foreign ore, smelted with stone coal; the number of tons each manufactured of bar and nail-rod iron, nails, hoop-iron, sheet-iron, stoves and hollow-ware, all other castings, spikes and railroad chairs, car wheels, and of railroad iron; the number each of locomotives built, steam engines constructed, plantation sugar-mills made, portable saw-mills made, and the number in use; the number, each, of reaping and mowing-machines, and of threshing-machines.

Water Crafts. The number of steamboats built upon the Ohio river and its navigable tributaries, and the number of barges, flat-boats, and store-boats, and the value of each; the number of steam-boats and of sail-vessels built upon Lake Erie and its tributaries within the borders of this state, and

the value of each; the number of canal-boats built and used in navigating the canals.

Mines and Miners. The number of bushels of stone coal mined; the number of persons engaged in mining stone coal, and the average rate of wages paid; the number of tons of iron ore mined; the number of persons engaged in mining iron ores, and the average rate of wages paid; the number of bushels of salt manufactured; the number of gallons of petroleum produced; the number of barrels of lime made; the number of barrels of water cement; the number of gallons of stoneware made.

Wages. The number of adult male persons engaged in each of the mechanic arts, and the average monthly or daily wages of each; the number of common laborers, and the average daily wages of each; the number of common farm laborers, and the average monthly wages of each; the average monthly wages paid to clerks and salesmen and saleswomen; the average monthly wages paid to book-keepers.

Investments. The amount of United States bonds owned; the amount of legal tender notes or moneys exempt from taxation; and the amount of state bonds or certificates.

Social. The number of marriages between persons related to each other by blood, and the degree of such relationship; the number of persons born with imperfect senses or idiotic, and how many of such persons are the offspring of parents related to each other by blood; the number of houses of prostitution or assignation, and the number of prostitutes. [R. S. Sec. 1522; 80 v. 68; S. & S. 738; S. & C. 87.]

Sec. 3357. [Return of statistics; agricultural statistics.] At the time he returns the lists of personal property for taxation, the assessor shall make return of all such statistics to the county auditor. On or before the first day of August, each year, the county auditor shall make return to the auditor of state of all statistics returned to his office, except those statistics under the head of "agriculture," which he shall return to the agricultural commission on or before the tenth day of July, each year, and the commission may compile and publish them in the monthly crop and stock bulletins and an-

nual report. [103 v. 304, 338; R. S. Sec. 1523; 93 v. 14; 68 v. 95.]

Sec. 3358. [Penalty for not making out and returning statistics.] An assessor who neglects or refuses to make out and return statistics as herein required, shall forfeit and pay to the state not less than twenty nor more than one hundred dollars, to be recovered by action which shall be brought by the prosecuting attorney, on the request of the auditor of state. The amount recovered, shall be paid into the state treasury to the credit of the school fund. [R. S. Sec. 1524; 68 v. 95 § 2.]

Sec. 3359. [Penalty for refusing to make statements.] Any person, company or corporation, refusing to make out and deliver a statement of the facts, or any of them, herein required, shall forfeit and pay to the state not less than fifty nor more than one hundred dollars, to be recovered and paid as provided in the next preceding section. [R. S. Sec. 1525; 66 v. 351 § 2.]

Sec. 3360. [Quadrennial enumeration of unfortunates.] Quadrennially at the time of taking a list of property for taxation, each assessor shall take an enumeration of all deaf and dumb, blind, epileptic and epileptic insane, insane and idiotic persons, whose usual place of residence is in any family, jail or infirmary in his township or precinct, on the day preceding the second Monday of April, with their names in full, their age, sex, race, residence, whether in charge of parents or guardian, and, where known, the cause and duration of such deficiency. He shall make a list of such deaf and dumb, blind, epileptic and epileptic insane, insane and idiotic persons, designating those of each class, and the names of their parents or guardians, and post-office address, and return it to the county auditor, on or before the third Monday of May in the same year. [R. S. Sec. 1526; 91 v. 97; 63 v. 64 § 1.]

Sec. 3364. [Compensation; when and how paid.] The compensation of assessors and assistant assessors, which shall

be paid out of the county treasury, shall be four dollars per day for each day of not less than eight full hours of actual service they are necessarily engaged in the performance of their duties. Each assessor and assistant assessor shall make and file with the county auditor a statement giving in detail the date of each day on which he was necessarily engaged in the performance of his duties, the number of hours he worked each such day and verify it by oath, which oath the county auditor may administer. If the county auditor is satisfied that such statement is correct he shall draw his warrant on the county treasurer for the amount thereof. No such warrant shall be drawn until such assessor or assistant assessor has filed with the county auditor all the statements and returns of property listed by him, the lists of the owners of property,[1] the statistics and enumerations required of him by law, and the county auditor is satisfied that the same are as full and accurate as could be made. The county auditor shall fix the time within which such officers shall complete their work and they shall not receive compensation for a longer period, unless the county auditor, for good cause shown, shall extend the same. [107 v. 29, 36; 106 v. 246.]

(1) **Duties of assessors.**—As to listing personal property and duties of assessors relative thereto see G. C., §§ 5320 et seq.

Assessment of real property.—See G. C. §§ 5548 et seq. (as amended, 108 O. L. 557).

EXEMPT PROPERTY.[1]

Sec. 5349. [School houses, churches, colleges, etc.] Public school houses and houses used exclusively for public worship, the books and furniture therein and the ground attached to such buildings necessary for the proper occupancy, use and enjoyment thereof and not leased or otherwise used with a view to profit, public colleges and academies and all buildings connected therewith, and all lands connected with public institutions of learning, not used with a view to profit, shall be exempt from taxation.[2] This section shall not extend to leasehold estates or real property held under the authority of a college or university of learning in this state, but leaseholds, or other estates or property, real or personal, the rents, issues,

profits and income of which is given to a city, village, school district, or subdistrict in this state, exclusively for the use, endowment or support of schools for the free education of youth without charge, shall be exempt from taxation as long as such property, or the rents, issues, profits or income thereof is used and exclusively applied for the support of free education by such city, village, district or subdistrict. [R. S. Sec. 2732; 99 v. 449; 91 v. 393, 216; 88 v. 95; 61 v. 39; S. & S. 761.]

(1) **Exemptions strictly construed.**—Exemptions from taxation must be strictly construed. Library Ass'n v. Pelton, 36 O. S. 253, 258; Sturges v. Carter, 114 U. S. 521; Lee v. Sturges, 46 O. S. 153.

And an exemption does not relieve from a local assessment. Lima v. Cemetery Ass'n, 42 O. S. 128.

Relief for property erroneously taxed may be had under § 2588 *et seq.*, G. C. Butler v. Comm'rs, 39 O. S. 169.

(2) **Schools and churches.**—See Gerke v. Purcell, 25 O. S. 229; State v. Cappelar, 6 B. 339; Commissioners v. Mannix, 11 B. 184; Kendrick v. Farquhar, 8 O. 189; College v. State, 19 O. 110.

Sec. 5351. [Public property.] Real or personal property belonging exclusively to the state or United States, and public property used for a public purpose shall be exempt from taxation. [110 v. 77, 78.]

Sec. 5353. [Lands, etc., for poor exempt.] Lands, houses and other buildings belonging to a county, township, city or village, used exclusively for the accommodation or support of the poor, or leased to the state or any political subdivision thereof for public purposes, and property belonging to institutions used exclusively for charitable purposes, shall be exempt from taxation.[1] [110 v. 77; 103 v. 548; R. S. Sec. 2732; 99 v. 449; 91 v. 393, 216; 88 v. 95; 61 v. 39; S. & S. 761.]

(1) **Public charities.**—For institutions of purely public character see Gerke v. Purcell, 25 O. S. 229; Humphreys v. Little Sisters of the Poor, 29 O. S. 201; Lodge v. Hayslip, 23 O. S. 144; Library Ass'n v. Pelton, 36 O. S. 253; Davis v. Camp Meeting Ass'n, 57 O. S. 257.

Sec. 5353-1. [Property used for support of children's home exempt.] Property, real, personal, and mixed, the net income of which is used solely for the support of institutions

used exclusively for children's homes for poor children, the real estate on which said institutions are located, and the buildings connected therewith, shall be exempt from taxation. [106 v. 179.]

Sec. 5356. [Property exempt from taxation.] Market houses, public squares, or other public grounds of a city, village or township, houses or halls used exclusively for public purposes or erected by taxation for such purposes, notwithstanding that parts thereof may be lawfully leased, and property belonging to park districts, created pursuant to the provisions of section 2976-1 et seq. of the General Code, shall be exempt from taxation.[1] [108 v. 1285; R. S. Sec. 2732; 99 v. 449; 91 v. 393, 216; 88 v. 95; 61 v. 39; S. & S. 761.]

(1) **Public property.**—Apparatus belonging to city used for supplying gas to its citizens is used for a public purpose and is exempt. Toledo v. Hosler, 54 O. S. 418.

For taxation of municipal property leased for more than fourteen years, see Zumstein v. Coal & Mining Co., 54 O. S. 264.

Property owned by a municipal corporation is not exempt from taxation unless it is used for municipal purposes, and this is true, although it is leased by the municipality and the money realized is applied to a public purpose. Cincinnati v. Lewis, 66 O. S. 49; Cincinnati v. Hynicka, 9 N. P. (N. S.) 273. But such property, owned by municipality, cannot be sold to pay the tax, and an attempted sale will be enjoined. Cincinnati v. Hynicka, 9 N. P. (N. S.) 273; 20 Dec. 365.

Property acquired by and being improved by a municipality with view of being turned over to a lessee railroad exempt. Railway v. Roth, 17 C. C. (N. S.) 562; reversing 13 N. P. (N. S.) 633.

Sec. 5357. [Water works, etc.] Works, machinery, pipelines and fixtures belonging to a city or village and used exclusively for conveying water to it, or for heating or lighting it, shall be exempt from taxation. [R. S. Sec. 2732; 99 v. 449; 91 v. 393, 216; 88 v. 95; 61 v. 39; S. & S. 761.]

Sec. 5359. [Monuments and funds therefor.] Funds raised and set apart for the purpose of building monuments to the soldiers of this state, and monuments and monumental buildings, shall be exempt from taxation. [R. S. Sec. 2732; 99 v. 449; 91 v. 393, 216; 88 v. 95; 61 v. 39; S. & S. 761.]

TRANSFER OF PUBLIC FUNDS.[1]

Sec. 2296. [By whom funds may be transferred.] The county commissioners, township trustees, the board of education of a school district, or the council or other board having the legislative power of a municipality, may transfer public funds except the proceeds or balances of special levies, loans or bond issues, under their supervision, from one fund to another, or to a new fund created under their respective supervision, in the manner hereinafter provided, which shall be in addition to all other procedure now provided by law. [103 v. 521, 522; 95 v. 371, §§ 1, 2.]

(1) See § 3800, *ante*, in Part I.

Sec. 2297. [Resolution and petition.] A resolution of such officers or board shall be duly passed by a majority of all the members thereof, declaring the necessity therefor, and such officers or board shall file a petition in the court of common pleas of the county in which the funds are held. The petition shall set forth the name and amount of the fund, the fund or funds to which it is desired to be transferred, a copy of such resolution with a full statement of the proceedings pertaining to its passage, and the reason or necessity for the transfer. [95 v. 371 § 2.]

Sec. 2298. [Notice of the petition.] The petitioner shall give notice of the filing, objects and prayer of the petition, and of the time when it will be for hearing. The notice shall be given by one publication in two newspapers of opposite politics, having a general circulation in the territory to be affected by such transfer of funds, preference being given to newspapers published within the territory. If there are no such newspapers, the notice shall be posted in ten most conspicuous places within the territory for the period of four weeks. [95 v. 371 § 2.]

Sec. 2299. [Hearing and objections.] The petition may be heard at the time stated in the notice, or as soon thereafter as convenient for the court, but such cause shall be heard, upon request of the petitioners in preference to all other cases on

the docket. Any person or persons, objecting to the prayer of such petition, shall file their objections in such cause on or before the time fixed in the notice for hearing, and they shall be entitled to be heard. [95 v. 371 § 2.]

Sec. 2300. [Finding of court.] If, upon the hearing the court finds that the notice has been given as herein required, that the petition states sufficient facts, that there are good reasons, or that a necessity exists for the transfer, and that no injury will result therefrom, it shall grant the prayer of the petition and order the petitioners to make such transfer. The court may make an order for the reimbursement, in whole or in part, of the fund from which such transfer is made. [103 v. 521, 522; 95 v. 371, § 2.]

Sec. 2301. [Findings to be entered in records.] A copy of the findings, orders and judgments of the court, shall be certified by the clerk and entered on the records of the petitioning officers or board, and thereupon the petitioners may make the transfer of funds as directed therein. All costs of such proceeding shall be paid by the petitioners, except in case objections are filed, the court may order such objectors to pay all or a portion thereof as is just and equitable. [95 v. 371 § 2.]

Sec. 2302. [Appeal and error.] The petitioners or any person or persons who filed objections to the petition, may appeal such cause to the circuit court of the county, and the proceedings in appeal shall be the same as provided for appeals from the common pleas to the circuit court in other cases, and such cause may be reviewed on error in the supreme court. When the cause is appealed and the circuit court shall have the same power and make the same orders, and all proceedings therein shall be had as herein provided for in the court of common pleas, except the question of costs shall be within the discretion of such court. [95 v. 371 § 2.]

Sec. 5654. [Proceeds of special levies shall not be used for other purpose; transfer of surplus.] The proceeds of a special tax, loan or bond issue shall not be used for any other purpose than that for which the same was levied, issued or

made, except as herein provided. When there is in the treasury of any city, village, county, township or school district a surplus of the proceeds of a special tax or of the proceeds of a loan or bond issue which cannot be used, or which is not needed for the purpose for which the tax was levied, or the loan made, or the bonds issued, all of such surplus shall be transferred immediately by the officer, board or council having charge of such surplus, to the sinking fund of such city, village, county, township or school district, and thereafter shall be subject to the uses of such sinking fund. [103 v. 521; R. S. Sec. 2834; 92 v. 77; 75 v. 132, § 1.]

LIMITATIONS ON TAX LEVY.[1]

Sec. 5649-1. [Tax levy for sinking fund and interest.] In any taxing district, the taxing authority shall, within the limitations and in the manner prescribed by law, levy a tax sufficient to provide for interest and maturity payment purposes for all serial bonds issued by any political subdivision, and for interest and for sinking fund purposes of all bonds heretofore issued by such political subdivision,[2] which tax shall be placed before and in preference to all other items, and for the full amount thereof. [109 v. 336, 346, § 19; 104 v. 12; 101 v. 430.]

(1) **Smith one per cent. tax law.**—The sections under this heading are commonly referred to as the "Smith One Per Cent. Tax Law." The original of this act will be found in 101 O. L. 430. See §§ 3784-3811 in Part I, and notes to those sections.

(2) **Sewage disposal bonds.**—Bonds issued by a municipal corporation to provide funds to comply with orders promulgated by the state board of health, and approved by the governor and attorney general, as provided by Sec. 1249 et seq., G. C., are subject to the provisions of this section. State ex rel. v. Dean, Auditor, 95 O. S. 108.

Sec. 5649-1a. [Former bonds shall be legal.] All bonds heretofore issued by any political subdivision for a lawful purpose which have been sold for not less than par and accrued interest and the proceeds thereof paid into the treasury, shall be held to be legal, valid and binding obligations of the political subdivision issuing the same. [104 v. 12.]

Sec. 5649-1b. [Resolution or ordinance shall contain tax levy and be included in annual budget.] The resolution, ordinance or other measure under which bonds are issued or authorized shall, within the limitations prescribed by law, provide for a levy of taxes, in the manner prescribed by law, sufficient to pay the interest and principal of the bonds as they mature and every such resolution, ordinance or measure shall be certified by the fiscal officer of the political subdivision to the county auditor of the county in which the subdivision is located. Thereafter, the county auditor, without further action by the tax-levying authority of the subdivision, shall include said annual levies in the appropriate annual budgets submitted by him to the budget commissioners as provided in section 5649-3c of the General Code, including the county budgets; provided, however, that the county commissioners of any county, board of education of any school district, trustees of any township or council or chief legislative body of any municipality or other political subdivision may appropriate for the purpose of paying any part of the annual interest or principal of such bonds of the political subdivision maturing in any year any surplus in the sinking fund or other bond retirement fund[1] of the political subdivision not required for the purpose for which the said sinking or other bond retirement fund was raised or assessments collected and applicable to the payment of such interest or principal or any such assessments due and payable during such year or proceeds of bonds and notes authorized by law to be applied to the payment of such interest or principal or collected inheritance taxes or surplus in the fund of any public utility or the estimated revenues of such utility in such year not required for operating expense or unexpended balances in funds created by issues of bonds and no longer needed for the purposes for which such funds were created or premiums and accrued interest from sale of bonds authorized by law to be applied to the payment of such interest or principal or any other fund authorized by law to be applied to such payment, and certify such appropriation to the county auditor; but nothing herein contained shall be construed to authorize the surplus or revenues of any public utility to be used for or applied to the payment

of the interest or principal of any bonds or indebtedness other than bonds issued or indebtedness incurred for such public utility. In the annual budgets submitted by the county auditor to the budget commissioners, the county auditor shall reduce the levy for said annual interest or principal by the amount of the sums or funds so appropriated, and such sums of funds shall be used for no other purpose than the payment of such interest or principal, until and unless said interest and principal be otherwise fully paid or liquidated; provided that no such appropriation shall be made from the sinking fund without the approval of the sinking fund trustees or commissioners. The sums thus included in any budget submitted to the budget commissioners shall not be reduced by said commissioners and shall be given by said auditor and commissioners and other taxing authorities all the precedence and priorities provided by law for interest and sinking fund and principal levies. The annual budget submitted to the county auditor, as required by law, by any county, school district, municipal corporation or other political subdivision shall, for the assistance of the county auditor, contain itemized and detailed statements of the amounts required for such annual interest and principal and of said sums or funds appropriated for their payment. [110 v. 456, 462; 109 v. 344.]

(1) Disposition of surplus in the sinking fund and surplus in a particular bond retirement fund. See Op. Atty. Gen. (1922) p. 1130.

Sec. 5649-1c. [Certification by fiscal officers of tax necessary to pay judgments.] On or before the first Monday in May of each year, the fiscal officer of the municipal corporation or other political subdivision shall certify to the council, county commissioners, board of education or other tax levying authority of his political subdivision the amount of tax necessary to provide for the payment of final judgments[1] against the political subdivision, except in condemnation of property cases, and said tax levying authority shall place such amount in the annual tax levying ordinance, resolution or other measure for the full amount certified. [109 v. 336, 345, § 16.]

(1) Anticipation of amounts needed for payment of future judgments. See Op. Atty. Gen. (1922) p. 593.

Sec. 5649-2. [Tax levy limitation.] Except as otherwise provided in section 5649-4 and section 5649-5 of the General Code, the aggregate amount of taxes that may be levied on the taxable property in any county, township, city, village, school district or other taxing district, shall not in any one year exceed ten mills on each dollar of the tax valuation of the taxable property of such county, township, city, village, school district or other taxing district for that year, and such levies in addition thereto for sinking fund and interest purposes as may be necessary to provide for any indebtedness heretofore incurred or any indebtedness that may hereafter be incurred by a vote of the people.[1] [103 v. 552; 102 v. 268; 101 v. 430.]

(1) The only change made in the original § 5649-2 by the amendment of Apr. 16, 1913 (103 O. L. 552), is the elimination of the part of the original section that is not included in the amendment. The words "heretofore" and "hereafter", found in both, refer to the date of the passage of the original act, June 2, 1911. State v. Spiegel, 91 O. S. 13. See note 1 to § 5649-5b, *post*.

Vote required.—The vote required to authorize such additional levy requires the approval of two-thirds of the voters, voting upon the question of issuing bonds as provided by §§ 3942-3947. A majority vote authorized by ordinance is not comprehended within the meaning of this section. State ex rel. v. Bish, 104 O. S. 206.

Sewage disposal bonds.—In providing funds for sinking fund and interest to discharge obligations arising from bonds issued after June 1, 1915, in compliance with orders of the state board of health issued and approved prior to June 1, 1915, the taxing authorities of municipal corporations shall disregard the limitations on tax levies provided by § 5649-2, General Code. Taxing authorities shall likewise disregard § 5649-3a, General Code, in so far as it limits to five mills the aggregate of all taxes that may be levied by a municipal corporation on the taxable property in a municipal corporation, for the purpose of providing funds for sinking fund and interest on account of bonds so issued. State ex rel. v. Dean, Auditor, 95 O. S. 108.

Sec. 5649-3a. [When tax levies to be made; budget; county; municipal corporation; township; school; blanks.][1] On or before the first Monday in June, each year, the county commis-

sioners of each county, the council of each municipal corporation, the trustees of each township, each board of education and all other boards or officers authorized by law to levy taxes, within the county, except taxes levied by the state or for state purposes, shall submit or cause to be submitted to the county auditor an annual budget, setting forth in itemized form an estimate stating the amount of money needed for their wants for the incoming year, and for each month thereof. Such annual budgets shall specifically set forth:

(1) The amount to be raised for each and every purpose allowed by law for which it is desired to raise money for the incoming year.

(2) The balance standing to the credit or debit of the several funds at the end of the last fiscal year.

(3) The monthly expenditures from each fund in the twelve months and the monthly expenditures from all funds in the twelve months of the last fiscal year.

(4) The annual expenditures from each fund for each year of the last five fiscal years.

(5) The monthly average of such expenditures from each of the several funds for the last fiscal year, and also the total monthly average of all of them for the last five fiscal years.

(6) The amount of money received from any other source and available for any purpose in each of the last five fiscal years, together with an estimate of the probable amount that may be received during the incoming year, from such source or sources.

(7) The amount of the bonded indebtedness, setting out each issue and the purpose for which issued, the date of issue and the date of maturity, the original amount issued and the amount outstanding, the rate of interest, the sum necessary for interest and sinking fund purposes, and the amount required for all interest and sinking fund purposes for the incoming year.

(8) The amount of all other indebtedness incurred, with a statement of the sections under which such indebtedness was incurred, and the amount of such additional taxes as may have been authorized as provided in section 5649-5 or 5649-4 or any other section of the General Code under which taxes have been levied outside of usual tax limitations or by a

vote of the people, setting out in detail each item of indebtness as provided in the next preceding paragraph and giving the details as to dates of such levies, their rates and the periods for which they run.

(9) Such other facts and information as the tax commission of Ohio or the budget commissioners may require.

The aggregate of all taxes that may be levied by a county, for county purposes, on the taxable property in the county on the tax list, shall not exceed in any one year three mills. The aggregate of all taxes that may be levied by a municipal corporation on the taxable property in the corporation, for corporation purposes, on the tax list, shall not exceed in any one year five mills. The aggregate of all taxes that may be levied by a township, for township purposes, on the taxable property in the township on the tax list, shall not exceed in any one year one and five-tenths mills. The local tax levy for all school purposes shall not exceed in any one year three mills on the dollar of valuation of taxable property in any school district. Such limits for county, township, municipal and school levies shall be exclusive of any special levy provided for by a vote of the electors, any levy excepted from the limitation provided for in section 5649-2 of the General Code or authorized by said section or by any other provision of law to be made in addition to the limitation provided for in said section; nor shall such limits include special assessments, levies for road taxes that may be worked out by the taxpayers, and levies and assessments in special districts created for road or ditch improvements, over which the budget commissioners shall have no control.

Such budget shall be made up annually at the time or times now fixed by law when such boards or officers are required to determine the amount in money to be raised or the rate of taxes to be levied in their respective taxing districts.

The county auditor shall provide and furnish such boards and officers blank forms and instructions for making up such budgets. [109 v. 146; 108 v. 1303; 102 v. 270.]

(1) **Effect on existing contracts.**—Effect of Smith one per cent. law on contracts entered into by municipality prior to its enactment, see State ex rel. v. Sayre, 12 N. P. (N. S.) 120. See Op. Atty. Gen. (1918), p. 1101.

The boundaries of a municipal

corporation for tax levying purposes are to be determined as of the first Monday of June. See Op. Atty. Gen. (1920), p. 1003.

Sec. 5649-3b. [County budget commission; members of; powers and duties.] There is hereby created in each county a board for the annual adjustment of the rates of taxation and fixing the amount of taxes to be levied therein, to be known as the budget commissioners. The county auditor, the county treasurer and the prosecuting attorney shall constitute such board.[1] The budget commissioners shall meet at the auditor's office in each county on the first Monday in August annually, and shall complete their work on or before the third Monday in that month, unless for good cause the tax commission of Ohio shall extend the time for completing the work. Each member shall be sworn faithfully and impartially to perform the duties imposed upon him by law. Two members shall constitute a quorum. The auditor shall be the secretary of the board and shall keep a full and accurate record of all proceedings. The auditor shall appoint such messengers and clerks as the board deems necessary, who shall receive not to exceed three dollars per day for their services for the time actually employed, which shall be paid out of the county treasury. The budget commissioners shall be allowed their actual and necessary expenses. such expenses shall be itemized and sworn to by the person who incurred them and paid out of the county treasury when approved by the board. For the purpose of adjusting the rates of taxation and fixing the amount of taxes to be levied each year the county auditor and the budget commissioners shall be governed by the amount of the taxable property as shown on the auditor's tax list for the current year; provided, that if the auditor's tax list has not been completed, the county auditor shall estimate as nearly as practicable the amount of the taxable property for such year and such officers shall be governed by such estimate.[2] [106 v. 180; 104 v. 237; 103 v. 552; 102 v. 271.]

(1) **Validity.** — §§ 5649-3b and 5649-3c, General Code, creating the budget commission and defining its duties, are not a delegation of legislative power. State ex rel. v. Cooper, 97 O. S. 86.

(This section, in designating the members of the Budget Commis-

sion from county officers, avoids the objections to the previous forms of this law which led to their being declared unconstitutional in State v. Groom, 91 O. S. 1, in which case it was held that the duties being for the county, the designation of officers not elected by the county was invalid.)

(2) This act is not a law providing for Tax Levies within the meaning of those terms as used in Sec. 1d of Art. II of the Constitution and did not go into effect until ninety days after it was filed with the Secretary of State. The State ex rel. v. Milroy, 88 O. S. 301.

Sec. 5649-3c. [Examination of budgets; adjustment and certification.] The auditor shall lay before the budget commissioners the annual budgets submitted to him by the boards and officers named in section 5649-3a of this act, together with an estimate to be prepared by the auditor of the amount of money to be raised for state purposes in each taxing district in the county, and such other information as the budget commissioners may request, or the tax commission of Ohio may prescribe. The budget commissioners shall examine such budgets and estimates prepared by the county auditor, and ascertain the total amount proposed to be raised in each taxing district for state, county, township, city, village, school district, or other taxing district purposes. If the budget commissioners find that the total amount of taxes to be raised therein does not exceed the amount authorized to be raised in any township, city, village, school district, or other taxing district in the county, the fact shall be certified to the county auditor. If such total is found to exceed such authorized amount in any township, city, village, school district, or other taxing district in the county, the budget commissioners shall adjust the various amounts to be raised so that the total amount thereof shall not exceed in any taxing district the sum authorized to be levied therein. In making such adjustment the budget commissioners may revise and change the annual estimates contained in such budgets, and may reduce any or all the items in any such budget, but shall not increase the total of any such budget, or any item therein. The budget commissioners shall reduce the estimates contained in any or all such budgets by such amount or amounts as will bring the total for each township, city, village, school district, or other taxing district,

within the limits provided by law,[1] but if the aggregate of the items of any school district budget for purposes for which taxes subject to the limitations imposed by section 5649-3a of the General Code are to be levied would require a total levy, subject to such limitation, of two mills in such districts in which all the limitations imposed by such section are operative, or of two and two-tenths mills in such districts in any part of which the township limitation therein imposed is not operative, the budget commissioners shall not reduce such items of such school district budget below an amount which would be produced by a levy in the whole district at the greater of the two rates mentioned in this section.

When the budget commissioners have completed their work they shall certify their action to the county auditor, who shall ascertain the rate of taxes necessary to be levied upon the taxable property therein of such county, and of each township, city, village, school district, or other taxing district, returned on the grand duplicate, and place it on the tax list of the county. [108 v. 1303; 102 v. 271.]

(1) **No power to reduce state levy.**—The budget commissioners have power under this section to reduce the items in the annual budgets submitted by the boards and officers named in Sec. 5649-3a, but they have no authority to reduce the levy certified for state purposes. State ex rel. v. Edmondson, 89 O. S. 93.

Findings of Budget Commission final.—The adjustment of the various amounts of taxes to be raised in a taxing district and the revising of estimates contained in the budget, require the exercise of judgment and discretion on the part of the budget commissioners, and, in the absence of fraud or abuse of discretion the courts can not interfere. Mandamus will not lie to control such discretion or to correct an error of judgment. State ex rel. v. Patterson, 93 O. S. 25.

Sec. 5649-3d. [Appropriations each fiscal half year.] At the beginning of each fiscal half year the various boards mentioned in section 5649-3a of this act shall make appropriations for each of the several objects for which money has to be provided, from the moneys known to be in the treasury from the collection of taxes and all other sources of revenue, and all expenditures within the following six months shall be made from and within such appropriations and balances thereof, but

no appropriation shall be made for any purpose not set forth in the annual budget nor for a greater amount for such purpose than the total amount fixed by the budget commissioners, exclusive of receipts and balances. [102 v. 272.]

Sec. 5649-3e. [Balances unexpended.] Unexpended appropriations of balances of appropriations remaining over at the end of the year, and the balances remaining over at any time after a fixed charge shall have been terminated by reason of the object of the appropriation having been satisfied or abandoned, shall revert to the general fund, and shall then be subject to other authorized uses, as such board or officers may determine. [102 v. 272.]

Sec. 5649-4. [Emergencies.][1] For the emergencies mentioned in sections forty-four hundred and fifty, forty-four hundred and fifty-one, fifty-six hundred and twenty-nine, and 7630-1 of the General Code, and for school purposes authorized by a vote of the electors under the provisions of sections 5649-5 and 5649-5a of the General Code, to the extent of three mills for such school purposes, the taxing authorities of any district may levy a tax sufficient to provide therefor, irrespective of any of the limitations of this chapter. [108 v. 1303; 103 v. 527; 101 v. 431.]

(1) **Neglect or inattention of public officers to repair of highways does not constitute such emergency. State ex rel. v. Zangerle, 95 O. S. 1.**

Sec. 5649-5. [Proceedings when maximum rate insufficient.] The county commissioners of any county, the council of any municipal corporation, the trustee of any township, or any board of education may, at any time, by a majority vote of all the members elected or appointed thereto, declare by resolution[1] that the amount of taxes that may be raised by the levy of taxes at the maximum rate authorized by sections 5649-2 and 5649-3 of the General Code as herein enacted within its taxing district, will be insufficient and that it is expedient to levy taxes at a rate, in excess of such rate and cause a copy of such resolution to be certified to the deputy state supervisors of the proper county. Such resolution shall specify the amount of such proposed increase of rate above the maximum

rate of taxation and the number of years not exceeding five during which such increased rate may be continued to be levied. [102 v. 272.]

(1) Form of resolution, see § 3794 in Part I.

Sec. 5649-5a. [Vote; notice; ballot.] Such a proposition shall be submitted to the electors of such taxing district at the November election that occurs more than twenty days after the adoption of such resolution. The deputy state supervisors shall prepare the ballots and make the necessary arrangements for the submission of such question to the electors of such taxing district, and the election shall be conducted, canvassed and certified in like manner, except as otherwise provided by law, as regular elections in such taxing district for the election of officers thereof. Twenty days' notice of the election shall be given in one or more newspapers printed in the taxing district once a week for four consecutive weeks prior thereto, stating the amount of the additional rate to be levied, the purpose for which it is to be levied, and the number of years during which such increased rate may be continued to be levied, and the time and place of holding the election. If no newspaper is printed therein, the notice shall be posted in a conspicuous place and published once a week for four consecutive weeks in a newspaper of general circulation in such taxing district.

The form of the ballots cast at such election shall be:

"For an additional levy of taxes for the purpose of..... ..... not exceeding ..... mills, for not to exceed ..... years, Yes."

"For an additional levy of taxes for the purpose of..... ..... not exceeding ..... mills, for not to exceed ..... years, No." [102 v. 272.]

Sec. 5649-5b. [Result.] If a majority of the electors voting thereon at such election vote in favor thereof, it shall be lawful to levy taxes within such taxing district at a rate not to exceed such increased rate for and during the period provided for in such resolution, but in no case shall the combined maximum rate for all taxes levied in any year in any county, city, village, school district or other taxing district, under the pro-

visions of this and the two preceding sections and sections 5649-1, 5649-2 and 5649-3 of the General Code as herein enacted, exceed fifteen mills.[1] [103 v. 57; 102 v. 273.]

(1) §§ 5649-2 to 5649-5b limit the rate of taxes that can be levied in any taxing district for any and all purposes. Any statutes existing at the time of the passage of these sections, in direct conflict therewith and not specifically repealed thereby, are repealed by implication. These sections furnish the basis of calculation for the issue of bonds in anticipation of income from taxes levied or to be levied. Rabe et al. v. The Board of Education et al., 88 O. S. 403.

The budget commissioners cannot be compelled to approve and certify, as part of the tax levy of a city, an amount sufficient to pay interest and sinking fund on bonds for the city's portion of the cost of a street improvement if the item sought to be approved, together with other local levies combined, exceeds the fifteen-mill limitation stipulated in Section 5649-5b, General Code. State ex rel. v. Bish, 104 O. S. 206.

A levy made against the taxable property of a township for the construction of a road improvement under §§ 6926 and 6928 is a tax and not an assessment, and is within the limitation provided in § 5649-5b. State ex rel. v. Moenter, 99 O. S. 110.

Sec. 5649-6. [Consolidated districts.] Whenever two or more taxing districts are consolidated by annexation or otherwise, the aggregate amount of taxes authorized under section two of this act, for such consolidated district shall not exceed the sum of the aggregate amounts which would have been authorized for all of said taxing districts separately. [101 v. 430.]

Sec. 5649-6a. [Taxing authorities permitted to remove interest and sinking fund levies from limitations on tax rates on majority vote of electors.] The commissioners of any county, the trustees of any township, the council or other legislative body of any municipal corporation, or the board of education of any school district having a bonded indebtedness on January 20, 1920, or having authority by a vote of the electors at an election held prior to said date, to issue such bonds, or having provided for the issuance of such bonds without a vote of the electors by ordinance or resolution adopted on or before said date, whether the effectiveness thereof was postponed until after said date by laws or charter provisions requiring publication or subjecting such

ordinance or resolution to a referendum, or not, may, at any regular or primary election held in the year 1920 or in any year thereafter during the life of any such bonds submit to the electors of such county, township, municipal corporation, or school district, in the manner provided by sections 5649-5 and 5649-5a of the General Code the proposition of exempting from the limitations of sections 5649-2, 5649-3a and 5649-5b of the General Code all subsequent levies for interest and sinking fund purposes on account of such bonds. In the resolution providing for such submission, the rate of taxes that would be required for such purposes in the next succeeding year on the basis of the duplicate made up in the year in which the resolution is adopted shall be set forth, together with the number of years during which the exemption would apply. The form of ballots cast at such election shall be:

"For exempting interest and sinking fund levies on account of outstanding bonds from all tax limitations 'Yes'.

"For exempting interest and sinking fund levies on account of outstanding bonds from all tax limitations 'No'." [108 v. 1199.]

Sec. 5649-6b. [Rate may run during life of bonds.] If a majority of the electors voting thereon at such election vote in favor thereof, it shall be lawful to levy taxes within such taxing district for such purposes during the remainder of the life of such bonds at such rate, annually, as may be necessary to pay the interest on such bonds and to provide a sinking fund for their retirement at maturity, irrespective of any of the limitations prescribed by the sections of the General Code mentioned in section 1 of this act. [108 v. 1199, 1200.]

Sec. 5649-6c. [Not applicable to current levies.] Nothing in this act shall apply to current levies in anticipation of which bonds have been issued; and such bonds shall not be considered as a part of the bonded indebtedness of any political subdivision for the purposes of this act. [108 v. 1199, 1200.]

Sec. 5649-6d. [What interest and sinking fund levies excluded.] All interest and sinking fund levies on account of bonds issued by any municipal corporation under authority of H. B. No. 712 of the 83rd general assembly passed January 22, 1920, entitled "to authorize the taxing authorities of municipal corporations to fund deficiencies in operating revenues for the year 1920, issue bonds and levy taxes for such purposes" shall be excluded from the operation of any and all limitations on tax rates imposed by any law now in force, anything in the provisions of said H. B. No. 712 or in such tax limitation laws to the contrary notwithstanding. [108 v. 1199, 1200.]

Sec. 5649-7. [Joint session of commissions to adjust tax rates; powers.] Whenever a taxing district is located in two or more counties, the budget commission of the counties in which such district is located shall meet in joint session at the call of the chairman of the commission of the county wherein the greatest amount in value of taxable property in such taxing district is located, and adjust the rates of taxation for the purpose of such district so as to enforce the limitation of the preceding section and to produce uniform rates throughout the districts. Provided, however, that the levies for such taxing district purposes shall not be reduced by such joint budget commission below what would be required to enforce such limitation in such part of such district in which the least reduction of such levies is necessary to enforce such limitation; and such levies so fixed shall be applied uniformly throughout such district, anything to the contrary in the provisions of the preceding sections of this chapter notwithstanding. [108 v. 1226.]

BONDS WHEN TAXES ENJOINED.

Sec. 5659-1. [Taxing districts authorized to issue bonds when 50 per cent of tax collections is enjoined or in litigation.] All municipal corporations, the board of education of any district and the commissioners of any county, through their proper officers, shall have power to borrow money and to issue bonds in payment therefor, to provide funds, to meet

the payment of current expenses and sinking fund indebtedness, when the collection of general taxes aggregating fifty per cent (50%) or more of the general tax duplicate, for any fiscal year, of their respective taxing districts, has been enjoined by any court or the collection of which is in litigation. The bonds so issued may be made to run for a term not to exceed ten years and shall not bear a greater rate of interest than six per cent. (6%), nor be sold for less than par with accrued interest. All moneys received from the sale of bonds, as herein provided, shall become a part of the general fund of the taxing district wherein bonds are so issued, and shall be used for only such purposes as the enjoined or otherwise litigated collection of taxes were appropriated for. [106 v. 11.]

Sec. 5659-2. [Application of money derived from bond issue.] All tax collections which are paid into the treasury of any taxing district, which have theretofore been enjoined or the collection of which has been in litigation, and for which deficit bonds have been issued, under authority of the preceding section, shall be turned over to the trustees of the sinking fund of said taxing district, to be applied toward the payment of the principal and interest of the deficit bonds so issued. [106 v. 11.]

INHERITANCE TAX DISTRIBUTION.[1]

Sec. 5348-11. [Division of tax between state and subdivision.] Fifty per centum of the gross amount of any taxes levied and paid under the provisions of this subdivision of this chapter[2] shall be for the use of the municipal corporation or township in which the tax originates, and shall be credited, one-half to the sinking fund, if any, of such municipal corporation or township, and the residue to the general revenue fund thereof; the remainder of such taxes, after deducting the fees and costs charged against the proceeds thereof under this subdivision of this chapter, shall be for the use of the state, and shall be paid into the state treasury to the credit of the general revenue fund therein. [108 v. 561, 575.]

(1) **Inheritance tax.**—For act providing for tax on inheritances and for distribution of such tax, see 108 O. L., p. 561; amended 108 O. L., p. 1192. The sections here carried relate to the distribution of a portion of such tax to municipalities.

Portion of the tax payable to city or village is payable to the city or village in which real estate is located, regardless of residence of the decedent. Belle Center v. Round Head Tp., 99 O. S. 50.

(2) The reference is to Chapter 2, Title I, Part II, and the subdivision referred to comprises §§ 5331 to 5348-14 G. C.

Sec. 5348-12. [Certification to auditor of other county portion of tax due; payment.] At each semi-annual settlement provided for under this subdivision of this chapter, the county auditor shall certify to the auditor of any other county in which may be located in whole or in part, any municipal corporation or township, to which any part of the taxes collected under this subdivision of this chapter, and not previously accounted for, is due, a statement of the amount of such taxes due to each municipal corporation or township in such county entitled to share in the distribution thereof. The amount respectively due upon such settlement to each such municipal corporation or township, and to each municipality and township in the county in which the taxes are collected shall be paid upon the warrant of the county auditor to the treasurer or other proper officer of such municipal corporation or township. The amount of any refunder chargeable against any such municipal corporation or township at the time of making such settlement, shall be adjusted in determining the amount due to such municipal corporation or township at such settlement; provided, however, that if the municipal corporation or township against which such refunder is chargeable is not entitled to share in the fund to be distributed at such settlement, the county auditor shall draw his warrant for the amount thereof in favor of the county treasurer payable from any undivided general taxes in the possession of such treasurer, unless such municipal corporation or township is located in another county, in which event the county auditor shall issue a certificate for such amount to the auditor of the proper county, who shall draw a like warrant therefor payable from any undivided general taxes in the possession of the treasurer of

such county; and in either case at the next semi-annual settlement of such undivided general taxes, the amount of such warrant shall be deducted from the distribution of taxes of such municipal corporation or township and charged against the proceeds of levies for the general revenue fund of such municipal corporation or township. [108 v. 561, 575.]

Sec. 5348-13. [Where tax deemed to originate on property within the state.] When the property passing is real estate or tangible personal property within this state the tax on the succession thereto shall be deemed to have originated in the municipal corporation or township in which such property is physically located. In case of real estate located in more than one municipal corporation or township the tax on the succession thereto, or to any interest therein, shall be apportioned between the municipal corporation or townships in which it is located in the proportions in which the tract is assessed for general property taxation in such townships or municipal corporations respectively. [108 v. 561, 576.]

Sec. 5348-14. [Where tax deemed to originate on property not within the state; where tax on property of non-resident deemed to have originated; how determined.] The tax on the succession to intangible property or tangible personal property not within this state from a resident of this state shall be deemed to have originated in the municipal corporation or township in which the decedent resided.

The municipal corporation or township in which the tax on the succession to the intangible property of a non-resident accruing under the provisions of this subdivision of this chapter, shall be deemed to have originated, shall be determined as follows:

1. In the case of shares of stock in a corporation organized or existing under the laws of this state, such taxes shall be deemed to have originated in the municipal corporation or township in which such corporation has its principal place of business in this state.

2. In case of bonds, notes, or other securities or assets, in the possession or in the control or custody of a corporation, institution or person in this state, such taxes shall be

deemed to have originated in the municipal corporation or township in which such corporation, institution or person had the same in possession, control or custody at the time of the succession.

3. In the case of moneys on deposit with any corporation, bank, or other institution, person or persons, such tax shall be deemed to have originated in the municipal corporation or township in which such corporation, bank or other institution had its principal place of business, or in which such person or persons resided at the time of such succession. [108 v. 561, 576.]

CIGARETTE TAX DISTRIBUTION.[1]

Sec. 5900. [Distribution of tax.] The revenues and fines collected under the provisions of this chapter and the penal laws relating to cigarettes, shall be distributed as follows, to-wit: In each county, three-fourths of the money paid into the county treasury on account of such business in a city, village or township therein, shall be placed to the credit of the general revenue fund of the state, and paid into the state treasury by the county treasury as provided in other cases. [108 v. 1222; 91 v. 313, § 10; 90 v. 235; Bates, 4364-40.]

(1) **Cigarette tax.**—See §§ 5894 *et seq.* G. C. See Op. Atty. Gen. (1912), p. 252.

Sec. 5901. [Same in city and township.] One-eighth of the money paid into the county treasury on account of such business in a municipal corporation shall be paid, upon the warrant of the county auditor, into the treasury of such corporation to the credit of the police fund, or in a corporation having no police fund, to the credit of the general revenue fund. The remaining one-eighth thereof shall be credited to the poor fund of such county; but in counties having no county infirmary, it shall be credited to the infirmary fund or poor fund of the township, village or city in which it was collected. In counties where such money is paid on acount of such business conducted in a township outside of a municipal corporation, the last named two-eighths shall be credited to the

infirmary fund or the poor fund of such township. [108 v. 1222; 91 v. 313, § 10; 90 v. 235; Bates, 4364-40.]

MOTOR VEHICLE TAX DISTRIBUTION.[1]

Sec. 6309. [Account with registration districts; payment into state treasury apportionment.] The secretary of state shall open an account with each municipal corporation and county district of registration in the state. All registration and duplicate registration fees he shall pay weekly into the state treasury with other receipts of his office. The tax collections he shall apportion between the state and the several districts of registration, and pay the state's portion thereof weekly into the state treasury with other receipts of his office. He shall deposit the proceeds of tax collections due districts of registration weekly with the treasurer of state, who shall be the custodian of such funds and shall disburse the same in the manner provided in section 6309-1 of the General Code. The treasurer of state shall give a separate and additional bond, in the sum of three hundred thousand dollars, the premium on which, if any, shall be paid by the secretary of state from his appropriation for defraying the expenses incident to carrying out and enforcing the provisions of this chapter and the sureties on which shall be approved by the auditor of state, conditioned for the faithful performance of his duties as such custodian. Such bond shall be deposited in the office of the secretary of state. [108 v. 1165; 108 v. 1078; 104 v. 6; 103 v. 763; 99 v. 545.]

(1) **Motor vehicle tax.**—For act providing for tax on operation of motor vehicles, see 108 O. L., p. 1078, as amended 108 O. L., p. 1165. The sections here carried relate to the distribution of a portion of such tax to municipalities.

Sec. 6309-1. [Deposit of funds due districts; credit of funds; monthly transmittal and statement of distribution.] The treasurer of state is hereby authorized to deposit any portion of the funds due districts of registration under this chapter not needed for immediate distribution, in the same manner and subject to all the provisions of the

law with respect to the deposit of active state funds by such treasurer; and all interest earned by such funds so deposited shall be collected by him and placed in the state treasury to the credit of the "state maintenance and repair fund." On the first business day of each month the secretary of state shall draw and transmit to the auditor of each county a voucher on the treasurer of state for the amount of the tax collection apportioned to districts of registration located wholly or in part in his county, accompanying the same with a statement showing the distribution of the amount represented thereby to each such district of registration. The county auditor shall certify the amount so transmitted into the county treasury to the credit of the undivided tax funds therein. [108 v. 1165; 108 v. 1078.]

Sec. 6309-2. [Distribution and application of revenue collected.] The revenue collected under the provisions of this chapter shall be distributed as follows:

(1) All fees collected under this chapter shall be paid into the state treasury to the credit of a fund to be designated as the "State maintenance and repair fund."

(2) Fifty per centum of all taxes collected under the provisions of this chapter shall be for the use of the municipal corporation or county which constitutes the district of registration as provided in this chapter. Such moneys shall be paid into the treasury of the proper county as provided herein and distributed as are other taxes. In the treasuries of such municipal corporations and counties, such moneys shall constitute a fund which shall be used for the maintenance and repair of public roads and highways and streets and for no other purpose,[1] and shall not be subject to transfer to any other fund. "Maintenance and repair" as used in this section includes all work done upon any public road or highway, or upon any street, in which the existing foundation thereof is used as the sub-surface of the improvement thereof, in whole or in substantial part.

(3) Fifty per centum of all taxes collected under the provisions of this chapter, shall be paid by the secretary of state

into the state treasury to the credit of the "State maintenance and repair fund."

The "state maintenance and repair fund" provided for herein shall be available for the use of the secretary of state in defraying the expenses incident to carrying out and enforcing the provisions of this chapter and for the use of the state highway commissioner in the manner provided by law. The general assembly shall make appropriations therefrom for such purpose. [108 v. 1078.]

(1) Proceeds of motor vehicle tax cannot be used for purchase of road repair equipment. See Op. Atty. Gen. (1920), p. 802.

V.

GAS, WATER AND ELECTRICITY.[1]

PUBLIC UTILITIES COMMISSION REGULATIONS.[1]

Sec. 499-8. [Valuation of property to determine justice of rates.] The commission, for the purpose of ascertaining the reasonableness and justice of rates and charges for the service rendered by public utilities or railroads of this state, or for any other purpose authorized by law may investigate and ascertain the value of the property of any public utility or railroad in this state, used or useful for the service and convenience of the public.[2] At the request of the council of any municipality the commission after hearing and determining that such a valuation is necessary may also investigate and ascertain the value of the property of any public utility used and useful for the service and convenience of the public where the whole or major portion of such utility is situated in such municipality. Every public utility or railroad shall furnish to the commission, its engineers, experts or other assistants from time to time and as the commission may require maps, profiles, contracts, reports of engineers and other documents, records and papers or copies of any or all of the same, in aid of any investigation and ascertainment of the value of its property, and shall grant to the commission or its agents free access to all of its premises and property and its accounts, records and memoranda whenever and wherever requested by any such duly authorized agent, and every public utility or railroad is hereby directed and required to co-operate with and aid the commission in the work of the valuation of its property in such further particulars and to such extent as the commission may require and direct. The commission shall have such power to make all rules and regulations, as to it may seem neces-

sary, to ascertain the value of each and every utility or railroad in the state. [106 v. 225; 103 v. 804.]

(1) **Public Utilities Commission.**—The railroad commission of Ohio was created by an act passed April 2, 1906 (98 O. L. 342). This act and other sections relating to railroads and telegraphs constituted Chapter 1, Division 2, Title 3, Part 1 of the General Code. Subsequently the name of the railroad commission was changed to the "Public Service Commission," and its powers and duties extended to public utilities generally (102 O. L. 549). Still later the name of the commission was changed to the "Public Utilities Commission," and its powers and jurisdiction further enlarged (103 O. L. 804).

Chapter 1, above referred to, now embraces §§ 487 to 614-84 G. C.

(2) **Valuation by Commission.**—As to methods of making valuation, see Cincinnati v. Pub. Util. Commission, 96 O. S. 554.

§§ 499-9 to 499-13 prescribe the procedure of the commission in making such valuation.

Sec. 499-15. [Hearing to ascertain value of property; notice.] For the purpose of ascertaining the value of the property of every public utility or railroad in this state, including municipally owned or operated utilities, the commission may cause a hearing or hearings to be held at such time or times and place or places as the commission may designate. Before any hearing is had, the commission shall give the public utility or railroad affected thereby, or if the whole or the major portion of said utility or railroad is situated in any municipality, then to the mayor of such municipality, at least thirty days' written notice specifying the time and place of hearing, and such notice shall be sufficient to authorize the commission to inquire into the matters designated in this section, but this provision shall not prevent the commission from making any preliminary examination or investigation into the matters herein referred to, or from inquiring into such matters in any other investigation or hearing. All public utilities or railroads affected, and any municipality in which the whole or the major portion of said utility or railroad is located, shall be entitled to be heard and to introduce evidence at such hearing or hearings. The commission is empowered to resort to any other source of information available. The evidence introduced at such

hearing shall be reduced to writing and certified under the seal of the commission. [103 v. 804.]

Sec. 499-16. [Filing finding of facts; review.] The commission shall make and file its findings of fact in writing upon all matters concerning which evidence shall have been introduced before it which in its judgment have bearing on the value of the property of the public utility or railroad affected. Such findings shall be subject to review by the supreme court of this state in the same manner and within the same time as other orders and decisions of the commission. [103 v. 804.]

Sec. 499-17. [Admissibility in evidence of finding.] The findings of the commission so made and filed, when properly certified under the seal of the commission, shall be admissible in evidence in any action, proceeding or hearing before the commission or any court, in which the commission, the state or any officer, department or institution thereof, or any county, city, municipality or other body politic and the public utility railroad affected may be interested, whether arising under the provision of this chapter or otherwise, and such findings, when so introduced, shall be evidence of the facts therein stated as of the date therein stated under conditions then existing. [103 v. 804.]

Sec. 614-44. [Power of municipality to fix rate, price, charge, etc; written complaint; hearing.][1] Any municipal corporation in which any public utility is established may, by ordinance, at any time within one year before the expiration of any contract entered into under the provisions of sections 3644, 3982 and 3983 of the General Code between the municipality and such public utility with request (respect) to the rate, price, charge, toll, or rental to be made, charged, demanded, collected, or exacted, for any commodity, utility or service by such public utility, or at any other time authorized by law proceed to fix the price, rate, charge, toll or rental that such public utility may charge, demand, exact or collect therefor for an ensuing period as provided in sections 3644, 3982 and 3983 of the General Code. Thereupon, the commission, upon

complaint in writing, of such public utilities or upon complaint of one per centum of the electors of such municipal corporation, which complaints shall be filed within sixty days after the passage of such ordinance, shall give thirty days' notice of the filing and pendency of such complaint to the public utility and the mayor of such municipality, of the time and place of the hearing thereof, and which shall plainly state the matters and things complained of.

Provided, however, if the council of any municipality fails by ordinance to regulate the rates to be charged by any public utility engaged in business of supplying water for public or private consumption within sixty days after the expiration of any lawful rate, such water company or one per centum of qualified electors of the municipality may petition the public utilities commission to fix the just and reasonable rates for the furnishing of such services, and the public utilities commission may thereupon proceed to fix the just and reasonable rates, tolls and charges for such services which may be charged for a period of two years from the date of the filing of such petition and thereafter until changed, altered or modified by the council of such municipality or further order of the commission upon like application.[2]

If any public utility shall have accepted any rate, price, charge, toll, or rental fixed by ordinance of such municipality, the same shall become operative, unless within sixty days after such acceptance there shall have been filed with the commission, a complaint signed by not less than three per centum of the qualified electors of such municipality. Upon such filing, the commission shall forthwith give notice of the filing and pendency of such complaint to the mayor of such municipality and fix a time and place for the hearing thereof. The commission shall, at such time and place, proceed to hear such complaint, and may adjourn the hearing thereof from day to day.

The filing of a complaint by a public utility, as herein provided, shall be taken and held to be the consent of such public utility to continue to furnish its product or service, and devote its property engaged therein to such public use

during the term so fixed by ordinance or by the provisions of this act. Parties thereto shall be entitled to be heard, represented by counsel, and to have process to force the attendance of witnesses. [109 v. 217; 108 v. 428; 102 v. 561.]

(1) **Public utilities commission.**—This section and the several succeeding sections to 614-73 inc., are part of Chapter 1, Division II, Title III, Part I of the General Code, relating originally to the railroad commission, later the public service commission (102 O. L. 549), and now the public utilities commission (103 O. L. 804 *et seq.*).

Other provisions—Waterworks.—Municipal power to establish waterworks and provisions governing them generally are found in Part I. See §§ 3619, 3955 to 3981, 4326, 4356 and 4357.

Municipal power to regulate charges by private companies, see § 3982; and to contract with private company, see § 3809, in Part I.

For Cincinnati waterworks act, providing for commissioners to construct waterworks, see §§ 14793 to 14815 Appendix, General Code. For cases relating to the validity and construction of the act, see Alter v. Cincinnati, 56 O. S. 47; Ampt v. Cincinnati, 15 Dec. 237; 2 N. P. (N. S.) 489; State v. Hermann, 63 O. S. 440; Coppin v. Hermann, 6 N. P. 452; 7 N. P. 6; New York & B. Co. v. Hermann, 27 C. C. 694.

For special act as to management of electric light plant owned in connection with waterworks in certain villages, see § 14777 Appendix, General Code.

Gas and electricity.—Municipal power to erect, maintain and operate lighting and heating plants and the management thereof are given in sections contained in Part I. See §§ 3618, 3990, 3991, 3992, 3995 to 4000, 4326, 4356 and 4357.

Control of municipality over private corporations for furnishing gas and electric light is provided for in sections contained in Part I. See §§ 3982 to 3989 and 3993.

See also Gas Co. v. Pub. Util. Com., 103 O. S. 168.

Contracts of municipality with private corporations for lighting streets, etc., are provided for in §§ 3809 and 3994, *ante*, in Part I.

For special act relating to subways and conduits for electric wires in Cincinnati, see §§ 14817 and 14819 Appendix, General Code.

For special act extending provisions of former chapter of Revised Statutes relating to gas and water companies to company supplying natural gas in cities of third grade, second class, see § 14776 Appendix, General Code.

Appeal from gas rate.—As to appeal by company from rate fixed by ordinance see Lighting Co. v. Pub. Util. Com., 108 O. S. 207.

(2) **Utilities commission not authorized to fix rate.**—The public utilities commission is not authorized by statute to summarily fix a rate to be charged consumers of natural gas subsequent to the expiration of a contract between the public utility and the municipality served during the period within which the operation of a new ordinance prescrib-

ing such rate is suspended by reason of the filing of a referendum petition. Cincinnati v. Pub. Util. Com., 96 O. S. 270.

In the absence of an effective ordinance prescribing rates for service by a public utility, such rates should be established in accordance with the provisions of Section 614-16 et seq., General Code. *Ib.*

The public utilities act has no application to the provisions of a franchise ordinance which fixes rates for a definite period. Columbus v. Telephone Co., 28 O. C. A. 102.

Where, by virtue of § 4, Art. XVIII, a contract is made between a municipality and a utility company, the terms thereof are not subject to review by the public utilities commission. Link v. Pub. Util. Com., 102 O. S. 336.

By virtue of the provisions of §§ 614-44 and 614-47 municipalities may fix by ordinance the rates which public utility companies may charge private consumers for electric current furnished for heat, light and power. In the absence of an ordinance effective for that purpose such contracts are subject to the regulation of the public utilities commission. Machine Co. v. Public Service Co. 32 O. C. A. 525; 13 Oh. App. 271.

In order that the public utilities commission may proceed on a complaint filed by a public utility under the provisions of this and following sections, to fix rates to be paid by the utility for its product, or service in a municipality, it is necessary that there should be an ordinance in existence passed by the municipality fixing the rate or charge complained of and that the commission after the hearing shall find that the rate "so fixed by ordinance is or will be unjust or unreasonable or insufficient to yield reasonable compensation for the service or product." Oak Harbor v. Pub. Util. Com., 99 O. S. 275.

Where the council has passed an ordinance regulating the price which may be charged for electric current to private consumers, and the company has not accepted the ordinance, and has not appealed to the commission, the commission is without authority to approve a schedule of rates filed with it by the company. Washington v. Pub. Util. Com., 99 O. S. 70.

Readiness to serve.—Where municipality and gas company have entered into contract fixing rate, public utilities commission is without power to authorize an additional charge for "readiness to serve." Lima v. Commission, 100 O. S. 416.

Where a minimum charge for service to be rendered is made or prohibited by the ordinance under which a public utility is operated, the utility is not authorized to make a readiness to serve charge to be paid in addition to the just and reasonable rate fixed for the rendering of the service. Gas Co. v. Pub. Util. Com., 102 O. S. 678.

See also Link v. Pub. Util. Com., 102 O. S. 336; State ex rel. v. Court of Appeals, 104 O. S. 96.

Sec. 614-44a. [Hearing of complaints may be held in community in which cause of action arose.] In all cases arising

under the preceding section and other sections providing for the hearing of complaints or protests against rates, such hearings, when feasible and proper, may be held in the community in which the cause of action arose. [110 v. 451.]

Sec. 614-45. [Rate will not be suspended or vacated, etc., without bond.] [§ 47.] No such complaint or appeal to the commission shall suspend, vacate, or set aside the rate, price, charge, toll or rental fixed by ordinance unless such public utility shall elect to charge the rate, price, charge, toll or rental in force and effect immediately prior to the taking effect of the regulation complained of and appealed from, and shall give an undertaking in such amount as the commission shall determine. The undertaking shall be filed with the commission and shall be payable to the state of Ohio for the use and benefit of the consumers affected by the regulation in question. The condition of the undertaking shall be that such public utility shall refund to each of its consumers, public or private, the amount collected by it in excess of the amount which shall finally be determined it was authorized to collect from such consumers. The commission shall make all necessary orders in respect to the form of such undertaking and the manner of making such refunders. [102 v. 549, 562.]

Sec. 614-46. [Finding as to rate.] If the commission, after such hearing, shall be of the opinion that the rate, price, charge, toll or rental, so fixed by ordinance is or will be unjust or unreasonable, or insufficient to yield reasonable compensation for the service, the commission shall, with due regard to the value of all the property of the public utility actually used and useful for the convenience of the public, excluding therefrom the value of any franchise or right to own, operate or enjoy the same in excess of the amount (exclusive of any tax or annual charge) actually paid to any political subdivision of the state or county as a consideration or the grant of such franchise or right; and exclusive of any value added thereto by reason of a monopoly or merger and to the necessity of making reservations from the income for surplus, depreciation and contingencies, and such other matters as may be proper, according to the facts in each case, fix and determine the just and reasonable rate,'

price, charge, toll or rental to be charged, demanded, exacted or collected by such public utility, during the period so fixed by ordinance, which shall not be less than two years, and order the same substituted for the rate, price, charge, toll or rental so fixed by ordinance or the commission may find and declare that the rate, price, charge, toll or rental, so fixed by ordinance, is just and reasonable, and ratify and confirm the same.

[When effective.] No such rate, price, charge, toll or rental so determined by the commission shall become effective or valid until after the commission shall have ascertained and determined the valuation upon which such price, charge, toll or rental is based as provided in this act. And such valuation so determined shall be, at all times, open to public inspection. Thereupon the commission shall make inquiry and investigation with respect to the ability of such public utility to furnish its product during such period, if it be found that it is able so to do, the commission shall order the public utility in question to continue to furnish the same for the period and at the rate, price, charge, toll or rental so fixed and determined, and such public utility shall continue to furnish its product as provided in such order. [102 v. 549, 562.]

(1) When the commission, on appeal from the rate fixed by council, has found a rate to be unreasonable, it is the duty of the commission to proceed to fix and determine a just and reasonable rate. Cleveland v. Pub. Util. Comm., 100 O. S. 121.

Sec. 614-47. [When act not applicable.] [§ 49.] This act shall not apply to any rate, fare or regulation now or hereafter prescribed by any municipal corporation granting a right, permission, authority or franchise, to use its streets, alleys, avenues or public places, for street railway or street railroad purposes, or to any prices so fixed under sections 3644, 3982[1] and 3983 of the General Code, except as provided in sections 46, 47 and 48 of this act. [102 v. 549, 563.]

(1) Where a rate has been fixed pursuant to Sec. 3982 *et seq.*, and accepted by the utility, such action constitutes a contract which is specifically exempted from the operation of the statutes relative to the powers of the public utility commission. Power Co. v. Steubenville, 99 O. S. 421.

Sec. 614-51. [Power to require additions and extensions.] The council of any municipality shall have the power upon filing of an application therefor by any person, firm or corporation, to require of any public utility, by ordinance or otherwise, such additions or extensions to its distributing plant as shall be deemed reasonable and necessary in the interest of the public, and subject to the provisions of section 9105 of the General Code, to designate the location and nature of all such additions and extensions, the time within which they must be completed, and all conditions under which they must be constructed and operated. Such requirements and orders of the council shall be subject to review by the commission, as provided in sections 46 and 48 [G. C., §§ 614-44 and 614-46] hereof. The council and commission in determining the practicability of such additions and extensions, shall take into consideration the supply of the product furnished by such public utility available, and the returns upon the cost and expense of constructing said extension and the amount of revenue to be derived therefrom, as well as the earning power of the public utility as a whole.[1] [102 v. 549, 564.]

(1) **Application to telephone companies.**—The provisions of the public service law apply to telephone companies, whether such companies are organized for profit or not. Mutual Telephone Co. v. Telephone Co., 92 O. S. 336.

Street Railway Extensions.—Under the provisions of this section the public utilities commission may determine the practicability of additions and extensions of street railway lines required by a city ordinance. In reaching such determination the commission may consider the physical conditions of the proposed route as well as the necessary plan of operation of cars thereover. If upon such hearing the commission finds that operation of cars over the proposed route would entail unusual dangers and jeopardize the lives of passengers it is authorized to relieve the street railway from the obligations sought to be imposed by the ordinance complained of. The Supreme Court will not disturb the commission's findings unless the record shows them to be unreasonable or unlawful. Cincinnati v. Commission, 91 O. S. 331.

Sec. 614-52. [Company not permitted to exercise right of franchise where another is giving adequate service.][1] No telephone company shall exercise any permit, right, license

or franchise that may have been heretofore granted but not actually exercised or that may hereafter be granted to own or operate a plant for the furnishing of any telephone service, thereunder in any municipality or locality, where there is in operation a telephone company furnishing adequate service, unless such telephone company first secures from the commission a certificate after public hearing of all parties interested that the exercising of such license, permit, right or franchise is proper and necessary for the public convenience. [102 v. 549, 564.]

(1) **Validity.**—This section held constitutional. Telephone Co. v. Telephone Co., 102 O. S. 524.

This section does not limit or abridge the right or power of the municipality to contract for product or service under § 4, Art. XVIII, of the constitution. Telephone Co. v. Telephone Co., 102 O. S. 524.

Sec. 614-73. [Limitation.] [§ 76.] No franchise, permit, license or right to own, operate, manage or control any public utility, herein defined as an electric light company, gas company, water works company or heating and cooling company, shall be hereafter granted or transferred to any corporation not duly incorporated under the laws of Ohio. [102 v. 549, 572.]

ELECTRIC LIGHT COMPANIES.

Sec. 9193. [Municipal control of electricity; exception.] In order to subject such companies[1] to municipal control alone, no person or company shall place, string, construct or maintain a line, wire, fixture or appliance of any kind to conduct electricity for lighting, heating or power purposes through a street, alley, lane, square, place or land of a city or village without the consent of such municipality. This inhibition also extends to all levels above or below the surface of such public ways, grounds or places, as well as along their surfaces, but not to rights heretofore received through and exercised under proceedings of a probate court.[2] [101 v. 14; R. S. Sec. 3471a; 92 v. 204; 84 v. 7.]

(1) **Electric light companies, etc.**—The reference is to companies organized for the purpose of supplying electric light and power or automatic package carriers, as provided for in § 9192 G. C.

Consent of council necessary.—Electric wires, or conduits for carrying such wires, can not be placed in the streets, alleys or public places of a municipality, for the purpose of distributing an electric current for commercial purposes, relying upon the consent of the owners of abutting property without obtaining the consent of council. Cincinnati v. Light Co., 21 C. C. (N. S.), 260; 4 Oh. App. 177.

(2) **Provision prospective.**—Provision of § 9193, prohibiting the placing of wires through a street for conducting electricity, has a prospective operation and does not affect wires already properly placed in the street. Henry v. Cincinnati, 25 C. C. 178; 1 C. C. (N. S.) 289.

A municipality will be enjoined from removing a wire already placed.—*Ib.*

But where a company already occupying the streets with its poles and wires removes and dismantles a portion of the same and renders itself wholly unable to furnish any electricity whatever for the purpose of public lighting, it can not repossess itself of its rights and replace its equipment without the consent of the municipality. Lighting Co. v. Upper Sandusky, 93 O. S. 428.

Scope of prohibition.—As to whether prohibition extends to case of wires a great distance above or below surface of ground, see Henry v. Cincinnati, 1 C. C. (N. S.) 289; 25 C. C. 178; and Butler v. Cincinnati, 2 C. C. (N. S.) 376.

The word "through" in the section was held not to apply to wires strung across the street. Henry v. Cincinnati, 1 C. C. (N. S.) 289; 25 C. C. 178, *contra;* Cincinnati v. Light Co., 21 C. C. (N. S.) 260; 4 Oh. App. 177.

Sec. 9194. [Any penalty cumulative.] Any penalty provided by law for enforcing such inhibition shall be cumulative to other means open to the municipality by way of injunction or otherwise, and not exclusive.[1] [R. S. Sec. 3471a; 92 v. 204; 84 v. 7.]

(1) **Penalty** is provided in § 12644. See that section under STREETS AND PUBLIC GROUNDS.

Sec. 9195. [Powers of electric light and power companies.] A company organized for the purpose of supplying electricity for power purposes, and for lighting the streets and public and private buildings of a city or village, may manufacture, sell and furnish the electric light and power required therein for such or other purposes, and with the consent of the municipality, under such reasonable regulations as it prescribes,[1] also construct lines for conducting electricity for power and light purposes through the streets, alleys, lanes, lands, squares and public places of such city or village, by the erection of the

necessary fixtures, including posts, piers and abutments necessary for the wires. All wires so erected and operated shall be covered with a waterproof insulation, and the poles, piers, abutments and wires so located and arranged as not to interfere with the successful operation of existing telegraph and telephone wires. [83 v. 143 § 1; Bates, 3471-3.]

(1) **Scope of regulations.**—See Toledo, etc., Co. v. Western, etc., Co., 10 C. C. 531. Power to require that poles already erected may be used for wires of another company, *Ib.*; Brush Electric Light Co. v. Jones Bros. Electric Co., 5 C. C. 340.

Exclusive use cannot be given to one company. Morrow, etc., Co. v. Mt. Gilead, 8 N. P. 669.

Sec. 9196. [Prior contracts declared valid.] When contracts for electric lighting have been heretofore entered into in which there is an omission or error from want of conformity to the statutes of this state but which contracts have been made as herein required, and when by reason of the expenditure of money or labor in the performance of such contracts or on any other account, it is just and equitable to fully execute them, in such cases the courts are authorized to uphold such contracts as binding on all parties to them and to carry them into effect as though no such defect, omission or error existed, any law of this state to the contrary notwithstanding. [92 v. 291 § 3; Bates, 3471-5.]

GAS AND WATER COMPANIES.

Sec. 9320. [Powers.] A company organized for the purpose of supplying gas for lighting the streets and public and private buildings of a city, village, or township, may manufacture, sell, and furnish the gas required therein for such or other purposes,[1] and a company organized for the purpose of supplying the inhabitants of a city, village or township with water may sell and furnish any quantity of water required therein for such or other purposes.[2] Such companies may lay conductors for conducting gas or water through the streets, lands, alleys, and squares in such city or village with the consent of the municipal authorities of the city or village, or with the consent of the trustees of the township, under such

reasonable regulations as they prescribe.[3] [R. S. Sec. 3550; 64 v. 255 § 53.]

(1) **Powers of gas company.**—Company is not authorized to have exclusive right to lay its conductors in the streets, by virtue of this section. State v. Hamilton, 47 O. S. 52; Columbus v. Gas Co., 76 O. S. 309; and ordinance granting it exclusive use is void. Hamilton v. Gas Co., 8 N. P. 319. See also State *ex rel.* v. Cin. Gas Light and Coke Co., 18 O. S. 262. Gas company organized under special charter is subject to the general laws of the state, unless clearly exempted by the terms of its charter. State *ex rel.* v. Gas Co., 34 O. S. 572.

Company organized to furnish illuminating gas, under earlier laws, cannot substitute natural gas. Findlay Gas Light Co. v. Findlay, 2 C. C. 237.

Company organized to furnish gas for lighting purposes, may amend its charter so as to allow it to furnish both gas and electric lighting. Picard v. Hughey, 58 O. S. 577.

Power to borrow money and give mortgage, see Hays v. Galion Gas Co., 29 O. S. 330; Burt v. Rattle, 31 O. S. 116.

(2) **Powers of water company.**—Such company has no right to appropriate property under this section. State v. Salem Water Co., 5 C. C. 58.

Regulation of price of water by council, see § 3982, in Part I.

(3) **Conditions which may be imposed.**—Without consent of the municipality no gas company can lawfully enter upon and occupy the streets for the purposes of its business; and a municipality, in granting such consent, may require the gas company to pay annually a reasonable sum to compensate for the municipality's supervision of the work during and after its installation. Columbus v. Gas Co., 76 O. S. 309.

A clause in an ordinance that such payments are "for the benefit of the gas company and light fund" does not render the ordinance invalid as a means to raise general revenue. *Ib.*

That the municipality subsequently gave permission to other companies to lay pipes in the streets, etc., does not constitute a defense to an action for such payments. *Ib.*

Damages.—As to liability of company in action by city for re-imbursement for damages, see Gas. Co. v. Elyria, 18 C. C. (N. S.) 156; (aff'd without opinion, 85 O. S. 72).

Contract can not be abrogated.—A franchise to a gas company to lay its pipes in the streets of a municipality, is a contract between the gas company and the municipality, which can not be abrogated as to one of the streets included therein by vacation of such street and the reversion of the title therein to the abutting owners; but the right to maintain said pipe continues so long as the right remains in the company to supply gas to the municipality and its inhabitants. Gas Co. v. Railway, 14 N. P. (N. S.) 171.

Mandatory injunction to compel gas company to construct service pipes from its mains as provided

by its franchise. See Cincinnati v. Gas Co., 14 N. P. (N. S.) 513.

City not estopped from obtaining such relief because it has formerly paid for such service pipes. *Ib.*

See further notes to § 3982, *ante*, in Part I.

Sec. 9321. [Gas or electric companies may manufacture and supply both electricity and gas.] Every corporation organized under the laws of this state to manufacture and supply artificial gas for light, heat and power purposes or for any of such purposes, and every corporation organized under the laws of this state to manufacture and supply electricity for light, heat and power purposes, or for any of such purposes, in addition to all powers heretofore conferred, but subject to statutory provisions in force relating to the granting of franchises by municipalities for either of such purposes at the time of granting the franchise, may manufacture and supply electricity and artificial gas, respectively, for light, heat and power purposes, and to make all contracts, and do all things necessary and convenient for furnishing the same for both public and private objects. [R. S. Sec. 3550a; 98 v. 150; 97 v. 258; 90 v. 291.]

Sec. 9322. [Consent of municipality.] Nothing herein confers any right to engage in such business or to erect or maintain structures in a street, alley or public place without the consent of the municipality in which it is to be constructed. [R. S. Sec. 3550a; 98 v. 150; 97 v. 258; 90 v. 291.]

Sec. 9323. [Contract with municipality.] Ordinances and resolutions heretofore passed by any municipal corporation, and contracts heretofore made by and between any municipality and company organized to manufacture and supply gas, which were and still are intended to provide for supplying electricity for a municipal purpose and as to which the time of performance has not begun to run, or has not expired, shall be as valid and binding as if this statute had been in force when such ordinance or resolution was passed or contract made. [R. S. Sec. 3550a; 98 v. 150; 97 v. 258; 90 v. 291.]

Sec. 9324. [Contracts with municipality for light and water.] The municipal authority of any city or village or the trus-

tees of any township, in which a gas or water company is organized, may contract with such company for lighting or supplying with water the streets, lands, lanes, squares and public places in such city, village, or township.[1] [R. S. Sec. 3551; 98 v. 150; 71 v. 93.]

(1) **Contract with municipality.**—See § 3809, in Part I, where such contracts are authorized to be made, and are exempted from the requirement of a certificate of money in the treasury before expenditure is made. See also § 3994, where power is given to contract with gas or electric companies.

Restrictions in former law.—Before the amendment of 1906, this section provided that "no such company shall go into operation in any city or village where a corporation has been already formed, or is hereafter formed, until after the question of authorizing such operation has been submitted to the qualified voters of such city or village, and authorized by ordinance." For cases relating to the question as to when a vote was required under such section, see Hunter v. Austin, 9 C. C. 583; Circleville L. & P. Co. v. Buckeye Gas Co., 69 O. S. 259; Gas Co. v. Lima, 4 C. C. 22.

Liability of company.—Water company is not liable to inhabitant, because of contract with municipality, for injury due to failure to supply water for fire protection. Blunk v. Dennison Co., 71 O. S. 250.

Power of company, as to appropriation of property, denied. State *ex rel.* v. Water Co., 5 C. C. 58.

Section cited, see State *ex rel.* Hamilton, 47 O. S. 52, 69.

Sec. 9325. [Gas company may extend mains beyond city.] A gas company in a city or village may extend[1] its pipes used for conveying gas to the various localities and inhabitants of the city or village, to any place in the vicinity thereof, outside the corporate limits; but the right of way must be obtained from the corporate or other authorities, or person having control of the places to be affected by such extension. [R. S. Sec. 3552; 56 v. 92 § 1; S. & C. 351.]

(1) **When extension may be granted.**—As to what would amount to establishment of company, so that it might be granted an extension, see Cincinnati Gas Co. v. Avondale, 43 O. S. 257.

HYDRAULIC COMPANIES.

Sec. 10128. [Construction of dams, pipe lines, etc.] Any company or companies organized for the purpose of erecting or building dams across rivers or streams in this state to raise and maintain a head of water, or for constructing and main-

taining canals, locks, and race-ways to regulate and carry such head of water to any plant or power house where electricity is to be generated, or for erecting and maintaining a line or lines of poles whereon to attach or string wires or cables to carry and transmit electricity, or for transporting natural gas, petroleum, water or electricity, through tubing, pipes or conduits, or by means of wires, cables or conduits, or for storing, transporting or transmitting water, natural gas or petroleum, or for generating and transmitting electricity, may enter upon any private land for the purpose of examining or surveying a line or lines for its tubing, pipes, conduits, poles and wires, or for a reservoir, dams, canals, race-ways, plant or power house, and for ascertaining the number of acres overflowed by reason of the construction of such dam or dams, and may appropriate so much thereof as is deemed necessary for the laying down or building of such tubing, conduits, pipes, dams, poles, wires, reservoir, plant and power house, as well as the land overflowed, and for the erection of tanks and reservoirs for the storage of water for transportation and the erection of stations along such line or lines, and the erection of such building as may be necessary for the purpose aforesaid. [R. S. Sec. 3878; 97 v. 300; 94 v. 382; 85 v. 115; 72 v. 151; 69 v. 194.]

Sec. 10129. [How right acquired.] Such appropriation shall be made in accordance with the law providing for compensation to the owners of private property appropriated to the use of corporations. So far as the rights of the public therein are concerned, the county commissioners as to county and state roads, the township trustees as to township roads, and the councils of municipal corporations as to streets and alleys in their respective jurisdictions, subject to such regulation and restrictions,[1] as they prescribe, may grant to such companies, the right to lay such tubing, pipes, conduits, poles and wires therein. But the right to appropriate for any of the purposes above specified, shall not include or extend to the erection of any tank, station, reservoir, or building, or lands therefor, or to more than one continuous pipe, conduit or tubing or land therefor, in or through a municipal corporation, unless the council first consents thereto. [R. S. Sec. 3878; 97 v. 300; 94 v. 382; 85 v. 115; 72 v. 151; 69 v. 194.]

(1) **Scope of regulations.**— Where a statute grants the power to a municipality to grant a franchise, either upon "terms and conditions" or "regulations and restrictions" that it may prescribe, large latitude must be allowed for the discretion of the municipality and its officers in the provisions made in such franchise contract; and unless expressly limited by the statute authorizing the grant, the municipality may exercise its discretion in any reasonable manner compatible with the best service and the greatest advantage, pecuniary or otherwise, to the municipality and its inhabitants. Gas Co. v. Columbus, 96 O. S. 531; affirming Columbus v. Gas Co., 13 N. P. (N. S.) 394. See note to Sec. 3714, Part I.

Sec. 10130. [Right to appropriate public way, how acquired.] Nothing in the two preceding sections shall be construed to confer power to appropriate any portion of any street, alley, highway or other public way or land, or to confer any right in any street, alley, highway or other public way or land situated within any municipality, without its consent. [R. S. Sec. 3878; 97 v. 300; 94 v. 382; 85 v. 115; 72 v. 151; 69 v. 194.]

Sec. 10131. [Reservoirs in certain places prohibited.] No reservoirs for the storage or transportation of water shall be constructed within the corporate limits of any municipal corporation or any public park, and all excavations, except reservoirs for storage and transportation of water, shall be well filled by such company, and so kept by it. [R. S. Sec. 3878; 97 v. 300; 94 v. 382; 85 v. 115; 72 v. 151; 69 v. 194.]

VI.

MUNICIPAL UNIVERSITIES.[1]

Sec. 7902. [Municipal university; powers of directors; deeds; by-laws.] As to all matters not herein or otherwise provided by law, the board of directors of a municipal university, college or institution, shall have all the authority, power and control vested in or belonging to such municipal corporation as to the sale, lease, management and control of the estate, property and funds, given, transferred, covenanted or pledged to such corporation for the trusts and purposes relating thereto and the government, conduct and control of such university, college or institution. It may, unless prohibited by the terms of the trust under which such estate or property is held, sell, or lease perpetually or for any less period and with or without a privilege of purchase at a fixed price, any part or the whole of any such estate or property, and on sale, or on an election to purchase under a lease containing a privilege to purchase as aforesaid, convey or transfer such estate or property, and if heretofore any lease with a privilege of purchase at a fixed price shall have been executed and delivered by said board, or any board preceding it in office, for any part or the whole of any such estate or property, said board shall on an election to purchase under such lease convey such premises. All instruments affecting real estate shall be executed on behalf of the board by such of its officers as it shall designate by resolution, authorizing the execution of such instrument and all deeds so executed shall convey all the title of said board and of such municipal corporation in and to the real estate so conveyed; it may appoint a clerk and all agents proper and necessary for the care and administration of the trust property and the collection of the income, rents and profits thereof; appoint the president, secretaries, professors, tutors, instructors, agents and servants, necessary and proper for such university, college or institution and fix their compensation;

provide all the necessary buildings, books, apparatus, means and appliances, and pass such by-laws, rules and regulations concerning the president, secretaries, professors, tutors, instructors, agents and servants, and the admission, government and tuition of students as it deems wise and proper, and by suitable by-laws, delegate and commit the admission, government, management and control of the students, courses of studies, discipline and other internal affairs of such university, college or institution to a faculty which the board appoints from among the professors.[2] [R. S. Sec. 4099; 101 v. 237; 97 v. 542; 67 v. 86.]

(1) **Directors** of municipal universities are provided for in §§ 4001-4003. See these sections and notes in Part I.

(2) **Discretion of board** in management of affairs of institution, cannot be interfered with by the courts, on the ground that an unwise policy is being pursued. State *ex rel.* v. Schauss, 3 C. C. (N. S.) 388.

Sec. 7903. [City solicitor to act as attorney.] When requested so to do by resolution of such board, the solicitor of such municipal corporation shall prosecute and defend, as the case may be, for and in behalf of the corporation, all complaints, suits and controversies in which the corporation or such board is a party, and which relate to any property, funds, trusts, rights, claims, estate or affairs under the control or direction of the board, or which, in any manner, relate to the conduct or government of such university, college or institution. [R. S. Sec. 4099; 97 v. 542; 67 v. 86 § 3.]

Sec. 7904. [When board may confer degrees.] The board of directors of such university, college or institution, upon the recommendation of the faculty thereof, may confer such degrees and honors as are customary in universities and colleges in the United States, and such others as with reference to the course of studies and attainments of the graduates in special departments it deems proper. [R. S. Sec. 4102; 97 v. 544; 67 v. 86 § 4.]

Sec. 7905. [University defined.] A university supported in whole or in part by municipal taxation, is defined as an assem-

blage of colleges united, under one organization or management, affording instruction in the arts, sciences and the learned professions, and conferring degrees. [R. S. Sec. 4102; 97 v. 544; 67 v. 86 § 4.]

Sec. 7906. [Council may provide site for municipal university.] The council of any such municipal corporation may set apart, or appropriate as a site for the buildings and grounds of such a university, college or institution, public grounds of the city not especially appropriated or dedicated by ordinance to any other use, any other law to the contrary notwithstanding; and the board of education of such a municipal corporation also, for a like purpose may set apart, convey or lease for a term of years, any grounds or building owned or controlled by such board. [R. S. Sec. 4103; 97 v. 544; 89 v. 251; 82 v. 121; 67 v. 86 § 5.]

Sec. 7907. [How such grant changed.] Any grant for the use of such grounds, or buildings heretofore or hereafter made by any council or board of education, may be modified, changed or extended as to the time when it shall take effect and be in force, or otherwise, by agreement between such council, or board of education, and the board of directors of such university, college or institution. Such council shall be taken and held to be the representative of such municipal corporation vested with the title, right of possession and entire control of such property for the purposes of a new grant. [R. S. Sec. 4103; 97 v. 544; 89 v. 251; 82 v. 121; 67 v. 86 § 6.]

Sec. 7908. [Tax levies.] The council annually may assess and levy taxes on all the taxable property of such municipal corporation to the amount of five-tenths of one mill on the dollar valuation thereof, less the amount necessary to be levied to pay the interest and sinking fund on all bonds issued for the university subsequent to June 1, 1910, to be applied by such board to the support of such university, college or institution and also levy and assess annually five one-hundredths of one mill on the dollar valuation thereof, for the establishment and maintenance of an astronomical observatory, or for other scientific purposes, to be deter-

mined by the board of directors and to be used in connection with such university, college or institution, the proceeds of which shall be applied by the board of directors for such purposes exclusively. But such taxes shall only be levied and assessed when the chief work of such university, college or institution is the maintenance of courses of instruction, in advance of, or supplementary to, the instruction authorized to be maintained in high schools by boards of education.

The above tax levies shall not be subject to any limitations of rates of taxation or minimum rates provided by law, except the limitations herein provided, and the further exception that the combined maximum rate for all taxes levied in any year in any city or other tax district shall not exceed fifteen mills. [103 v. 472; R. S. Sec. 4104; 98 v. 128; 97 v. 544; 95 v. 548; 94 v. 399; 90 v. 150; 75 v. 133, § 1; 67 v. 86, § 6.]

Sec. 7909. [When levy to be made.] Such levies shall be made by the council at the time, and in like manner as other levies for other municipal purposes, and must be certified by it and placed upon the tax duplicate as other municipal levies. The funds of any such university, college or institution shall be paid out by the treasurer upon the order of the board of directors and the warrant of the auditor. [R. S. Sec. 4104; 98 v. 128; 97 v. 544; 95 v. 548; 94 v. 399; 90 v. 150; 75 v. 133 § 1; 67 v. 86 § 6.]

Sec. 7910. [Municipal university.] Any municipal corporation having a university supported in whole or part by municipal taxation, may issue bonds[1] for the erection of additional buildings or the completion of buildings not completed, for such municipal university, and for the equipment thereof. [99 v. 133 § 1.]

(1) Bonds issued under this section not subject to the limitation of Longworth Act. Op. Atty. Gen. (1918), p. 246.

Sec. 7911. [Issue of bonds.] Such bonds may be issued under ordinance of the council of such municipality with the

approval of the mayor, but only upon the receipt of a certified resolution from the board of directors of such university of the necessity of such issue. The resolution and ordinance must specify the amount of the issue, the denomination of bonds, their rate of interest, their dates, and the times of their maturity. [99 v. 133 § 2.]

Sec. 7912. [Disposal of bonds.] The bonds so issued shall be sold according to the provisions of law for the sale of municipal bonds, and the proceeds thereof, excepting the premiums and accrued interest, shall be placed in the treasury of such municipality and be used only for the purpose of erecting or completing and equipping such additional buildings as may have been specified in the resolution and ordinance calling for their issue. [99 v. 133 § 3.]

Sec. 7913. [Power and control vested in directors.] In the use of such fund for such purpose, all power and control shall be vested in the board of directors of the municipal university. Such board shall make any contracts necessary for the erection or completion of the buildings specified, and the equipment thereof; supervise their erection, completion and equipment, and issue proper vouchers for the payment out of such fund of moneys due under such contracts, and for any other expenses connected with the erection, completion, and equipment of such buildings. The amount of premium and accrued interest arising from the sale of the bonds shall be paid into the sinking fund. [99 v. 133 § 3.]

Sec. 7914. [Duties of trustees of sinking fund.] The trustees of the sinking fund of any municipality issuing bonds under the above authority, annually shall levy a tax sufficient to pay the interest, and to provide a sinking fund for the final redemption of the bonds at maturity. [99 v. 134 § 4.]

Sec. 7915. [Board of directors of educational institution may accept educational trusts.] The board of directors of a university, college or other educational institution of any municipal corporation, in the name and on behalf of such corporation, may accept and take any property or funds heretofore

or hereafter given to such corporation for the purpose of founding, maintaining or aiding a university, college or institution for the promotion of education, and upon such terms, conditions and trusts consistent with law as such board deems expedient and proper for that end. [R. S. Sec. 4095; 97 v. 541; 92 v. 358; 67 v. 86 § 1.]

Sec. 7915-1. [Exemption from taxation.] All such property, personal or mixed, or real property located within the county in which a university, college or other educational institution of any municipal corporation is located, heretofore or hereafter so given to or received by the board of directors of a university, college or other educational institution of any municipal corporation, the rents, issues, profits and income of which are used exclusively for the use, endowment or support of a university, college or other educational institution of any municipal corporation, shall be exempted from taxation so long as such property or the rents, issues, profits or income thereof is used for and exclusively applied to the endowment or support of such university, college or other educational institution of such municipal corporation. [102 v. 32.]

Sec. 7916. [How trust funds to be applied.] For the further endowment, maintenance and aid of any such university, college or institution heretofore or hereafter founded, the board of directors thereof, in the name and in behalf of such municipal corporation may accept and take as trustee and in trust for the purposes aforesaid any estate, property or funds which may have been or may be lawfully transferred to the municipal corporation for such use by any person, persons or body corporate having them, or any annuity or endowment in the nature of income which may be covenanted or pledged to the municipal corporation, towards such use by any person, persons or body corporate. Any person, persons or body corporate having and holding any estate, property or funds in trust or applicable for the promotion of education, or the advancement of any of the arts or sciences, may convey, assign and deliver these to such municipal corporation as trustee in his, their or its place, or covenant or pledge its income or any part thereof to it. Such estate, property, funds or income shall

be held and applied by such municipal corporation in trust for the further endowment, maintenance and aid of such university, college or institution, in accordance nevertheless with the terms and true intent of any trust or condition upon which they originally were given or held.[1] [R. S. Sec. 4096; 97 v. 542; 92 v. 358; 67 v. 86, § 2.]

(1) **Terms of donations.**—The directors of an institution of learning are at liberty under § 7916, relating to trust funds for the endowment, maintenance and aid of such schools, to reject a proposed donation, if the terms under which it is offered are not acceptable, but donations which are accepted must be accepted in accordance with the terms prescribed. State *ex rel.* v. Schauss, 3 C. C. (N. S.) 388.

Sec. 7917. [Trusteeship to vest in city, etc.] Upon such transfer and the acceptance thereof the municipal corporation and its successors, as trustees shall become and be perpetually obligated and held to observe and execute such trust in all respects according to any other or further terms or conditions lawfully agreed upon at the time of such transfer and acceptance. Any court having jurisdiction of the appointment of trustees of such trust for educational purposes, in a proceeding therefor, duly instituted and had, may, with the consent of its council, appoint and constitute such municipal corporation, trustee of the estate, property and funds so transferred to it, and dispense with bond and surety upon the part of the municipality for the performance of such trust, unless that is required by the original terms or conditions thereof, and upon the due transfer and acceptance of such trust shall release and fully discharge the trustee or trustees so transferring it. Any acceptance or acceptances by such municipal corporation of any or all property, funds, rights, trust estate or trusts heretofore given, granted, assigned, or otherwise conveyed or transferred to or bestowed upon such a municipal corporation or to or upon such a university, college or institution in good faith, and which are still held and retained by such municipality or such a university, college or institution, shall be held and deemed to be valid and binding as to all parties. [R. S. Sec. 4097; 97 v. 542; 67 v. 86, § 2.]

Sec. 7918. [Account of receipts and expenditures of endowment fund.] The accounts of such trust estate, property and

funds, and of the income and expenditure thereof, shall be kept by the auditor of such municipal corporation entirely distinct from all other accounts or affairs of the municipality and the moneys must be kept by the treasurer of the municipal corporation distinct from other moneys. Such board of directors, at all times, must confine their disbursements for current expenses within the income of the trust, estate, property and funds, and annually shall report to the mayor and council of such municipality a full statement of the accounts of administration of such trust and other funds. [R. S. Sec. 4101; 97 v. 543; 80 v. 86; 67 v. 86, § 3.]

Sec. 7919. [Investments.] Such board may invest any part of the funds belonging to or set apart for the use of such university, college or institution or to any department thereof, as it from time to time deems proper in bonds of the United States, or of the State of Ohio, or of any municipal corporation of this state, or any county, or school district herein, or in any other bonds or first mortgage securities approved by it, and may use any funds, including those arising from sales of any property sold under section seventy-nine hundred and two hereof, (provided the terms of the trust do not prohibit such use), in the improvement of any real or leasehold estate belonging either to the particular trust of which the property sold was part or to any other trust under its control and management; or in the improvement of any real or leasehold estate set apart for the use of such university, college or institution. [R. S. Sec. 4101; 101 v. 238; 97 v. 543; 80 v. 86; 67 v. 86.]

Sec. 7920. [Citizens not to be charged; tuition as of other students.] Citizens of such municipalities shall not be charged for instruction in the academic department, except in professional courses therein. Such board of directors may charge fees for any purpose to students in other departments and to students in professional courses in the academic department, and may charge fees for purposes other than instruction to students in the academic department. From time to time they may make such university, college or institution free in any or all of its departments to citizens of the county in which it is located. The board

of directors may receive other students on such terms as to tuition or otherwise as they see fit. [110 v. 37; R. S. Sec. 4100; 97 v. 543; 92 v. 359; 67 v. 86, § 3.]

Sec. 7921. [Board of education to have control and management of property held in trust for educational purposes.][1] The custody, management and administration of any and all estates or funds, given or transferred in trust to any municipality for the promotion of education, and accepted by the council thereof, and any institution for the promotion of education heretofore or hereafter so founded other than a university as defined in this chapter, shall be committed to, and exercised by, the board of education of the school district including such municipality. Such board of education shall be held the representative and trustee of such municipality in the management and control of such estates and funds so held in trust and in the administration of such institution, excepting always funds and estates held by any municipality which are used to maintain a university as heretofore defined. [R. S. Sec. 4105; 97 v. 545; 95 v. 519; 94 v. 241; 70 v. 117 § 1.]

(1) **Held unconstitutional** and void in so far as it changes the plans and purpose of the terms of the original trust created by donors and accepted by the municipal council of Toledo. Toledo v. Seiders et al., 15 C. C. (N. S.) 469; aff'd 83 O. S. 495.

Sec. 7922. [Tax levy.] For the uses and purposes of such board of education in administering such trusts, the council of such municipality annually may levy taxes on all the taxable property of such municipal corporation to the amount of three-tenths of one mill on the dollar valuation thereof. [R. S. Sec. 4105; 97 v. 545; 95 v. 519; 94 v. 241; 70 v. 117 § 1.]

VII.

CHARITABLE AND REFORMATORY INSTITUTIONS.[1]

INSPECTION AND SUPERVISION.

Sec. 1352. [Duties of the board; employment of visitors.][1] The board of state charities shall investigate by correspondence and inspection the system, condition and management of the public and private benevolent and correctional institutions of the state and county, and municipal jails, workhouses, infirmaries and children's homes as well as all institutions whether incorporated, private, or otherwise, which receive and care for children. Officers in charge of such institutions or responsible for the administration of public funds used for the relief and maintenance of the poor shall furnish the board or its secretary such information as it requires. The board may prescribe such forms of report and registration as it deems necessary. For the purpose of such investigation and to carry out the provisions of this chapter it shall employ such visitors as may be necessary, who shall, in addition to other duties, investigate the care and disposition of children made by institutions for receiving children, and by all institutions including within their objects the placing of children in private homes, and, when they deem it desirable they shall visit such children in such homes, and report the result of such inspection to the board. The members of the board and such of its executive force as it shall designate may attend state and national conferences for the discussion of questions pertinent to their duties. The actual traveling expense so incurred by the members and such of its executive force as it shall designate shall be paid as provided by section 1351 of the General Code. [108 v. 46; 103 v. 864, 865; R. S. Sec. 656; 93 v. 105; 77 v. 227; 73 v. 165, § 2.]

(1) **Other provisions.**—Provisions relating to hospitals, children's homes, infirmaries, houses of refuge, and workhouses, will be found in Part I. See §§ 4021-4052, 4083-4088, 4089-4096, 4097-4153.

For special act for Commercial Hospital of Cincinnati, see §§ 14786-14792, Appendix to General Code.

For special act for Cincinnati Orphan Asylum, see §§ 14780-14785, Appendix to General Code.

For special act authorizing county commissioners to unite with Zanesville in erection and maintenance of workhouse, see §§ 14548-14570, Appendix to General Code.

For special act authorizing cities of second class to establish homes for the friendless, see § 14649, Appendix to General Code.

For act authorizing cities to aid societies incorporated for conducting children's homes, see § 14654, Appendix to General Code.

For act authorizing cities and villages to unite in erecting soldiers' monuments, see §§ 14829-14844, Appendix to General Code.

For act providing for payment by cities of bounties to soldiers, see §§ 14854-14861, Appendix to General Code.

For special act authorizing cities of third grade of first class to rent hall of soldiers' memorial association for armory, see § 14866, Appendix to General Code.

Sec. 1353. [Plans for public buildings must be submitted to the board.] Before their adoption by the proper officials, plans for new jails, workhouses, children's homes, infirmaries, state institutions and municipal lock-ups or prisons and for important additions to or alterations in such existing institutions, shall be submitted to the board of state charities for its approval. [R. S. Sec. 656; 93 v. 105; 77 v. 227; 73 v. 165 § 2.]

Sec. 1356. [Board may call conferences, other officials and agencies; Ohio welfare conference.] The board of state charities may call an annual conference, of the officials specified in section 1357 and representatives of the various social agencies in the state, to be known as the Ohio welfare conference. The purpose of the conference shall be to facilitate discussion of the problems and methods of practical human improvement, to increase the efficiency of agencies and institutions devoted to this cause; to disseminate information and to consider such other subjects of general social importance as may be determined upon by the conference itself. For this purpose the conference shall organize by the election of officers, the appointment of the proper committees, and the adoption of rules and regulations. The board may also call other conferences at any time or place for the con-

sideration of problems relating to any particular group of institutions and agencies. [108 v. 427; 98 v. 29; R. S. Sec. 656a.]

Sec. 1357. [Expenses of officers and employes attending welfare conferences.] The necessary expenses of such officers and employes of the state, county and municipal boards, benevolent and correctional institutions, officials responsible for the administration of public funds used for the relief and maintenance of the poor, officials authorized to administer the probation laws, and members of the boards of county visitors as are invited by the board of state charities to the conferences provided for in section 1356 shall be paid from any fund available for their respective offices, boards and institutions, provided they first procure a certificate from the secretary of the board of state charities as evidence that they were invited to and were in attendance at the sessions of such conferences. [109 v. 54; 108 v. 427; 98 v. 29; R. S. Sec. 656a.]

Sec. 2419-1. [Commissioners may contract with cities for maintenance of county poor.] In any county containing a city which has an infirmary, it shall be competent for the commissioners of such county (if they find it will be conducive to economy), to agree with the director of public safety or his successor, or the proper person, persons or board in charge or control of the same of such city upon terms and conditions for the care and maintenance of the county's poor in such city's infirmary, and for such city to receive and care for such county poor in its infirmary in accordance with such agreement. The cost and expense of maintaining the county poor in the city infirmary shall be paid out of the county poor fund on the allowance of the county commissioners. [103 v. 577.]

Sec. 2497. [Institutions subject to inspectors of commissioners or board of health.] Each public or private hospital, reformatory home, house of detention, private asylum, reformatory and correctional institution shall be open at any and all times to the inspection of the commissioners of the county or the board of health of the township or other municipality, in

which such institution is situated. [92 v. 212 § 1; Bates, 633-11.]

Sec. 2974. [Duties of board of visitors.] The board of visitors,[1] by personal visitation or otherwise, shall keep themselves fully advised of the condition and management of all charitable or corrective institutions supported in whole or in part by county or municipal taxation, or which are under county or municipal control, and especially the infirmary, county jail, municipal prisons, and children's home. From time to time they shall recommend to the county commissioners and to other officials responsible therefor, such changes and additional provisions as they deem essential for their economical and efficient administration. At least once in every three months each of such institutions shall be visited by such board, or a committee of its members. Failure in the performance of these duties on the part of any member of the board for one year shall be sufficient cause for his or her removal by the judge of the probate court. [R. S. Sec. 633-16; 98 v. 28; 79 v. 107.]

(1) **Board of visitors.**—§ 2971 G. C. provides for the appointment by the probate court of each county of a board of county visitors for the inspection of charitable and correctional institutions supported in whole or in part from county or municipal funds.

Sec. 12933. [Refusing to permit inspection of certain institutions.] Whoever refuses to permit, or interferes with the inspection of a public or private hospital, reformatory, house of detention, private asylum, or institution exercising or pretending to exercise a reformatory or correctional influence over its inmates, by the county commissioners of the county in which such institution is situated or the board of health of the municipality in which it is situated, shall be fined not less than twenty-five dollars or imprisoned for six months, or both, and for each subsequent offense shall be fined not less than one hundred dollars and imprisoned for six months. [92 v. 212 § 4; Bates, 633-14.]

RELIEF OF POOR.

Sec. 3476. [Trustees and municipal officers shall afford relief.][1] Subject to the conditions, provisions and limitations herein, the trustees of each township or the proper officers of each city therein, respectively, shall afford at the expense of such township or municipal corporation public support or relief to all persons therein who are in condition requiring it. It is the intent of this act that townships and cities shall furnish relief in their homes to all persons needing temporary or partial relief who are residents of the state, county and township or city as described in sections 3477 and 3479. Relief to be granted by the county shall be given to those persons who do not have the necessary residence requirements, and to those who are permanently disabled or have become paupers and to such other persons whose peculiar condition is such they cannot be satisfactorily cared for except at the county infirmary or under county control. When a city is located within one or more townships, such temporary relief shall be given only by the proper municipal officers, and in such cases the jurisdiction of the township trustees shall be limited to persons who reside outside of such a city. [108 v. 266; 93 v. 270; 73 v. 233; R. S. Sec. 1491.]

(1) For construction of this section see Op. Atty. Gen. (1919), p. 1236.

Sec. 3477. [Legal settlement defined.] Each person shall be considered to have obtained a legal settlement in any county in this state in which he or she has continuously resided and supported himself or herself for twelve consecutive months, without relief under the provisions of law for the relief of the poor, subject to the following exceptions:

First—An indentured servant or apprentice legally brought into this state shall be deemed to have obtained a legal settlement in the township or municipal corporation in which such servant or apprentice has served his or her master or mistress for one year continuously.

Second—The wife or widow of a person whose last legal settlement was in a township or municipal corporation in this state, shall be considered to be legally settled in the same town-

ship or municipal corporation. If she has not obtained a legal settlement in this state, she shall be doomed to be legally settled in the place where her last legal settlement was previous to her marriage. [R. S. Sec. 1492; 73 v. 233.]

Sec. 3478. [Defense of trustees in action for non-support of pauper.] In an action to compel the support or relief of a pauper, or in an action based upon the refusal of such officers to afford support or relief to any person, it shall be a sufficient defense for the township trustees, or proper municipal officers to show that such person, during the period necessary to obtain a legal settlement therein has been supported in whole or in part by others with the intention to thereby make such person a charge upon such township or municipal corporation. The fact that such person, during the period necessary to obtain a legal settlement therein, has been supported in whole or in part by others shall be prima facie evidence of such intention. [R. S. Sec. 1492a; 93 v. 112.]

Sec. 3479. [Who considered having legal settlement.] A person having a legal settlement in any county in the state shall be considered as having a legal settlement in the township, or municipal corporation therein, in which he has last resided continuously and supported himself for three consecutive months without relief, under the provisions of law for the relief of the poor. When a person has for a period of more than one year not secured a legal settlement in any county, township or city in the state, he shall be deemed to have a legal settlement in the county, township or city where he last has such settlement. [108 v. 266; 95 v. 52; 93 v. 271; 73 v. 233; R. S. Sec. 1493.]

Sec. 3480. [Relief, how obtained; notice to trustees or officers.][1] When a person in a township or municipal corporation requires public relief, or the services of a physician or surgeon, complaint thereof shall be forthwith made by a person having knowledge of the fact to the township trustees, or proper municipal officer. If medical services are required, and no physician or surgeon is regularly employed by contract to furnish medical attendance to such poor, the physician called or attending shall immediately notify such trustees or officer, in

writing, that he is attending such person, and thereupon the township or municipal corporation shall be liable for relief and services thereafter rendered such person, in such amount as such trustees or proper officers determine to be just and reasonable. If such notice be not given within three days after such relief is afforded or services begin, the township or municipal corporation shall be liable only for relief or services rendered after notice has been given. Such trustees or officer, at any time may order the discontinuance of such services, and shall not be liable for services or relief thereafter rendered. [R. S. Sec. 1494; 93 v. 271; 75 v. 13.]

(1) This section does not apply where resident of a village is quarantined and in need of medical aid and unable to pay, but § 4436 does apply. Op. Atty. Gen. (1918), p. 1509.

Sec. 3481. [Proper officers shall visit persons requiring relief; examination and report.] When complaint is made to the township trustees or to the proper officers of the municipal corporation that a person therein requires public relief or support, one or more of such officers, or some other duly authorized person, shall visit the person needing relief, forthwith, to ascertain his name, age, sex, color, nativity, length of residence in the county, previous habits and present condition and in what township and county in this state he is legally settled. The information so ascertained shall be transmitted to the township clerk, or proper officer of the municipal corporation, and recorded on the proper records. No relief or support shall be given to a person without such visitation or investigation, except that within counties, where there is maintained a public charity organization, or other benevolent association, which investigates and keeps a record of facts relating to persons who receive or apply for relief, the infirmary superintendents, township trustees or officers of a city shall accept such investigation and information and may grant relief upon the approval and recommendation of such organization. Every reasonable effort shall be made by the township trustees and municipal officers to secure aid from relatives and interested organizations before granting relief from public funds. [108 v. 266; R. S. Sec. 1495; 93 v. 271; 73 v. 233.]

Sec. 3482. [Removal of foreign paupers to their own county; removal expenses.] When it has been so ascertained that a person requiring relief has a legal settlement in some other county of the state, such trustees or officers shall immediately notify the infirmary superintendent of the county in which the person is found, who, if his health permits, shall immediately remove the person to the infirmary of the county of his legal settlement. If such person refuses to be removed, on the complaint being made by the infirmary superintendent, the probate judge of the county in which the person is found shall issue a warrant for such removal, and the county wherein the legal settlement of the person is, shall pay all expenses of such removal and the necessary charges for relief, and in case of death the expense of burial if a written notice is given the county commissioners thereof within twenty days after such legal settlement has been ascertained. [108 v. 266; R. S. Sec. 1496; 93 v. 271; 89 v. 133; 83 v. 202; 77 v. 265; 73 v. 233.]

Sec. 3483. [Notice to other county; action for recovery.] Upon refusal or failure to pay such expenses, such board of county commissioners may be compelled so to do by a civil action against them by the board of county commissioners of the county from which such person is removed, in the court of common pleas of the county to which such removal is made. If such notice is not given within twenty days after such board of county commissioners ascertain such person's residence, and within ninety days after such relief has been afforded, the board of county commissioners where such person belongs shall not be liable for charges or expenditures accruing prior to such notice. [108 v. 266; R. S. Sec. 1496; 93 v. 271; 89 v. 133; 83 v. 202; 77 v. 265; 73 v. 233.]

Sec. 3484. [Removal of indigent persons to their own counties.] When the trustees of a township in a county in the state in which there is no county infirmary ascertain that any person in such township has a legal settlement in another county of the state, they shall immediately notify the board of county commissioners thereof to remove such person to the infirmary of such county. Should his health per-

mit, such board of county commissioners shall immediately remove such person to their infirmary, and, if within twenty days after such legal settlement is ascertained, a written notice is given them, to pay all expenses theretofore incurred for his relief in the township in which such person is found. Upon their refusal or failure to so remove such person, the trustees of such township may furnish him the necessary relief and collect the amount thereof from such board of county commissioners by a civil action, in the name of such township trustees, in the court of common pleas of the county in which such infirmary is situated. [108 v. 266; 98 v. 98; R. S. Sec. 1496a.]

Sec. 3485. [Accounts to be kept by trustees and corporation officers; settlements.] The township trustees or proper officers of a municipal corporation shall keep accurate accounts of expenses so incurred, and make entries in a book of the names of the persons, and the time when each became chargeable, with an account of their own services rendered. Such account shall be adjusted and settled on the first Mondays of March and September. The clerk of the township or municipality shall record the accounts in the proper records, and issue orders on the treasurer thereof for the amount thus paid and services rendered as soon as paid or rendered. Such trustees or proper officer shall issue orders on the treasurer thereof for such demands when they accrue. [R. S. Sec. 1497; 93 v. 272; 73 v. 233 § 18.]

Sec. 3486. [Annual report to auditor.] Immediately after the September settlement the township clerk or proper officer of a municipal corporation shall make and file with the county auditor a report of the administration of the poor laws in the township or municipality for the preceding year, showing all expenditures in that behalf as follows: First, the aggregate of physicians' fees paid; second, the aggregate paid for supplies, food, clothing, etc.; third, aggregate of per diem and expenses of such trustees or municipal officers in connection with the poor laws. [R. S. Sec. 1497; 93 v. 272; 73 v. 233 § 18.]

Sec. 3487. [Accounts to be certified.] No account shall be audited or allowed by the trustees of a township or officers of

a municipal corporation for the support of the poor, unless accompanied by the proper voucher, verified by the claimant or his agent, and duly certified by such trustees or officers. [R. S. Sec. 1498; 93 v. 273; 73 v. 233 § 19.]

Sec. 3490. [Medical relief of poor in townships or corporations.] The trustees of a township, or the proper officers of a municipal corporation in any county, may contract with one or more competent physicians to furnish medical relief and medicines necessary for the persons who come under their charge under the poor laws, but no contract shall extend beyond one year. Such physician shall report quarterly to the clerk of the township or municipality, on blanks furnished him for that purpose, the names of all persons to whom he has furnished medical relief or medicines, the number of visits made in attending such person, the character of the disease, and such other information as may be required by such trustees or officers. [R. S. Sec. 1499-1; 93 v. 273; 86 v. 143.]

Sec. 3491. [To whom contract shall be awarded.] Such contracts shall be given to the lowest competent bidder. The trustees or municipal officers shall reserve the right to reject any and all bids, and to annul such contract at any time for proper cause. [R. S. Sec. 1499-2; 93 v. 273; 86 v. 143.]

Sec. 3492. [Non-liability after contract.] When the township trustees or the officers of a municipal corporation enter into such contract, such township or municipality shall not be liable for any relief thereafter otherwise furnished such person, so long as such contract remains in force. [108 v. 266; R. S. Sec. 1499-3; 93 v. 273; 86 v. 143.]

Sec. 3493. [Performance of labor by recipient of public relief.] When public relief, not in a county or city infirmary is applied for, or afforded by the infirmary officials of any county or the trustees of a township or officers of a municipal corporation, and the applicant or recipient is able to do manual labor, such officers shall require a male applicant or recipient to perform labor to the value of the relief afforded, at any time, upon any free public park, public highway, or other public property or public contract therein, under the

direction of the proper authorities having charge or control thereof. If relief has been afforded and such recipient refuses to perform the labor provided, record of the fact shall be made, all relief or support thereafter refused him, and he may be proceeded against as a vagrant. [108 v. 266; R. S. Sec. 1499-4; 93 v. 273; 91 v. 25.]

Sec. 3494. [Control of pauper's property by commissioners and trustees.] The commissioners of counties having no infirmary, the trustees of a township or the proper officer of a municipal corporation therein, shall have and may exercise the same rights, powers and duties with reference to the property of persons coming under their charge under the poor laws of the state, as are conferred upon and exercised by infirmary officials in counties having infirmaries. [108 v. 266; R. S. Sec. 1500; 93 v. 274; 63 v. 64.]

Sec. 3495. [Burial of dead in certain cases.] When the dead body of a person is found in a township or municipal corporation, and such person was not an inmate of a penal, reformatory, benevolent or charitable institution, in this state, and whose body is not claimed by any person for private interment at his own expense, or delivered for the purpose of medical or surgical study or dissection in accordance with the provisions of section 9984, it shall be disposed of as follows: If he were a legal resident of the county, the proper officers of the township or corporation[1] in which his body was found shall cause it to be buried at the expense of the township or corporation in which he had a legal residence at the time of his death; if he had a legal residence in any other county of the state at the time of his death, the infirmary superintendent of the county in which his dead body was found shall cause it to be buried at the expense of the township or corporation in which he had a legal residence at the time of his death, but if he had no legal residence in the state, or his legal residence is unknown, such infirmary superintendent shall cause him to be buried at the expense of the county.

[Marker at grave.] It shall be the duty of such officials to provide at the grave of such person, a stone or concrete

marker on which shall be inscribed the name and age of such person, if known, and the date of death. [108 v. 266; R. S. Sec. 1500a; 99 v. 357; 93 v. 274; 87 v. 283; 84 v. 29.]

(1) **Burial of indigent persons.**—When such person legal resident of township or municipal corporation. See Op. Atty. Gen., (1921) p. 332.

HUMANE SOCIETIES.

Sec. 10070. [May appoint agents.] Such societies[1] may appoint agents who are residents of the county or municipality for which the appointment is made, for the purpose of prosecuting any person guilty of an act of cruelty to persons or animals, who may arrest any person found violating any provision of this chapter, or any other law for protecting persons or animals or preventing acts of cruelty thereto. Upon making such arrest, such agent shall convey the person so arrested before some court or magistrate having jurisdiction of the offense, and there forthwith make complaint on oath or affirmation of the offense. [R. S. Sec. 3718; 81 v. 181; 72 v. 129.]

(1) **Humane societies.**—§ 10062 G. C., *et seq.*, provide for the powers, privileges, etc., of the Ohio Humane Society, for the purpose of enforcing laws for the prevention of cruelty to children and animals.

Sec. 10071. [Approval of appointments.] All appointments by such societies under the next preceding section shall have the approval of the mayor of the city or village for which they are made. If the society exists outside of a city or village, appointments shall be approved by the probate judge of the county for which they are made. The mayor or probate judge shall keep a record of such appointments. [R. S. Sec. 3718; 81 v. 181; 72 v. 129.]

Sec. 10072. [Salary of agents.] Upon the approval of the appointment of such an agent by the mayor of the city or village, the council thereof shall pay monthly to such agent or agents from the general revenue fund of the city or village, such salary as the council deems just and reasonable. Upon the approval of the appointment of such an agent by the probate judge of the county, the county commissioners shall pay monthly to such agent or agents, from the general revenue

fund of the county, such salary as they deem just and reasonable. The commissioners, and the council of such city or village may agree upon the amount each is to pay such agent or agents monthly. The amount of salary to be paid monthly by the council of the village to such agent shall not be less than five dollars, by the council of the city not less than twenty dollars, and by the commissioners of the county not less than twenty-five dollars. But not more than one agent in each county shall receive remuneration from the county commissioners under this section. [R. S. Sec. 3718; 81 v. 181; 72 v. 129.]

Sec. 10075. [Member may require police to act.] A member of such society may require the sheriff of any county, the constable of any township, the marshal or policeman of any city or village, or the agent of such society, to arrest any person found violating the laws in relation to cruelty to persons or animals, and to take possession of an animal cruelly treated, in their respective counties, cities, or villages, and deliver it to the proper officers of the society. [R. S. Sec. 3722; 81 v. 183; 72 v. 129.]

WORKHOUSES.

Sec. 12384. [Counties having no workhouse may contract with workhouse authorities.] The commissioners of a county, or the council of a municipality, wherein there is no workhouse, may agree with the city council, or other authority having control of the workhouse of a city in any other county, or with the board of district workhouses having a workhouse, upon what terms and conditions persons convicted of misdemeanors, or the violation of an ordinance of such municipality having no workhouse, may be received into such workhouse under sentence thereto. The county commissioners, or the council of a municipality, are authorized to pay the expenses incurred under such agreement out of the general fund of the county or municipality, upon the certificate of the proper officer of such workhouse. [R. S. Sec. 6801a; 81 v. 84; 80 v. 220.]

Sec. 12384-1. [Workhouse agreement.] In any county which has no workhouse, but contains a city which has a workhouse maintained by such city, it shall be competent for the commissioners of such county to agree with the director of public safety of such municipality, upon terms and conditions upon which persons convicted of violations of said laws shall be maintained in such city workhouse at the expense of such county. In any such case persons committed to such city workhouse for the violation of any law of the state of Ohio, whether such commitment be from a court of common pleas or from a police court, mayor's court or magistrate's court, the cost and expense of maintaining such person so committed shall be paid out of the general fund of the county, on the allowance of the county commissioners; provided, however, that all persons committed to any such city workhouse for the violation of any ordinance of such municipality shall be maintained in such workhouse at the sole cost of such municipality. [101 v. 230.]

Sec. 12385. [Payment of expenses in such cases.] The sheriff or other officer transporting a person to a workhouse, upon a warrant of commitment shall be paid the actual necessary expense from the county treasury in state cases and the city or village treasury in ordinance cases, upon specifically itemized bills verified by his oath and certified to by the judge or magistrate which authorized the commitment. Such conveyance shall be made by the usual rail route, if there be one available, otherwise by the most inexpensive method of transportation. If commitment be made from the court of a justice of the peace, the county, in addition to the actual expense herein provided, shall pay the constable who delivers the prisoner to the workhouse a fee of two dollars in lieu of any other fees. [108 v. 1203, 1220; R. S. Sec. 6801a; 81 v. 84; 80 v. 220.]

Sec. 12386. [Sentence to workhouse for jail offense.] When a person has been convicted of a misdemeanor, or of the violation of an ordinance of a municipality, by a court or magistrate in a county or municipality having no workhouse, and the commissioners of such county, or council of such municipality,

have made provisions as allowed by law for receiving persons so convicted into the workhouse of a city in any other county or district in the state, such court or magistrate, where imprisonment in the county or municipal jail may lawfully be imposed in punishment of such offense, may sentence such person to such workhouse for a period not exceeding the maximum period of confinement in the county or municipal jail allowed by statute or ordinance for the offense. In such cases, the court or magistrate may further order that such person stand committed to such workhouse until the costs of prosecution are paid, or he is discharged as herein provided.[1] [R. S. Sec. 6801b; 81 v. 84; 80 v. 220.]

(1) See notes to § 4128 *ante*, in Part I.

Sec. 12387. [Payment of fine and costs in such cases.] In cases where a fine may be imposed in whole or part in punishment of an offense, or for a violation of an ordinance of a municipality, and such court or magistrate could order that such person stand committed to the jail of the county or municipality until the fine and the costs of prosecution are paid, the court or magistrate may order that such person stand committed to such workhouse until such fine and costs are paid, or until he is discharged therefrom by allowing a credit of sixty cents per day on the fine and costs for each day of confinement in the workhouse, or until he is otherwise legally discharged.[1] [R. S. Sec. 6801b; 81 v. 84; 80 v. 220.]

(1) **Sentence** must contain the limitations in the statute, see Hamilton v. State, 78 O. S. 76, 84.

Sec. 12388. [Proceedings when committed.] When, under the provisions of the next four preceding sections, a person is sentenced to a workhouse by the court of common pleas, the clerk shall make and deliver to the sheriff a certified copy of the docket and journal entries, showing the crime charged and the sentence of the court, which shall be delivered by the sheriff to the proper officer in charge of the workhouse, and shall be his warrant for detaining such person in custody therein. In cases of such convictions by any other court or magistrate, the court or magistrate shall make a certified transcript of the docket in the case, which, in like manner, shall

be delivered to the marshal, constable or sheriff by the court or magistrate, and shall be delivered by him to the proper officer in charge of the workhouse, and be such officer's warrant for detaining such person in custody therein. [R. S. Sec. 6801c; 80 v. 221.]

Sec. 12389. [Prisoner may be confined in jail temporarily.] In cases of sentence to a workhouse under the provisions of the next five preceding sections, the person so sentenced may be confined in the jail of the county in which he was convicted for such period as is necessary for the officer to procure the papers and make arrangements to transport him to the workhouse. [R. S. Sec. 6801c; 80 v. 221.]

Sec. 12840. [Escape or attempt to escape from workhouse.] Whoever, having been committed to a workhouse, escapes or attempts to escape therefrom, shall be imprisoned in such workhouse not more than double the term for which he had been originally sentenced. Unless the former sentence has expired, such sentence shall commence from and after the expiration of the former sentence. The court which originally sentenced him shall have jurisdiction concurrently with the court of common pleas in the county in which such workhouse is situated. [R. S. Sec. 2103; 66 v. 196 § 279.]

Sec. 14563. [Inmates from other counties and municipalities.] Any city and county or county having or that may hereafter erect a joint city and county workhouse, or a county workhouse, may receive as inmates of such joint city and county workhouse, or county workhouse, persons sentenced thereto as provided by law, from counties and municipal corporations having no workhouse, upon such terms and for such length of time as may be agreed upon by the commissioners of such county or the council of such municipal corporation, and the board of such joint city and county workhouse directors, or county workhouse directors; provided, that such convicts so received shall, in all respects, be and remain under control of the directors of such workhouse, and subject to the rules, regulations and discipline of such workhouse the same as other convicts therein detained. [91 v. 180; 84 v. 136.]

Sec. 14564. [Agreement upon terms and conditions.] The commissioners of any county, or the council of any municipal corporation, wherein there is no workhouse, may agree with the council of any municipal corporation or other authority having control of the workhouse of any other city, or with the directors of any district of joint city and county workhouse, or county workhouse, upon terms and conditions, upon which persons convicted of misdemeanor, or of the violation of any ordinance of such municipal corporation by any court of [or] magistrate of such county or municipal corporation, having no workhouse, may be received into such workhouse, under sentence of such court or magistrate; and the county commissioners of any such county, and the council of any such municipal corporation, are authorized to pay the expenses incurred under such agreement out of the general fund of such county, or of the municipal corporation, upon the certificate of the proper officer of such workhouse; and the sheriff or other officer transporting any person to such workhouse shall have the following fees therefor: Six cents per mile for himself, going and returning, and five cents per mile for transporting such convict, and five cents per mile going and coming for the service of each guard, to be allowed as in penitentiary cases; the number of miles to be computed by the usual routes of travel, to be paid in state cases out of the general fund of the county, on the allowance of the county commissioners, and in case for the violation of the ordinances of any municipal corporation by such municipal corporation on the order of the council thereof. [91 v. 180; 84 v. 136.]

Sec. 14565. [Sentence and order of court or magistrate.] When any person has been convicted of a misdemeanor or of the violation of any ordinance of a municipal corporation, by any court or magistrate of this state, or of such municipal corporation, in a county or municipal corporation having no workhouse, and the commissioners of such county, or council of such municipal corporation have made provisions as allowed by law for receiving persons so convicted into the workhouse of a city in any other county or district, or a joint city and county workhouse, or a county workhouse in this

state, it shall be competent for such court or magistrate, in its discretion, where imprisonment in the county or municipal jail may by law or ordinance be imposed in punishment of such offense, to sentence such person to such workhouse for a period not exceeding the maximum period of confinement in the county or municipal jail allowed by statute or ordinance for such offense; and in all such cases such court or magistrate may further order that such person stand committed to such workhouse until the costs of prosecution are paid, or he be discharged, as herein provided; and in all cases where a fine may be imposed in whole or in part punishment of an offense, or for violation of an ordinance of any municipal corporation, and such court or magistrate could order that such person stand committed to the jail of the county or municipal corporation until such fine and costs of prosecution are paid, such court or magistrate may order that such person stand committed to such workhouse until such fine and the costs of prosecution are paid, or until he be discharged therefrom by allowing a credit of sixty cents per day on such fine and costs for each day of confinement in such workhouse, or be otherwise legally discharged. [91 v. 180, 181; 84 v. 136.]

Sec. 14568. [Improvement of buildings, grounds, etc.] The board of joint city and county workhouse directors, or county workhouse directors, may enlarge or improve the buildings, shops or grounds from any surplus that may arise from income of such workhouse, or from the levy for such maintenance made by such county and city, or county; but no levy for maintenance shall be made when it has not been necessary to use more than one-half of the avails of the levy of the year preceding; and any surplus arising from the carrying on of (the) such joint workhouse shall be returned to the general fund of such city and county in the proportion that such surplus may have been produced by the labor of the convicts of each, and any surplus arising from the carrying on of such county workhouse shall be returned to the general fund of the county. [91 v. 180, 181; 84 v. 136.]

VIII.

OFFICERS.

GENERAL PROVISIONS.

Oath, Bond, Term, Etc.

Sec. 1. [Oath includes affirmation.] The word "oath" includes affirmation. When an oath is required or authorized by law, an affirmation in lieu thereof may be taken by a person having conscientious scruples to taking an oath. An affirmation has the same force and effect as an oath.[1] [R. S. Sec. 1; 51 v. 57 § 596; (S. & C. 1130).]

(1) **Who may administer oaths.**—See Harmon v. Stockwell, 9 O. 93; Warwick v. State, 25 O. S. 21.

When oath binding.—See Brock v. Milligan, 10 O. 121.

Sec. 2. [All officers must take an oath of office.] Each person chosen or appointed to an office under the constitution or laws of the state, and each deputy or clerk of such officer, shall take an oath of office before entering upon the discharge of his duties.[1] The failure to take such oath shall not affect his liability or the liability of his sureties.[2] [R. S. Sec. 2.]

(1) See § 4666 and notes thereto, *ante*, in Part I.

(2) See § 4242 and notes thereto, *ante*, in Part I.

Sec. 3. [Oath of office of judges and other officers.] The oath of office of each judge of a court of record shall be to support the constitution of the United States and the constitution of this state, to administer justice without respect to persons, and faithfully and impartially to discharge and perform all the duties incumbent on him as such judge, according to the best of his ability and understanding. The oath of office of every other officer, deputy or clerk, shall be to support the constitution of the United States and the constitution of this

state, and faithfully to discharge the duties of his office.[1] [R. S. Sec. 3; 50 v. 67 § 19.]

(1) **Form of oath.**—See notes to § 4666, in Part I.

Sec. 4. [Depositaries of official bonds must record them.] Every officer, on receiving an official bond which by law is required to be filed or deposited with him, shall, on receiving such bond, record it in a book to be kept by him for that purpose. A certified transcript of the record of such bond shall be conclusive evidence of such record, and prima facie evidence of the execution and existence of such bond.[1] [R. S. Sec. 5; 41 v. 13 § 1.]

(1) **Bonds of municipal officers.**—See §§ 4667 and 4668 in Part I, and notes thereunder.

Filing bonds of municipal officers.—See § 4669, in Part I, and notes thereunder.

Sec. 5. [What bonds good when signed in blank.] All official bonds, and bonds of executors, administrators, guardians and trustees, bonds required or authorized to be taken by or before a court, judge, public board or officer, judicial or ministerial, bonds of indemnity, and all other bonds conditioned to become void upon the performance by the parties thereto, or any of them, of the stipulations therein contained, shall bind and render liable thereon, both principals and sureties therein, whether at the time of the signing thereof by such obligors, or any of them, the amounts of such bonds be filled in or left in blank, if such amounts be filled in before, or at the time of the approval or acceptance of such bonds, and such filling in may be done in the absence of any or all of the obligors, and without any express authority for that purpose from them or any of them.[1] [R. S. Sec. 6; 80 v. 79; 66 v. 15 §§ 1, 2.]

(1) **Effect of blanks.**—See § 4668 and notes thereunder in Part I.

What blanks may be filled.—Stevens v. Allmen, 19 O. S. 485; McLain v. Simington, 37 O. S. 484; Partridge v. Jones, 38 O. S. 375. See also early cases of State v. Boring, 15 O. 507; Famulener v. Anderson, 15 O. S. 473.

Sec. 6. [Sufficiency of bonds of state officials; premium paid by state.] A bond payable to the state of Ohio, or other payee as may be directed by law, reciting the election or appointment of a person to an office or public trust under

or in pursuance of the constitution or laws, and conditioned for the faithful performance, by such person, of the duties of the office or trust, shall be sufficient, notwithstanding any special provision made by law for the condition of such bond.[1] In all cases where an elective or appointive state officer is required by law to furnish bond, a surety company bond may be given and the annual premium in such cases shall be paid from the funds appropriated by the General Assembly to the various departments, boards and commissions for such purpose. The provisions of this section shall not be deemed to prevent the giving of a personal bond with sureties approved by the official authorized by law to give such approval. [110 v. 128; R. S. Sec. 7.]

(1) **Condition in bond.**—See § 4668, in Part I.

Sec. 7. [An office is vacant if the person does not qualify.] A person elected or appointed to an office who is required by law to give a bond or security previous to the performance of the duties imposed on him by his office, who refuses or neglects to give such bond or furnish such security, within the time and in the manner prescribed by law, and in all respects to qualify himself for the performance of such duties, shall be deemed to have refused to accept the office to which he was elected or appointed, and such office shall be considered vacant and be filled as provided by law.[1] [R. S. Sec. 19; 29 v. 407 § 4; (S. & C. 888).]

(1) **Failure to qualify.**—Compare § 4242, and see notes thereunder, in Part I.

Acceptance delayed. — Where bond is given within time required by law, but is not accepted till after the term begins, the acceptance will relate back and the bond will be sufficient. State v. Tool, 4 O. S. 553.

Effect of failure to give bond. —Under § 7 G. C. and a section requiring proper authorities to "declare office vacant" on failure to give bond, if one elected to office fails, without justification, to give bond, a vacancy is created beginning on the day the bond should have been given. State *ex rel.* v. Commissioners, 61 O. S. 506.

Old § 19 cited, Reiter v. State, 51 O. S. 74.

Sec. 8. [Officers to hold till successors qualified.] A person holding an office or public trust shall continue therein until his successor is elected or appointed and qualified, unless otherwise provided in the constitution or laws.[1] [R. S. Sec. 8.]

(1) **Holding until successor qualifies.**—See § 4208 (relating to term of members of council) and note thereunder, in Part I.

Compare also §§ 4251, 4274, 4275, 4293, and others, relating to terms of other municipal officers.

What officers.—Membership in council was held to be an office within the meaning of old § 8 R. S., State *ex rel.* v. Kearns, 47 O. S. 566, 568. See further as to what is an office, State v. Kennon, 7 O. S. 546; State v. Taylor, 12 O. S. 130; Walker v. Cincinnati, 21 O. S. 14; Warwick v. State, 25 O. S. 21; State v. Wilson, 29 O. S. 347.

The chief of a volunteer fire department elected by the city council under an ordinance of the city is "an officer" within the meaning of Revised Statutes, Sec. 8, and continues in office until his successor is elected or appointed and qualified. Essex v. Ault, 20 C. C. (N. S.) 478.

An officer whose term is fixed and limited by the constitution holds only until the end of such term and cannot hold over until his successor qualifies, as provided in § 8 G. C., State *ex rel.* v. Brewster, 44 O. S. 589.

An officer appointed to fill an unexpired term, holds until his successor is chosen and qualifies. State v. McGregor, 44 O. S. 628; State *ex rel.* v. Darby, 12 C. C. 235, 239 (aff'd 52 O. S. 611).

See also State *ex rel.* v. Thrall, 59 O. S. 368.

Meaning of successor.—Successor was held to mean a regular successor and not a mere temporary appointee. State v. Wright, 56 O. S. 540, 554.

The holding over continues where the time of qualifying and taking office by the successor has been extended by statute. State, ex rel. v. Killits, 8 C. C. 30.

Character of holding over.—The holding over is a continuance of the original term of office. State v. Howe, 25 O. S. 588.

Resignation.—It is not necessary that a resignation from a public office be couched in any particular words; it is only necessary that the incumbent evince a purpose to relinquish the office; that this purpose be communicated to the proper authority; and that this resignation be accepted, either in terms, or something tantamount thereto. State, ex rel., v. Board of Education, 23 C. C. (N. S.) 98 (aff'd 87 O. S. 529).

A resignation from office, to become effective at some future time, can not be withdrawn without the consent of the accepting party. *Ib.*

Sec. 9. [Deputies and clerks, their terms, etc.] A deputy, when duly qualified, may perform all and singular the duties of his principal.[1] A deputy or clerk, appointed in pursuance of law, shall hold the appointment only during the pleasure of the officer appointing him.[2] The principal may take from his deputy or clerk a bond, with sureties, conditioned for the faithful performance of the duties of the appointment. In all

cases the principal shall be answerable for the neglect or misconduct in office of his deputy or clerk. [R. S. Secs. 9, 10.]

(1) **Character of deputy.**—Deputy is not a public officer within penal laws. State v. Meyers, 56 O. S. 340, 349.

See further note (2) to § 4666, in Part I.

Duties.—As to duties that may be performed by various deputies such as deputy clerks of court sheriffs, etc., see Chapin v. Allison, 15 O. 566; Walke v. Bank, 15 O. 288; Haines v. Lindsey, 4 O. 88; Anderson v. Brown, 9 O. 151; Hulse v. State, 35 O. S. 421; Warwick v. State, 25 O. S. 21; Feasel v. State, 18 Dec. 478, 6 N. P. (N. S.) 321.

(2) **No holding over.**—A deputy, since he must hold during the pleasure of the officer appointing him, cannot claim the office under a successor to the principal, though the deputy was appointed for a definite term which had not expired. Brady v. French, 6 N. P. 122.

Whether a deputy clerk legally appointed during first term and holding over during second term, without reappointment, is a *de facto* officer, *quaere*. State v. Townley, 67 O. S. 21, 27.

Sec. 10. [Term of appointee to elective office.] When an elective office becomes vacant, and is filled by appointment, such appointee shall hold the office until his successor is elected and qualified. Unless otherwise provided by law, such successor shall be elected for the unexpired term at the first general election for the office which is vacant that occurs more than thirty days after the vacancy shall have occurred.[1] This section shall not be construed to postpone the time for such election beyond that at which it would have been held had no such vacancy occurred, nor to affect the official term, or the time for the commencement thereof, of any person elected to such office before the occurrence of such vacancy. [R. S. Sec. 11.]

(1) **Municipal offices.**—As to manner of filling vacancies and terms of appointees, in municipal offices, see §4252 in Part I.

Effect of special provisions.—When there is a special statute providing for the manner of appointment to fill vacancies in particular offices and the terms of such appointees, such special statute must be regarded as an exception to the general provisions of § 10. State *ex rel.* v. McGregor, 44 O. S. 628; see also Cincinnati v. Holmes, 56 O. S. 104, 114.

Vacancy.—As to when a vacancy occurs see note (2) to § 4252 in Part I.

First proper election.—The words "first election" were held to mean the first recurrence of the regular election for that particular office, under the law regulating elections to that office. State v. Barbee, 45, O. S. 347; State *ex rel.* v. Hadley, 59 O. S. 167, 169; State v.

Slough, 12 C. C. 105; Harte v. Bode, 4 N. P. 421; State *ex rel.* v. Nash, 66 O. S. 612, 620.

Appointment to fill vacancy.—Officer cannot generally make appointment to begin after expiration of term of officer appointing; but where statute requires appointment at a particular time it may be made at that time without regard to the time when service begins. State *ex rel.* v. Ermston, 14 C. C. 614.

Appointment for less or more than the legal time will not abridge or extend the term of the appointee as fixed by the statute. State *ex rel.* v. Darby, 12 C. C. 235, (aff'd, 52 O. S. 611); State *ex rel.* v. Slough, 12 C. C. 105.

Sec. 10-1. [Providing for forfeiture for misconduct in office.] That any person holding office in this state, or in any municipality, county or any subdivision thereof, coming within the official classification in section 38, article 2, of the constitution of the state of Ohio, who refuses or wilfully neglects to enforce the law, or to perform any official duty now or hereafter imposed upon him by law, or who is guilty of gross neglect of duty, gross immorality, drunkenness, misfeasance, malfeasance or nonfeasance, shall be deemed guilty of misconduct in office; upon complaint and hearing in the manner provided for herein shall have judgment of forfeiture of said office with all its emoluments entered thereon against him, creating thereby in said office a vacancy to be filled as prescribed by law. The proceedings provided for herein are in addition to impeachment and other methods of removal now authorized by law. [103 v. 851.]

Sec. 10-2. [How complaint shall be commenced for removal; service of copy and time of hearing.] Complaint for the removal of public officers on any of the grounds enumerated in the preceding section shall be commenced by the filing of a written or printed statement specifically setting forth the charge which statement shall, when it contains a complaint against an officer other than a state officer be signed in their own handwriting by at least twenty per cent. of the qualified electors within the designated limits for which said officer was elected, as shown by the number of votes cast at the next preceding general election; when such statement contains a complaint against a state officer, it shall be signed in their own handwriting by at least six per cent. of the qualified electors of the state as shown by the number

of votes cast at the next preceding general election. Signatures to said complaint may be obtained by the circulation of copies thereof for such signatures. Only signatures attached to such copies whereby the party before signing was afforded the opportunity of reading such complaint will be counted, and all such copies will be treated as originals. Said complaint, in copies or singly as the case may be, with all the signatures attached as aforesaid, shall be fastened as one document and may when such complaint is against a state officer be filed with the governor of the state; complaints against officers other than state officers may be filed with the judge of the court of common pleas of the county wherein the officer against whom the complaint is filed resides, except that when the officer against whom the complaint is filed is a common pleas judge, such complaint may be filed in the court of appeals of the district where such judge resides, and all complaints against state officers may be filed with the court of appeals in the district wherein the officer against whom the complaint is filed resides. The governor, or judge or clerk of the court, shall cause a copy of such statement to be served upon the officer, against whom the complaint has been filed, at least ten days before the hearing. The hearing herein provided for shall be had within thirty days from the date of the filing of the complaint by said electors. The proceedings had by the governor or court upon such removal shall be matters of public record and a full detailed statement of the reasons for such removal shall be filed by the governor in the office of the secretary of state, or by the judge with the clerk of the court, and shall be made a matter of public record therein. [103 v. 851.]

Sec. 10-3. [Suspension; witnesses and fees.] The decision of the governor so filed with the reasons therefor shall be final. The governor or judge or court may suspend the officer pending such investigation. The governor may subpoena witnesses for the hearing and the adjutant general or the sheriff of the county in which the witnesses live, or the county in which the hearing is to occur, shall serve the subpoenas. The witness fees and other fees shall be the same

as in civil cases. The governor shall have authority to compel the attendance of the witnesses and have the same powers therein as are now authorized to be exercised by the court of common pleas. Expenses for such hearing shall be paid out of the general revenue fund of the state when such hearing is before the governor upon the warrant of the governor. When such hearing is before the judge of the court of common pleas or the court of appeals in the county where such officer resides, such court is authorized to subpoena witnesses and compel their attendance in the same manner as said court is now authorized in civil cases, and the expenses shall be paid out of the general revenue fund of the county. [103 v. 851, 852.]

Sec. 10-4. [Petition in error on leave; right of review or appeal to supreme court; vacancy.] The decision of the court of common pleas in all cases for the removal of officers may be reviewed on error by the court of appeals. The transcript of the record and the petition in error shall be filed in such court of appeals in not more than thirty days after the decision is rendered and the journal entry made by the court of common pleas. Such petition in error may be filed only after leave has been granted by the court for good cause shown at a hearing of which the attorneys for both the officer and the prosecution have been duly notified. Such court of appeals shall have jurisdiction to hear such case at any place in the judicial district in which such court may be sitting, and such court shall hear such case in not more than thirty court days after the filing of the petition in error. The decision of such court in refusing to allow a petition in error to be filed, or in the passing upon the merits of the case in the error proceedings, shall be final. If the court of appeals review the proceedings herein provided for in any other county within their judicial district other than the county wherein the officer complained against resides, said court of appeals shall transmit their findings with the reasons therefor to the clerk of the court of common pleas of the county wherein the officer complained against resides, with instructions to said clerk to make the findings of said court a matter of record upon the journal of said court in

the county wherein the officer complained against resides. In all cases involving the removal of an officer against whom a complaint has been filed in the court of appeals, the officer shall have the right of review or appeal to the supreme court on leave first obtained, and such court shall hear such case in not more than thirty court days after leave has been granted and in other respects such hearing shall follow the regular procedure in appealable cases which originate in the court of appeals. If any officer is removed and the law provides no means for filling the vacancy, the county board of deputy supervisors of elections in such county where such officer so removed resides shall order a special election to fill such vacancy in the unit of government in which such officer removed was elected. [103 v. 851, 852.]

Sec. 18. [Gifts, devises and bequests to public authorities.] The state, a county, township or cemetery association, the commissioners or trustees thereof, a municipal corporation, the council, a board or other officers thereof, a benevolent, educational, penal or reformatory institution, wholly or in part under the control of the state, the board of directors, trustees or other officers thereof, may receive by gift, devise or bequest, moneys, lands or other properties, for their benefit or the benefit of any of those under their charge, and hold and apply the same according to the terms and conditions of the gift, devise or bequest.[1] Such gifts or devises of real estate may be in fee simple or of any lesser estate, and may be subject to any reasonable reservation. This section shall not affect the statutory provisions as to devises or bequests for such purposes. [110 v. 247; R. S. Sec. 20; 78 v. 109; 75 v. 42; 74 v. 38; 66 v. 8.]

(1) **Power to receive.** — See §§ 3615 and 3631 in Part I.

Character of devises. — For cases sustaining devises to public authorities, see Scott v. Trustees, 39 O. S. 153; Christy v. Commissioners, 41 O. S. 711; Chapin v. School District. 3 Dec. (Re) 321. See further Urmey v. Wooden, 1 O. S. 160.

Investment of funds received, see Scott v. Trustees, *supra.*

Void devises.—§ 18 must be construed in connection with § 10504 G. C., (making bequests for charitable purposes void, if made within

one year of death, etc.), and bequests in violation of § 10504 will be absolutely void, and the public authorities will not have power to receive the same. Folsom v. Haas, 9 C. C. 473.

Sec. 19. [Illegal loans or deposits by public officers.] The state, a county, township, municipal corporation, or school board, shall not be precluded by the illegal loan or deposit by an officer or agent of public money, funds, bonds, securities, or assets, belonging to it, from suing for and recovering the same.[1] Such suit shall not be held to be an adoption or satisfaction of such illegal transaction. [R. S. Sec. 21; 60 v. 64 § 1; (S. & S. 920).]

(1) **Application of section.**— Where a municipality has purchased property for the purpose of donating the same to a manufacturing corporation, which purpose is without authority of law, and has conveyed the same, it cannot claim to recover back the property and hold it under the provisions of § 19 for the original purchase was invalid. Markley v. Mineral City, 58 O. S. 430.

In State v. Buttles, 3 O. S. 309, it was held the state could not sue to recover an unauthorized loan without ratifying the loan.

Sec. 31. [Official seals.] All official seals shall have engraved thereon the coat of arms of the state, as described in the preceding section. * * *

The seals of all other state, county, and municipal officers shall be one inch and three-fourths in diameter, and shall be surrounded by the proper name of the office. * * *

All the seals mentioned in this section shall contain the words and devices mentioned herein, and no other. [104 v. 175; 103 v. 405; R. S. Sec. 16; 98 v. 344, § 1; 99 v. 288, § 88; 73 v. 80; 65 v. 175; 82 v. 16, 121; 83 v. 60.]

Sec. 32. [Seal; of what it may consist.] Where an official or a corporate seal is required to be affixed to an instrument of writing, an impression of such seal upon either wax, wafer or other adhesive substance, or upon the paper or material on which such instrument is written, shall be alike valid and sufficient. Private seals are abolished, and the affixing of what has been known as a private seal to an instrument shall not give such instrument additional force or effect, or change the construction thereof. [R. S. Sec. 4; 81 v. 198; 80 v. 79; 29 v. 349.]

Sec. 2281. [Officers entitled to state documents.] Each judge, clerk of a court of record, justice of the peace, county officer, township or municipal officer, may receive from the county auditor one copy of the laws passed at each session of the general assembly. Each university, college, academy and county or state agricultural society may receive from the county auditor, one copy of each of the laws, journals, "Ohio General Statistics," or other publications of the state of Ohio sent to him by the secretary of state. [106 v. 508, 515; R. S. Secs. 68, 69; 82 v. 12; 72 v. 179, § 12; 70 v. 275; 71 v. 32.]

Sec. 2283. [Officers must deliver volumes to successor.] Each officer named in section twenty-two hundred and eighty-one, who, by virtue of his office, receives a copy of the laws, journal, or "Ohio General Statistics," as provided in such section, shall deliver it to his successor in office. If, upon demand, such officer refuses so to do he shall forfeit and pay not less than five dollars, nor more than fifteen dollars. An action to recover such forfeiture may be brought by his successor in office, in the name of the state, before a justice of the peace of the county. Forfeiture so collected shall be paid into the county treasury. [106 v. 508, 515; R. S. Sec. 69; 72 v. 179, §§ 13, 16; 71 v. 32, § 1; 70 v. 275, § 17.]

Sec. 4836. [Election of municipal officers.] All elective municipal officers and judges and clerks of police courts and assessors in municipalities shall be chosen on the first Tuesday after the first Monday in November in the odd numbered years.[1] [98 v. 172, § 222; 97 v. 39; 96 v. 93, § 222.]

(1) Duty of mayor with reference to proclamation of election. See § 4837 *post*, under this title.

Sec. 4963. [Primaries for township and municipal candidates; primaries in municipalities under optional plan of government.] Primaries under this chapter to nominate candidates for members of the house of representatives in the congress of the United States, and for all elective state, district and county offices, and to select committeemen, shall be held in each county at the usual polling places on the sec-

ond Tuesday in August of the even numbered years; and primaries under this chapter to nominate candidates for township and municipal offices and justices of the peace shall be held in each county at the usual polling places on the second Tuesday in August of the odd numbered years; provided, however, that in a municipality organized under any of the provisions of sections 3515-1 to 3515-71, both inclusive, of the General Code and in townships lying wholly within and the boundaries of which are co-extensive with the boundaries of such municipality, primaries under this chapter to nominate candidates for all offices not provided for in the plan of government under which such municipality is organized shall be held in such municipality at the usual polling places on the same day on which primary elections are held to nominate the officers of such municipality provided for in its plan of government. Primaries to nominate candidates for United States senator shall be held on the second Tuesday in August of the years in which such senators are to be elected. [110 v. 143; 107 v. 400; 104 v. 8; 103 v. 476.]

Sec. 9571. [Sufficiency of bonds executed by guaranty company.] When a bond, recognizance or undertaking is required or permitted by law, with one or more sureties, its execution or the guaranteeing thereof, as the case may be, as sole surety, by a company authorized to guarantee the fidelity of persons holding places of public or private trust, to guarantee the performance of contracts other than insurance policies, and to execute and guarantee bonds and undertakings in actions or proceedings or by law allowed is sufficient, and when so executed and guaranteed, shall be a full compliance with every requirement of law, ordinance, rule or regulation that such bond, or recognizance must be executed and guaranteed by one surety or two or more sureties, or that such sureties, shall be residents or householders or freeholders. [R. S. Sec. 3641c; 97 v. 182; 92 v. 320; 90 v. 157; 88 v. 14.]

Sec. 9572. [Allowance of premium.] A judge, court or officer, whose duty it is to pass upon the account of an assignee, trustee, receiver, guardian, executor, administrator or other

fiduciary, required by law to give bond as such, whenever any fiduciary has given bond with a surety company as surety thereon, in the settlement of his account as such fiduciary, shall allow a reasonable sum paid such a company authorized under the laws of this state so to do, for becoming his surety, not above half of one per cent. per annum on the amount of the bond; unless it is in double the amount of the liability of the fiduciary, when the sum so allowed must not exceed a fourth of one per cent. per annum. Such company must have complied and continued to comply with the laws of this state relative to it, and with requirements as to justification, prescribed by the head of the department, court, judge, or officer required to approve or accept the bond. The bond or recognizance also must be approved by the head of the department, court, judge or officer required to approve or accept it. [R. S. Sec. 3641c; 97 v. 182; 92 v. 320; 90 v. 157; 88 v. 14.]

Sec. 9573. [Bonds of public officers.] The two preceding sections authorize such company to become surety upon the bond required by law of any state officer, except the superintendent of insurance, and of any county, township or municipal officer. Such company may be accepted by the officer or officers required to approve such bond, in lieu of the sureties now required by law.[1] [R. S. Sec. 3641c; 97 v. 182; 92 v. 320; 90 v. 157; 88 v. 14.]

(1) The present law permits surety companies to act as sureties on bonds of certain officers. The old law, insofar as it required surety companies as sureties on certain bonds, was held unconstitutional. State *ex rel.* v. Robbins, 71 O. S. 273; Haunts v. Lanman Co., 15 Dec. 64.

Workmen's Compensation.

Sec. 1465-60. [Employers subject to law.] The following shall constitute employers subject to the provisions of this act:[1]

1. The state and each county, city, township, incorporated village and school district therein.

2. Every person, firm, and private corporation including any public service corporation, that has in service three or more workmen or operatives regularly in the same business,

or in or about the same establishment under any contract or hire, express or implied, oral or written. [110 v. 224; 108 v. 313; 103 v. 72.]

(1) The "act" here referred to is the act further defining the powers and duties of the state liability board of awards with reference to the collection, maintainance and distribution of the state insurance fund, etc. (103 v. 72, et seq., as amended 108 v. 313 and 110 v. 224.)

Sec. 1465-61. [Definition of terms.] The terms "employe", "workman" and "operative" as used in this act, shall be construed to mean:

1. Every person in the service of the state, or of any county, city, township, incorporated village or school district therein, including regular[1] members of lawfully constituted police and fire departments of cities and villages, under any appointment or contract of hire, express or implied, oral or written, except any official of the state, or of any county, city, township, incorporated village or school district therein. Provided that nothing in this act shall apply to police or firemen in cities where the injured policemen or firemen are eligible to participate in any policemen's or firemen's pension funds which are now or hereafter may be established and maintained by municipal authority under existing laws.

2. Every person in the service of any person, firm or private corporation, including any public service corporation, employing three or more workmen or operatives regularly in the same business, or in or about the same establishment under any contract of hire, express or implied, oral or written, including aliens and minors, but not including any person whose employment is but casual and not in the usual course of trade, business, profession or occupation of his employer.

3. Every person in the service of any independent contractor or sub-contractor who has failed to pay into the state insurance fund the amount of premium determined and fixed by the industrial commission of Ohio for his employment or occupation, or to elect to pay compensation direct to his injured and to the dependents of his killed employes, as pro-

vided in section 1465-69, General Code, shall be considered as the employe of the person who has entered into a contract, whether written or verbal, with such independent contractor unless such employes, or their legal representatives or beneficiaries elect, after injury or death, to regard such independent contractor as the employer. [110 v. 224; 108 v. 313; 107 v. 157; 103 v. 72.]

(1) Emergency police and fireman not entitled to workman's compensation. Op. Atty. Gen. (1918), p. 1378.

Sec. 1465-62. [Contribution by state, county, city, township, etc.] Every employer mentioned in subdivision one of section thirteen hereof, shall contribute to the state insurance fund in proportion to the annual expenditure of money by such employer for the service of persons described in subdivision one of section fourteen hereof, the amount of such payments and the method of making the same to be determined as hereinafter provided. [103 v. 72.]

Sec. 1465-63. [Percentum to be contributed by state and subdivisions.][1] The amount of money to be contributed by the state itself and each county shall be a sum equal to not less than one percentum nor more than two percentum of the amount of money expended by the state and by each such county respectively, during the next preceding fiscal year for the service of persons described in subdivision one of section fourteen hereof, and the amount to be contributed by each city shall be a sum equal to not less than one percentum and not more than five percentum of such moneys so expended by such city, and the amount to be so contributed by each school district shall be equal to one-tenth of one percentum of such money so expended by such school district, and the amount to be so contributed by any incorporated village or other taxing district of the state shall be a sum equal to not less than one percentum nor more than two percentum of such moneys so expended by such village or other taxing district of the state; the amount of such contribution by each taxing district shall be determined by the industrial commission of Ohio. [110 v. 264; 108 v. 555; 103 v. 72.]

(1) **Validity.**—The provision of different methods for determining the amount to be contributed by the State and its subdivisions from that for determining the amount to be contributed by private employers is reasonable and does not offend Secs. 26 or 35 of Art. II of the Constitution. Porter, et al., v. Hopkins, 91 O. S. 74; see also, Cincinnati v. Hopkins, 16 N. P. (N. S.) 279.

Sec. 1465-65. [Annual list for each county showing amount expended by and amount due from taxing districts.] In the month of December of each year, the auditor of state shall prepare a list for each county of the state, showing the amount of money expended by each township, city, village, school district or other taxing district therein for the service of persons described in subdivision one of section fourteen hereof, during the fiscal year last preceding the time of preparing such lists; and shall file a copy of each such list with the auditor of the county for which such list was made, and copies of all such lists with the treasurer of state. Such lists shall also show the amount of money due from the county itself, and from each city, township, village, school district and other taxing district thereof, as its proper contribution to the state insurance fund, and the aggregate sum due from the county and such taxing districts located therein.

Provided, however, that should the industrial commission of Ohio on or before the first day of December in any year certify to the auditor of state that sufficient money is in the state insurance fund to the credit of any county or counties to provide for the payment of compensation to the injured and to the dependents of killed employes of such county or counties and the several taxing districts therein for the ensuing year, the auditor of state shall not prepare and file with the county auditors and the treasurer of state said list or lists for such county or counties specified in such certificate; and it shall be the duty of the industrial commission of Ohio to make and file such certificate with the auditor of state whenever in its judgment there is sufficient money in the state insurance fund to the credit of any county or counties to provide for the probable disbursements required to be made to the injured and to the dependents of killed employes of such county or counties and the several

taxing districts therein for the ensuing year.[1] [105 v. 3; 103 v. 72.]

(1) **Payments into state insurance fund.**—§§ 1465-66 and 1465-67 provide for the payment by the county treasurer into the state insurance fund of the amounts due from the several taxing subdivisions and for charging such amounts to such subdivisions.

Sec. 1465-68. [When fund available.] Every employe mentioned in subdivision one of section fourteen hereof [G. C. § 1465-61], who is injured, and the dependents of such as are killed in the course of employment, wheresoever such injury has occurred, provided the same was not purposely self-inflicted, on or before January 1st, 1914, shall be paid such compensation out of the state insurance fund for loss sustained on account of such injury or death as is provided in the case of other injured or killed employes, and shall be entitled to receive such medical, nurse and hospital services and medicines, and such amount of funeral expenses as are payable in the case of other injured or killed employes.

Every employe mentioned in subdivision two of section fourteen hereof, who is injured, and the dependents of such as are killed in the course of employment, wheresoever such injury has occurred, provided the same was not purposely self-inflicted, on and after January 1st, 1914, shall be entitled to receive, either directly from his employer as provided in section twenty-two hereof, or from the state insurance fund, such compensation for loss sustained on account of such injury or death, and such medical, nurse and hospital services and medicines, and such amount of funeral expenses in case of death as is provided by sections thirty-two to forty inclusive of the act. [103 v. 72.]

Public Contracts.

Sec. 17. [Debts not to be contracted without authority.] An officer or agent of the state or of any county, township or municipal corporation, who is charged or intrusted with the construction, improvement or keeping in repair of a building or work of any kind, or with the management or providing for a public institution, shall make no contract binding or purporting to bind the state, or such county, township or munici-

pal corporation, to pay any sum of money not previously appropriated for the purpose for which such contract is made, and remaining unexpended and applicable thereto, unless such officer or agent has been duly authorized to make such contract.[1] If such officer or agent makes or participates in making a contract without such appropriation or authority, he shall be personally liable thereon, and the state, county, township or municipal corporation in whose name or behalf the contract was made, shall not be liable thereon. [R. S. Sec. 17; 54 v. 77 §§ 1, 2.]

(1) **Certificate of funds** on hand also required, see § 3806 in Part I.

Effect of contract without funds.—When the municipality refuses payment to a contractor on the ground that the fund provided by legislative authority has already been expended, the corporation must show clearly that at the time of making the contract and entering upon its execution it with others exceeded the amount the fund provided. Otherwise this defense can not prevail. Cincinnati v. Cameron, 33, O. S. 336.

Sec. 17-1. [Hours constituting day's and week's work on public work.][1] Except in cases of extraordinary emergency, not to exceed eight hours shall constitute a day's work and not to exceed forty-eight hours a week's work, for workmen engaged on any public work carried on or aided by the state, or any political subdivision thereof, whether done by contract or otherwise; and it shall be unlawful for any person, corporation or association, whose duty it shall be to employ or to direct and control the services of such workmen, to require or permit any of them to labor more than eight hours in any calendar day or more than forty-eight hours in any week, except in cases of extraordinary emergency. This section shall be construed not to include policemen or firemen. [108 v. 1286; 103 v. 854.]

(1) A municipality is not liable, by implied contract, to pay a workhouse guard for extra hours beyond eight hours a day, where said guard accepts said employment by the month, knowing that he is expected to work twelve hours a day, making no objection thereto or demand for extra pay during his employment, and not expecting or intending to claim compensation for extra time. Ibold v. Cincinnati, 21 N. P. (N. S.) 155 (aff'd by Ct. of App. without report).

Does not apply to workman en-

gaged in operation of municipal power, heat, light and water plants. Op. Atty. Gen. (1917), p. 604. See also *Ib.* (1915), p. 1713.

Sec. 17-1a. [Platoons in fire department.] It shall be the duty of the chief of the fire department of each city to divide the uniform force into platoons, and the said chief shall not keep a platoon of the uniform force on duty more than twenty-four consecutive hours, except in cases of extraordinary emergency, after which the platoon serving twenty-four hours shall be allowed to remain off duty for twenty-four consecutive hours. This section shall not apply to any city that may have adopted or may hereafter adopt the eight-hour regulation for its fire department. [108 v. 1286.]

Sec. 17-2. [Penalty for violation.] Any person who shall violate any of the provisions of this act shall be deemed guilty of a misdemeanor and upon conviction be fined not to exceed five hundred dollars or be imprisoned not more than six months or both. [103 v. 854.]

Sec. 22. [Contracts deemed valid.] When an officer or board of a county, township or municipal corporation, by ordinance, resolution, order or other proceeding, and in pursuance of a statute of the state, has authorized or caused the issue and delivery of any bonds, obligations or instruments of such county, township or municipal corporation, or has caused any county, township or municipal contracts, grants, franchises, rights or privileges to be made or given, which were valid according to judicial construction and adjudication at the date of such action or proceeding, and loans or other things of value have been effected or acquired or expenditures have been made by other persons in reliance upon such construction or adjudication, such bonds, obligations, contracts, grants, franchises, rights and privileges, shall be valid and binding, notwithstanding subsequent change of such rule of judicial construction and adjudication with respect to other similar legislation.[1] [95 v. 444.]

(1) **Effect of validating acts.** —See Thomas v. State, 76 O. S. 341, 359.

Sec. 2362. [Separate bids for work and materials.] An officer, board or other authority of the state, a county, township, city, village, school or road district or of any public institution belonging thereto, authorized to contract for the erection, repair, alteration or rebuilding of a public building, institution, bridge, culvert or improvement and required by law to advertise and receive proposals for furnishing of materials and doing the work necessary for the erection thereof, shall require separate and distinct proposals to be made for furnishing such materials or doing such work or both, in their discretion, for each separate and distinct trade or kind of mechanical labor, employment or business entering into the improvement. [R. S. Sec. 794; 85 v. 218; 74 v. 186 § 1.]

(1) **Municipal contracts.**—See § 4332, *ante* in Part I, making the provisions as to contracts for public buildings generally, applicable to contracts in cities. See further notes to § 4332.

Sec. 2363. [When contract shall not be awarded for entire work.] When more than one trade or kind of mechanical labor, employment or business is required no contract for the entire job, or for a greater portion thereof than is embraced in one such trade or kind of mechanical labor shall be awarded, unless the separate bids do not cover all the work and materials required or the bids for the whole or for two or more kinds of work or materials are lower than the separate bids therefor in the aggregate. [R. S. Sec. 794; 85 v. 218; 74 v. 186 § 1.]

Sec. 2364. [Each contract shall be for only one class of labor or material; exceptions.] The contract for doing the work belonging to each separate trade or kind of mechanical labor, employment or business or for the furnishing of materials therefor, or both, shall be awarded by such officer, board or other authority in its discretion, to the lowest and best separate bidder therefor, and shall be made directly with him or them in the manner and upon the terms, conditions and limitations as to giving bond with security and otherwise as prescribed by law, unless it is let as a whole, or to bidders for more than one kind of work or materials. The provisions of this and the preceding two sections shall not apply to the erection of buildings

and other structures of a less cost than ten thousand dollars. [R. S. Sec. 794; 85 v. 218; 74 v. 186 § 1.]

Sec. 2365. [Limitation on bonds; qualification of sureties.] The bonds provided for in this chapter required to be taken by a board or officer of the county, township, city, village or school district of the state shall not exceed fifty per cent. of the estimated cost of such public building, bridge substructure or superstructure, or repairing, altering or rebuilding thereof. The officers named herein may require the person or persons on the bond of the successful bidder or bidders to qualify that they are residents of the state, and jointly worth a greater sum than the amount named in the bond over and above all liabilities and exemptions allowed by law. [R. S. Sec. 799a; 85 v. 218, 222.]

Sec. 2365-1. [Bond and additional obligation of contractor to pay subcontractors and material men.] That when public buildings or other public works or improvements are about to be constructed, erected, altered or repaired under contract, at the expense of the state, or any county, city, village, township or school district thereof, it shall be the duty of the board, officer or agent, contracting on behalf of the state, county, city, village, township, or school district, to require the usual bond as provided for in statute with good and sufficient sureties, with an additional obligation for the payment by the contractor, and by all subcontractors, for all labor performed or materials furnished in the construction, erection, alteration or repair of such building, works or improvements. [107 v. 642.]

Sec. 2365-2. [Approval of bond; conditions.] Such bond shall be executed by such contractor with such sureties as shall be approved by the board, officer, or agent acting on behalf of the state, county, city, village, township or school district aforesaid, in an amount equal to at least fifty per cent (50%) of the contract price, and conditioned for the payment by the contractor and by all subcontractors, of all indebtedness which may accrue to any person, firm or corporation, on account of any labor performed or materials

furnished in the construction, erection, alteration or repair of such building, works or improvement. Such bond shall be deposited with, and held by, such board, officer or agent for the use of any party interested therein. [107 v. 642.]

Sec. 2365-3. [Creditor shall furnish statement of amount due to sureties; when and how suit shall be brought.] Any person, firm or corporation to whom any money shall be due on account of having performed any labor, or furnished any material in the construction, erection, alteration or repair of any such building, work or improvement, within ninety (90) days after the acceptance thereof by the duly authorized board or officer, shall furnish the sureties on said bond a statement of the amount due to any such person, firm or corporation. No suit shall be brought against said sureties on said bond until the expiration of sixty (60) days after the furnishing of said statement. If said indebtedness shall not be paid in full at the expiration of said sixty days, said person, firm or corporation may bring an action in his own name upon such bond, as provided in sections 11242 and 11243 of the General Code of the state of Ohio, said action to be commenced within one year from the date of the acceptance of said building, work or improvement. [107 v. 642.]

Sec. 2365-4. [Form of bond.] The bond hereinbefore provided for shall be in substantially the following form, and recovery of any claimant thereunder shall be subject to the conditions and provisions of this act to the same extent as if such conditions and provisions were fully incorporated in said bond form:

KNOW ALL MEN BY THESE PRESENTS, that we, the undersigned ..... as principal and ..... as sureties, are hereby held and firmly bound unto .... in the penal sum of .... dollars, for the payment of which well and truly to be made, we hereby jointly and severally bind ourselves, our heirs, executors, administrators, successors and assigns.

Signed this ..... day of ....., 19....

THE CONDITION OF THE ABOVE OBLIGATION IS SUCH that whereas the above named principal did on the ..... day of ....., 19...., enter into a contract with ..... which said contract is made a part of this bond the same as though set forth herein;

Now, if the said ..... shall well and faithfully do and perform the things agreed by ..... to be done and performed according to the terms of said contract; and shall pay all lawful claims of subcontractors, material men and laborers, for labor performed and materials furnished in the carrying forward, performing or completing of said contract; we agreeing and assenting that this undertaking shall be for the benefit of any material man or laborer having a just claim, as well as for the obligee herein; then this obligation shall be void; otherwise the same shall remain in full force and effect; it being expressly understood and agreed that the liability of the surety for any and all claims hereunder shall in no event exceed the penal amount of this obligation as herein stated.

The said surety hereby stipulates and agrees that no modifications, omissions, or additions, in or to the terms of the said contract or in or to the plans or specifications therefor shall in any wise affect the obligations of said surety on its bond. [107 v. 642.]

Sec. 2366. [Penalty.] Whoever, being an officer, violates any provision of this chapter shall be fined in any sum not to exceed one thousand dollars. [R. S. Sec. 799a; 85 v. 218, 222.]

Sec. 12910. [Officer or agent interested in contracts.] Whoever, holding an office of trust or profit by election or appointment, or as agent, servant or employe of such officer or of a board of such officers, is interested in a contract for the purchase of property, supplies or fire insurance for the use of the county, township, city, village, board of education or a public institution with which he is connected, shall be imprisoned in the penitentiary not less than one year nor more than ten years.[1] [R. S. Sec. 6969; 94 v. 391; 74 v. 236; 73 v. 31, 43, 86.]

(1) **Municipal officer.**—Compare § 3808 in Part I and see notes thereto.

Interest in contract, what is.—To be interested in a contract it is not necessary that the officer make profits on the same; it is sufficient that, while acting as such officer, he sells property to the municipality for its use, or is personally interested in the proceeds of the contract of sale, and receives the same, or part thereof, or has some pecuniary interest or share in the contract. Doll v. State, 45 O. S. 445.

Scope of section.—See Barker v. State, 69 O. S. 68, 73.

Sec. 12911. [Same as to other contracts.] Whoever, holding an office of trust or profit, by election or appointment, or as agent, servant or employe of such officer or of a board of such officers, is interested in a contract for the purchase of property, supplies or fire insurance for the use of the county, township, city, village, board of education or a public institution with which he is not connected, and the amount of such contract exceeds the sum of fifty dollars, unless such contract is let on bids duly advertised as provided by law, shall be imprisoned in the penitentiary not less than one year nor more than ten years. [R. S. Sec. 6969; 94 v. 391; 74 v. 236; 73 v. 31, 43, 86.]

Sec. 12912. [Contracts, officials forbidden to be interested; penalty.] Whoever, being an officer of a municipal corporation or member of the council thereof or the trustee of a township, is interested in the profits of a contract, job, work or services for such corporation or township, or acts as commissioner, architect, superintendent or engineer, in work undertaken or prosecuted by such corporation or township during the term for which he was elected or appointed, or for one year thereafter,[1] or becomes the employe of the contractor of such contract, job, work, or services while in office, shall be fined not less than fifty dollars nor more than one thousand dollars or imprisoned not less than thirty days nor more than six months, or both, and forfeit his office. [101 v. 145; R. S. Sec. 6976; 94 v. 406; 90 v. 29; 66 v. 164.]

(1) Member of council may be appointed director of public service within one year after expiration of his term. See Op. Atty. Gen. (1922), p. 530.

Sec. 12918. [Fraud in connection with public work.] Whoever, being an officer, or a person appointed or employed by an officer or by a board of officers, whose lawful duty it is to superintend the making, construction, erection, enlargement, repair or improvement of a public structure or part thereof, or any public improvement whatever, or make a plan or specification of materials or labor therefor, or an estimate of the cost thereof or the amount of labor done on or materials furnished therefor, knowingly makes an incomplete or fraudulent plan, specification or estimate or knowingly permits work to be done in a manner other than in accordance with the plans and specifications thereof, or with material different from that required thereby, or, being a contractor or his agent, knowingly permits materials to be used therein, or work to be done thereon, different from the plans and specifications and in violation of his contract, shall be imprisoned in the penitentiary not less than one year nor more than five years.[1] [101 v. 131; R. S. Sec. 6970.]

(1) **Sufficiency of indictment.**—See State v. Henkel, 11 N. P. (N.S.) 97.

Embezzlement.

Sec. 12467. [Embezzlement; fraudulent conversion.] Whoever, being an officer, attorney-at-law, agent, clerk, guardian, executor, administrator, trustee, assignee in insolvency, officer of a lodge or subordinate body of a fraternal or mutual benefit society, servant or employe of a person, except apprentices or persons under eighteen years of age, embezzles or converts to his own use, fraudulently takes or makes away with, or secretes with intent to embezzle or convert to his own use anything of value which shall come into his possession by virtue of his election, appointment or employment thereto, if the total value of the property embezzled in the same continuous employment or term of office, whether embezzled at one time or at different times within three years prior to the inception of the prosecution, is thirty-five dollars or more, shall be imprisoned in the penitentiary not less than one year nor more than ten years, or, if such total value is less than thirty-five dollars shall be fined not more than two hundred dollars or imprisoned not more than thirty days, or both.[1] [R. S. Sec. 6842; 95 v. 303;

83 v. 23; 82 v. 140; 78 v. 186; 74 v. 249; 73 v. 86; 73 v. 31; 66 v. 29; 55 v. 84.]

(1) **Policeman,** obtaining money by virtue of his office and secreting it with intent to convert to his own use, would violate this section. Todd v. Publishing Co., 29 C. C. 155, 160.

Sec. 12873. [Embezzlement of public money; deposit with bank.] Whoever, being charged with the collection, receipt, safekeeping, transfer or disbursement of public money or a bequest, or part thereof, belonging to the state, or to a county, township, municipal corporation, board of education, cemetery association or company, converts to his own use, or to the use of any other person, body corporate, association or party, or uses by way of investment in any kind of security, stock, loan, property, land or merchandise, or in any other manner or form, or loans with or without interest to a company, corporation, association or individual, or, except as provided by law, deposits with a company, corporation or individual, public money or other funds, property, bonds, securities, assets or effects received, controlled or held by him for safekeeping or in trust for a specific purpose, transfer or disbursement, or in any other way or manner, or for any other purpose, shall be guilty of embezzlement of the money or other property thus converted, used, invested, loaned, deposited or paid out, and shall be imprisoned in the penitentiary not less than one year nor more than twenty-one years and fined double the amount of money or other property embezzled.[1] [R. S. Sec. 6841; 91 v. 338; 80 v. 43; 74 v. 249 § 11; 55 v. 44 § 15; (S. & C. 1610).]

(1) **Purpose** of this section is to safeguard the public money by keeping it in the custody of the public officer and not to secure for the public any profit or interest he might receive from the use of it. State v. Pierson, 83 O. S. 241; State v. Newton, 26 O. S. 265.

Depositing public funds at interest either for the officer's or the bank's benefit constitutes embezzlement. State v. Cameron, et al., 91 O. S. 50.

When officer charged with custody.—Where officer receives public money, though under an ordinance which is invalid, yet where there is a legal duty resting upon him to account for it, then his embezzlement of it is within the statute. State v. Carter, 67 O. S. 422. Where the funds embezzled were shown not to have become the property of the municipality or other political subdivision, the taking of it does not violate the

section. State v. Forbes, 4 N. P. (N. S.) 394; 17 Dec. 102.

Only officers charged with custody included.—Only those officers charged by law with the duties, or some of them, mentioned in the statute, are subject to prosecution. State v. Meyers, 56 O. S. 340.

For example, a deputy or clerk of county treasurer, not being charged with custody, etc., is not subject to prosecution for violation of the section. *Ib.*

As to what officers would be included, see further State v. Morton, 21 O. S. 669; Hartford Twp. v. Thompson, 33 O. S. 321; State v. Whetstone, 7 N. P. 631.

Interest on public funds.—An officer depositing funds and receiving the interest for his own use, would be liable to account for the interest. Eshelby v. Board, 66 O. S. 71.

Sec. 12874. [Fine is a judgment against whole estate.] The fine, provided for in the next preceding section, shall operate as a judgment at law on all of the estate of the person sentenced and be enforced to collection by execution or other process for the use only of the owner of the property or effects so embezzled, and such fine shall only be released or entered as satisfied by the person in interest as aforesaid. [R. S. Sec. 6841; 91 v. 338; 80 v. 43; 74 v. 249 § 11; 55 v. 44 § 15; (S. & C. 1610).]

Sec. 12875. [Lawful deposit of certain fees and trust funds.] The provisions of section twelve thousand, eight hundred and seventy-three shall not make it unlawful for the treasurer of a township, municipal corporation, board of education, or cemetery association, to deposit public money with a person, firm, company, or corporation organized to do a banking business under the laws of this state or the United States, but the deposit of such funds in such bank shall not release such treasurer from liability for loss which may occur thereby. Nor shall the provisions of section twelve thousand, eight hundred and seventy-three, make it unlawful for a county auditor, county treasurer, probate judge, sheriff, clerk of courts, or recorder, to deposit fees and trust funds coming into their custody as such officers as above, until such time as said aforesaid officers are required to make payment of the official earnings of their offices, so deposited, into their respective fee funds as required by section twenty-nine hundred and eighty-three, and until such time as the trust funds,

so held by them in their official capacities, may be paid to the person, persons, firms, or corporations, entitled to same, and any interest earned and paid upon said deposits shall be apportioned to, and become a part of said fees or trust funds, and shall in no instance accrue to, and be received by, the official making said deposits, for his own use. [106 v. 556; R. S. Sec. 6841; 91 v. 338; 80 v. 43; 55 v. 44; (S. & C. 1610).]

Sec. 12876. [Embezzlement of public property; fraudulent conversion.] Whoever, being elected or appointed to an office of public trust or profit, or an agent, clerk, servant or employe of such officer or board thereof, embezzles or converts to his own use, or conceals with such intent, anything of value that shall come into his possession by virtue of such office or employment, is guilty of embezzlement,[1] and, if the total value of the property embezzled in the same continuous employment or term of office, whether embezzled at one time or at different times within three years prior to the inception of the prosecution, is thirty-five dollars or more, shall be imprisoned in the penitentiary not less than one year nor more than ten years, or, if such total value is less than thirty-five dollars, shall be fined not more than two hundred dollars or imprisoned not more than thirty days, or both. [R. S. Sec. 6842; 91 v. 338; 80 v. 43; 74 v. 249; 55 v. 44.]

(1) **Return of money immaterial.**—The use of public money in taking up a private loan constitutes embezzlement and the fact that the money was promptly replaced is held immaterial in State v. Baxter, 89 O. S. 269 in which case the court in the syllabus says, "It is the design and policy of that section (12876) and kindred statutes to prevent public officers and agents from using public funds in their possession or under their control, in any manner or for any purpose not expressly authorized by law." See also State v. Cameron, 91 O. S. 50.

Sec. 12878. [Embezzlement by municipal and school officers.] Whoever, being a member of the council of a municipal corporation, or an officer, agent, clerk or servant of such corporation, or board or department thereof, or an officer, clerk or servant of a board of education, knowingly diverts, appropriates or applies funds, or a part of a fund raised by taxation or

otherwise, to any use or purpose other than that for which it was raised or appropriated, or knowingly diverts, appropriates or applies money borrowed, or a bond of the corporation or part of the proceeds of such bond, to any use or purpose other than that for which such loan was made, or bond issued, shall be imprisoned in the penitentiary not less than one year nor more than twenty-one years and fined in double the amount of money or other property embezzled.[1] [R. S. Sec. 6846; 74 v. 250 § 15; 73 v. 116 § 675: 66 v. 263 § 671.]

(1) **Purpose of section** is to punish as an offense, the diversion, appropriation or application of funds to a use other than that for which the funds were raised; a conversion of money to the officer's own use is embezzlement under § 12873 and is not within the above section. State v. Johnson, 53 O. S. 307.

Sec. 12879. [Fine is judgment on whole estate.] The fine provided for in the next preceding section, shall be a judgment at law on all of the estate of the person sentenced and be enforced to collection by execution or other process for the use only of the owner of the property or effects so embezzled, and such fine shall only be released or entered as satisfied by the person in interest as aforesaid. [R. S. Sec. 6846; 74 v. 250 § 15; 73 v. 116 § 675; 66 v. 263 § 671.]

Sec. 12880. [Selling public property with intent to defraud.] Whoever, being intrusted with the care, custody or control of property of the state, county, township or municipal corporation, sells or disposes of it for his own use, with intent to defraud, shall be imprisoned in the penitentiary not less than one year nor more than twenty-one years and fined double the amount of money or other property so embezzled. [R. S. Sec. 6847; 74 v. 250 § 16; 69 v. 193 § 2.]

Sec. 12881. [Fine is a judgment on whole estate.] The fine provided for in the next preceding section shall be a judgment at law on all of the estate of the person sentenced, and be enforced to collection by execution or other process for the use only of the owner of the property or effects so embezzled and such fine shall only be released or entered as satisfied by

the person in interest as aforesaid. [R. S. Sec. 6847; 74 v. 250 § 16; 69 v. 193 § 2.]

Sec. 13674. [What is prima facie evidence of embezzlement by public officer.] Failure or refusal to pay over, or produce the public money, or part thereof, by an officer or other person charged with the collection, receipt, transfer, disbursement or safe-keeping of such money, or part thereof, whether belonging to the state, or a county, township, municipal corporation or board of education in this state, or other public money, or to account to, or make settlement with a legal authority, of the official accounts of such officer or person, shall be prima facie evidence of the embezzlement thereof. Upon the trial of such officer or person for the embezzlement of public money under any provision of law, it shall be sufficient evidence, for the purpose of showing a balance against him, to produce a transcript from the books of the auditor of state, auditor of the county or the records of the commissioners of the county. The refusal of such officer or person, whether in or out of office, to pay a draft, order or warrant drawn upon him by an authorized officer, for public money in his hands, or a refusal by a person or public officer to promptly pay over to his successor public money or secureties on the legal requirement of an authorized officer of the state or county, on the trial of an indictment against him for embezzlement, shall be prima facie evidence thereof.[1] [R. S. Sec. 7299; 55 v. 44; S. & C. 1610.]

(1) **Application** of section is to persons only who are charged by law with the duties mentioned in the statute. State v. Meyers, 56 O. S. 340.

False Vouchers.

Sec. 13105. [False bill, note, bond, etc., for payment out of public treasury prohibited; penalty.] Whoever, knowing it to be false or fraudulent in whole or in part, makes, presents for payment or certifies as correct to the general assembly, either house thereof or a committee thereof, to the auditor of state, other state officer or board thereof, or the auditor, commissioners or other officers of a county, or the auditor or other accounting officer of a municipal corporation, or the township

trustees or other township officer, a claim, bill, note, bond, account, pay-roll or other evidence of indebtedness, for procuring its allowance or an order for the payment thereof out of the treasury of the state, or of such county, township or municipal corporation, or whoever, knowing it to be false and fraudulent in whole or in part, receives payment thereon from the treasurer of the state, or a county, township or municipal corporation, if it is false or fraudulent to the amount of thirty-five dollars or more, shall be imprisoned in the penitentiary not less than one year nor more than ten years, or, if it is fraudulent to a sum less than that amount, shall be fined not more than two hundred dollars or imprisoned not more than thirty days, or both.[1] [102 v. 115; R. S. Sec. 7075; 69 v. 193 § 1.]

(1) **Accounting officer** means such an officer as may lawfully pass upon and allow a claim or account against a municipal corporation, upon the authority of which allowance the comptroller may issue his warrant upon the treasurer. Hauck v. State, 45 O. S. 439.

A board of infirmary directors of a municipality was held to be included. *Ib.*

Authority of officer.—Whether an auditor to whom a false claim has been presented has power in himself to allow or pay the claim or not, the presentation of the fraudulent claim for the purpose of procuring from him or other proper authority its allowance, will constitute the offense. State v. Voute, 68 O. S. 274.

Sufficiency of indictment.—Must aver wherein claim was false. Du Brul v. State, 80 O. S. 52.

Preferment to Soldiers.

Sec. 12893. [Failure to prefer soldiers for appointments.] Whoever, being in a public department of the state or a municipal corporation, or upon public works of the state, fails to prefer for appointment and employment honorably discharged soldiers, sailors and marines of the United States, shall be fined not less than fifty dollars nor more than one hundred dollars. [92 v. 50 § 2; R. S. Sec. 3107-48.]

Inspection and Supervision of Public Offices.

Sec. 274. [Bureau of inspection of public offices; powers and duties.][1] There shall be a bureau of inspection and supervision of public offices in the department of auditor of

state which shall have power as hereinafter provided in sections two hundred seventy-five to two hundred eighty-nine, inclusive, to inspect and supervise the accounts and reports of all state offices, including every state educational, benevolent, penal and reformatory institution, public institution and the offices of each taxing district or public institution in the state of Ohio. Said bureau shall have the power to examine the accounts of every private institution, association, board or corporation receiving public money for its use and purpose, and may require of them annual reports in such form as it may prescribe. The expense of such examination shall be borne by the taxing district providing such public money. By virtue of his office the auditor of state shall be chief inspector and supervisor of public offices, and as such appoint not exceeding two deputy inspectors and supervisors, and a clerk. No more than one deputy inspector and supervisor shall belong to the same political party. [106 v. 26; 103 v. 246; 101 v. 382; 95 v. 511.]

(1) **Validity of act.**—See State v. Shumate, 72 O. S. 487, where held constitutional. See also State, ex rel., v. Maharry, 97 O. S. 272.

Sec. 275. [Traveling expenses of inspectors and supervisors.] All necessary traveling and hotel expenses of the deputy inspectors and supervisors shall be paid from the state treasury. [107 v. 503; 101 v. 382; 95 v. 511.]

Sec. 276. [Appointment of examiners; compensation and mileage.] The chief inspector and supervisor shall appoint such assistants as he deems necessary, who shall be known as state examiners, and assistant state examiners. State examiners shall receive the same compensation as is paid the auditor of the county in which the examination is held, said compensation to be reduced to a per diem basis by dividing the annual compensation of said county auditor by three hundred; provided, such per diem compensation shall not be more than fifteen dollars nor less than eight dollars per day. Assistant state examiners shall receive one-half of the above compensation so determined, except that in no event shall the per diem compensation be less than five dollars. Each state examiner and assistant state examiner shall be allowed mile-

age at the legal rate of railroad transportation when traveling on official business under orders of the chief inspector and supervisor or the deputy inspectors and supervisors. Should any such examiner or assistant be called upon to testify in any legal proceeding in regard to any official matters, they shall be entitled to the compensation and expense herein provided, to be paid in the same manner, but shall not be entitled to witness fees. [109 v. 98; 108 v. 262; 101 v. 382; 95 v. 511.]

Sec. 277. [Uniform system.] The auditor of state, as chief inspector and supervisor, shall prescribe and require the installation of a system of accounting and reporting for the public offices, named in section two hundred seventy-four. Such system shall be uniform in its application to offices of the same grade and accounts of the same class, and shall prescribe the form of receipt, vouchers and documents, required to separate and verify each transaction, and forms of reports and statements required for the administration of such offices or for the information of the public. [95 v. 512 § 2; 101 v. 383.]

Sec. 278. [Forms of accounts.] The system shall provide forms of accounts showing the sources from which the public revenue is received, the amount collected from each source, the amount expended for each purpose, and the use and disposition of other public property. It shall also provide forms of accounts of every public service industry, showing cost of ownership and operation, amount collected from private users, amount received from taxation, and value of service rendered the public. [95 v. 512 §§ 2, 4.]

Sec. 279. [Separate appropriation accounts.] A separate account shall be kept of each appropriation made or fund created by each taxing body, or legislative body, showing date and manner of payment therefrom, name of person or organization paid, and for what purpose paid. Separate accounts shall be kept for each institution, department, improvement, or public service industry, under the supervision or control of the state, or of a taxing body. [101 v. 383; 97 v. 272 § 3; 95 v. 512.]

Sec. 280. [Department accounts.] All service rendered and property transferred from one institution, department, improvement, or public service industry, to another, shall be paid for at its full value. No institution, department, improvement, or public service industry, shall receive financial benefit from an appropriation made or fund created for the support of another. When an appropriation account is closed, an unexpended balance shall revert to the fund from which the appropriation was made. [97 v. 272 § 3; 95 v. 512.]

Sec. 281. [Certified report of each institution or taxing district; when made and what it shall contain.] A financial report of each public institution or taxing district for each fiscal year shall be made in accordance with forms prescribed by the chief inspector and supervisor. The report shall be certified by the proper officer or board, filed with the bureau within thirty days after the close of the fiscal year, and contain the following: amount of collections and receipts, and accounts due from each source; amount of expenditures for each purpose; income of each public service industry owned or operated by a municipality, and the cost of such ownership or operation; amount of public debt of each taxing district, the purpose for which each item of such debt was created, and the provision made for the payment thereof. Each county auditor shall receive for his services in making such report the sum of fifty dollars, to be paid out of the county treasury upon the allowance of the county commissioners and to be credited to said auditor's fee fund. [102 v. 278; 101 v. 383; 97 v. 272; 95 v. 513.]

Sec. 282. [Report shall be verified and published.] The report shall be verified by the state inspector and supervisor, a deputy state inspector and supervisor, or a state examiner, and the substance thereof published at the expense of the state in an annual volume of statistics, which shall be submitted to the governor, who shall transmit it to the general assembly at its next session. [97 v. 272 § 5; 95 v. 513.]

Sec. 283. [Penalty for refusal to comply with instructions.] A public officer or employe who refuses or neglects to keep the

accounts of his office in the form prescribed, or make the reports required by the bureau of inspection and supervision, shall be removed from office on hearing before the proper authority. [97 v. 273 § 6; 95 v. 513.]

Sec. 284. [Biennial and annual examinations.] The bureau of inspection and supervision of public offices, shall examine each public office. Such examination of township, village and school district offices shall be made at least once in every two years, and all other examinations shall be made at least once a year, except that the offices of justices of the peace shall be examined at such times as the bureau shall determine. On examination, inquiry shall be made into the methods, accuracy and legality of the accounts, records, files and reports of the office, whether the laws, ordinances and orders pertaining to the office have been observed, and whether the requirements of the bureau have been complied with. [103 v. 506, 507; 101 v. 383; 97 v. 273; 95 v. 514.]

Sec. 285. [Powers of inspection officers; employment of experts.] The chief inspector and supervisor, each deputy inspector and each state examiner, shall have such authority to issue subpoena and compulsory process, to direct service thereof by a sheriff or constable, to compel the attendance of witnesses and the production of books and papers before him, to administer oaths, and to punish for disobedience of subpoena, refusal to be sworn, or to answer as a witness, or to produce books and papers, as is conferred upon officers authorized to take depositions. Sheriffs and constables shall receive the same fees as for like services in similar cases, and witnesses shall receive the same fees as are allowed in the common pleas court. The chief inspector, and, subject to his approval, each deputy inspector and each state examiner, shall likewise have authority to employ such experts or other assistants as may be necessary to disclose the facts concerning any matter under investigation, and fix their compensation. [103 v. 506, 507; 97 v. 273; 95 v. 514.]

Sec. 286. [What report of examination shall set forth; where report filed.] The report of the examination shall set

forth, in such detail as may be deemed proper by the bureau, the result of the examination with respect to each and every matter and thing inquired into and shall be made and signed by the state examiner in charge of the examination or by a deputy inspector, and shall be filed in the office of the bureau of inspection and supervision of public offices and certified copies thereof filed as follows: One in the office of the auditing department of the taxing district reported upon, and one in the office of the attorney general, prosecuting attorney, city solicitor, or mayor of a village, as hereinafter provided. If the report relates to the expenditure of public money from the state treasury or to the disposition of property belonging to the state, the certified copy thereof hereinbefore provided for shall be filed with the attorney general; if it relates to the expenditure of public money belonging to the treasury of a city or city school district or to the disposition of public property belonging to such city or city school district, the certified copy thereof shall be filed with the city solicitor of such city; if the report relates to the expenditure of public money belonging to the treasury of a village or the disposition of public property belonging to such village, the certified copy thereof shall be filed with the mayor of such village; if the report relates to the expenditure of public money belonging to the treasury of any other subdivision of the state or of a special taxing district or to any custodian of public funds other than the treasurer of state, the treasurer of a city, the treasurer of a city school district or the treasurer of a village, or to the disposition of public property belonging to such subdivision or special taxing district, or to any custodian of public property not otherwise mentioned herein, the certified copy thereof shall be filed with the prosecuting attorney of any county in which such political subdivision or special taxing district or part thereof is located, or in which such custodian of public money or public property resides. Such copy of the report may be so filed by expressing or mailing it to the office of the attorney general, city solicitor, mayor or prosecuting attorney, as the case may be.

[Collection of amounts found due by bureau; officer authorized to institute proceedings; employment of counsel.] If the report sets forth that any public money has been illegally expended, or that any public money collected has not been accounted for, or that any public money due has not been collected, or that any public property has been converted or misappropriated, the officer receiving such certified copy of such report, other than the auditing department of the taxing district, may, within ninety days after the receipt of such certified copy of such report, institute or cause to be instituted, and each of said officers is hereby authorized and required so to do, civil actions in the proper court in the name of the political subdivision or taxing district to which such public money is due or such public property belongs, for the recovery of the same, and shall prosecute, or cause to be prosecuted the same to final determination. Any mayor of a village is hereby authorized and required to employ legal counsel for such purpose, who shall be paid out of the treasury of the village on voucher approved by the mayor and on warrant of the village clerk, and the amount of such compensation shall constitute a charge against said village notwithstanding the failure of the council thereof to appropriate money or levy funds therefor. Each prosecuting attorney, city solicitor, or legal counsel employed by a mayor of a village shall forthwith notify the attorney general of the filing of such actions and keep him fully advised of the progress thereof; and the attorney general or his assistant may appear in any such action on behalf of the particular political subdivision or taxing district and may, either in conjunction with or independent of such prosecuting attorney, city solicitor or legal counsel employed by a mayor, prosecute the same to final determination; and the attorney general may, when in his judgment it is proper or there is good reason for so doing, if requested so to do by the auditor of state, bring the action in all cases where the prosecuting attorney, city solicitor or mayor fails or neglects to do so within ninety days after a report of an examination has been so filed.

[Criminal proceedings; when instituted.] If a report sets

forth any malfeasance or gross neglect of duty on the part of any officer or employe for which a criminal penalty is provided by law, a certified copy thereof shall be filed with the prosecuting attorney of the county in which the offense is committed, and such prosecuting attorney shall, within ninety days after receipt thereof, institute criminal proceedings against such officer or employe.

[Claims shall not be abated or compromised.] No claim for money or property found in any such report to be due to any public treasury or custodian thereof in any such report shall be abated or compromised either before or after the filing of civil actions, by any board or officer or by order of any court unless the attorney general shall first give his written approval thereof.

["Public money" defined; payment to taxing district.] The term "public money" as used herein shall include all money received or collected under color of office, whether in accordance with or under authority of any law, ordinance or order, or otherwise, and all public officials, shall be liable therefor. All money received under color of office and not otherwise paid out according to law, shall be due to the political subdivision or taxing district with which the officer is connected, and shall be by him paid into the treasury thereof to the credit of a trust fund, there to be retained until claimed by the lawful owner; if not claimed within a period of five years after having been so credited to said special trust fund, such money shall revert to the general fund of the political subdivision where collected.

[Submission to attorney general before entry of final order.] No judgment or final order shall be entered in any civil action commenced under the authority or direction of this section until such entry shall have been submitted to the attorney general, and the attorney general is hereby constituted an attorney of record in each such action. [108 v. 1115; 103 v. 506; 101 v. 383; 97 v. 273; 95 v. 514.]

Sec. 286-1. [Jurisdiction and prosecutions in civil actions.]

The civil actions provided for in section 286 of the General Code may be entertained, heard and determined by any court having jurisdiction of the amount involved or having jurisdiction to afford the remedy prayed for, notwithstanding the absence of any other provision of law authorizing such civil actions to be filed by the attorney general, prosecuting attorney, city solicitor or legal counsel employed by the mayor of a village. In any such action it shall be sufficient for the plaintiff to allege in the petition so much of the report of the bureau of inspection and supervision of public offices as relates to the claim against the defendant therein and that the amounts claimed against the defendant are unpaid, and it shall not be necessary in such petition separately to state and number any separate causes of action, the findings of such report, upon whatever claims or circumstances based, being considered for that purpose as constituting a single cause of action; nor shall the plaintiff be required to set forth in the petition any other or further matter relating to such claims. A certified copy of any portion thereof shall constitute prima facie evidence of the truth of the allegations of the petition. [103 v. 506, 509.]

Sec. 286-2. [Advancement of causes.] On the application of the plaintiff the court wherein such action is pending shall advance the cause on the docket. [103 v. 506, 509.]

Sec. 286-3. [When cause of action deemed to have accrued.] No cause of action on any matter set forth in any report made under authority and direction of section 286, General Code, shall be deemed to have accrued until such report is filed with the officer or legal counsel whose duty it is to institute civil actions for the enforcement thereof, and all statutes of limitations otherwise applicable thereto shall not begin to run until the date of such filing. [103 v. 506, 509.]

Sec. 286-4. [Liability of sureties.] In addition to any and all liability of any officer or employe for which he may be sued under the provisions of section 286 and the succeeding sections of the General Code, the sureties on any official bond

given by any such officer or employe shall be liable to the same extent as the principal and such actions may be brought upon such official bonds. [103 v. 506, 509.]

Sec. 287. [Expenses of bureau.] The necessary expenses of the maintenance and operation of the bureau of inspection and supervision shall be borne by the several counties in proportion to their population at the preceding federal census. The auditor of state shall draw on the treasurer of each county for its proportion of such expenses and the county treasurer shall pay such amount from the general revenue fund of the county semi-annually during the months of June and December. All moneys so received by the auditor of state shall be paid into the state treasury to the credit of the bureau of inspection and supervision fund. [95 v. 514 § 9.]

Sec. 288. [Expenses of inspection and auditing.] The expenses of the inspection and auditing of the public accounts and reports of a taxing district shall be borne by the district, and the auditor of state shall certify the amount of such expenses to the auditor of the county in which the district is situated. The county auditor shall forthwith issue his warrant in favor of the auditor of state on the county treasurer, who shall pay it from the general fund of the county, and the county auditor shall charge the amount so paid to the taxing district at the next semi-annual settlement. Moneys so received by the auditor of state shall be paid into the state treasury to the credit of the public audit expense fund. [97 v. 274 § 10; 95 v. 514.]

Sec. 289. [Payment over of public moneys.] Every public officer and employe whose duty it is to collect or receive payments due the public shall deposit all public moneys collected or received by him with the treasurer of the taxing district once every twenty-four consecutive hours. If such officer or employe collects or receives public moneys for a taxing district of which he is not an officer or employe, he shall during Saturday of each week pay to the proper officer of such district the amount so collected or received during the current week. [97 v. 273 § 6; 95 v. 513.]

PROVISIONS AS TO CERTAIN OFFICERS.

Mayor.[1]

Sec. 4837. [Mayor shall issue proclamation of election.] Previous to any election for municipal officers, the mayor shall issue a proclamation to the electors of the corporation or of the respective wards or districts thereof, as the case may require, setting forth the time and places of election and the officers to be chosen, and cause such proclamation to be published in a newspaper printed in the corporation at least ten days previous to the election. If no such newspaper is published in the corporation, such notice may be given by posters. [R. S. Sec. 1726; 66 v. 161 § 73.]

(1) **Abstract of votes.**—Duty of mayor with reference to return made by judges and clerks of election, see § 5114 G. C.

FORM OF MAYOR'S ELECTION PROCLAMATION.

Election Notice.

The qualified electors of the city [*or* village] of ....., State of Ohio, are hereby notified that an election will be held at the usual voting places in said city [*or* village] on ....., the ..... day of ....., 19...., between the hours of..... A. M. and ..... P. M., at which election the following officers will be chosen: (here insert names of officers to be elected.)

Given under my hand and the corporate seal of the city [*or* village] of ....., this ..... day of ....., 19....

....., Mayor.

Sec. 4841. [Proclamation as to sale of liquors on election day.] Three days previous to and on the day of any election, the mayor shall issue a proclamation to the public, setting forth therein the substance of the enactment to prohibit the sale of intoxicating liquors upon that day, and he shall take proper measures for the enforcement of such enactments.[1] [R. S. Sec. 1838; 61 v. 24.]

(1) See § 13197 forbidding sale of intoxicating liquors on election day.

Auditor.

Sec. 5114. [Abstract of vote for municipal officers.] The returns of municipal elections shall be made by the judges and

clerks in each precinct to the clerk or auditor of the municipality. Such clerk or auditor, or, in his absence or disability, a person selected by the council, shall call to his assistance the mayor, and, in his presence, make an abstract and ascertain the candidates elected, as herein required with respect to county officers. Such clerk or auditor shall make a certificate as to each candidate so elected, and cause it to be delivered to him. If there is no mayor, or he is absent, disabled or a candidate at such election, the clerk or auditor shall call to his assistance a justice of the peace of the county. [R. S. Secs. 1728, 1729; 97 v. 223 § 8; 66 v. 162.]

FORM OF CERTIFICATE OF ELECTION.

I, ..., auditor of the city [*or* clerk of the village] of ....., State of Ohio, do hereby certify that at the election held in said city [*or* village] on ....., 19...., ... was duly elected ..... of the said city [*or* village] of .....

Witness my hand and official seal, this ..... day of ....., 19.....

.....,

Auditor of the city [*or* Clerk of the village] of .....

Sec. 5115. [How returns made and canvassed in registration cities.] In registration cities the returns of the election of municipal officers, members of boards of education or justices of the peace shall be made to the board of deputy state supervisors of the county in which such city is located, and canvassed by a board of canvassers, consisting of such board of deputy state supervisors and the city auditor. [97 v. 223 § 8; 90 v. 61, 266; 89 v. 459.]

Treasurer.

Sec. 2303. [Treasurers and sureties may be released.][1] When a loss of public funds, entrusted to a county, city, village, township, or school district treasurer, by virtue of his office, heretofore or hereafter results from fire, robbery, burglary, or inability of a bank to refund public money lawfully in its possession belonging to such public funds, the county commissioners, township trustees, a city or village council or a board of education, respectively, may release and discharge such treasurer and the sureties upon his official bond, from all liability to or de-

mands of such county, township, city, village or school district, for loss so created and arising. [99 v. 388 § 1; 98 v. 120.]

(1) See Op. Atty. Gen. (1915), p. 794.

Sec. 2304. [What finding necessary to release.] Before such release and discharge shall be effected, the board of county commissioners, township trustees, city or village council or board of education shall find that the treasurer was entrusted by law with the care of such public funds, and that the loss thereof was not occasioned by his fault or negligence, and an entry of such findings shall be made upon the record book of the proceedings of such council or board. [99 v. 388 § 1; 98 v. 120.]

Sec. 2305. [Appeal from findings.] Within five days after such finding of release and discharge is made, a taxpayer of such county, township, municipality or school district, may appeal therefrom to the common pleas court of the county. Until such appeal is finally determined, the finding and other proceedings shall not effect a release and discharge. Notice in writing of intention to appeal shall be filed with the clerk or auditor of the board or council making the findings within five days. Within thirty days after such finding, a transcript thereof and of the other proceedings shall be filed in the common pleas court and docketed as other cases. [99 v. 388 § 1; 98 v. 120.]

Sec. 2306. [Trial in common pleas court.] The common pleas court shall proceed to try and determine the question whether such public funds were lost by the fault or negligence of the treasurer. If it be found that the funds were so lost, the finding of the board or council ordering the discharge shall be vacated. If it be found that the funds were not so lost, the finding shall remain in full force and the court shall cause its judgment to be certified to the board or council making such finding. [99 v. 388 § 1; 98 v. 120.]

Sec. 2307. [Questions may be submitted to vote.] If the finding of such county commissioners, township trustees, city or village council or board of education, as the case may be,

has been made and entered on the record book of its proceedings, such board or council may, at the next ensuing general election to be held in the county, township, city, village or school district, submit to the qualified electors thereof, the question whether such treasurer and the sureties upon his official bond shall be discharged from liability on account of such loss of funds. [99 v. 388 § 1; 98 v. 120.]

Sec. 2308. [Electors may demand submission to vote.] If twenty-five per cent. of the qualified electors of such county, township, city, village or school district, petition the council or board thereof for the privilege of determining by ballot whether such treasurer and the sureties on his official bond shall be released and discharged, such council or board shall submit the question to the qualified electors of the county, township, city, village or school district as herein provided. [99 v. 388 § 1; 98 v. 120.]

Sec. 2309. [Notice of election shall be given.] The deputy state supervisors of elections of the county, or within which such township, city, village or school district is located, shall cause notice of the submission of such proposition to the electors thereof. For the release of a county or city treasurer the notice shall be by publication in two newspapers of opposite politics in the county or city, for at least thirty days next prior to the date upon which the election is to be held. For the release of a village or township treasurer, twenty days' notice of the election shall be given by posting notices thereof in five public places within such village or township. For the release of a school treasurer, ten days' notice of such election shall be given by posting notice thereof in five public places in the school district. [98 v. 122 § 2.]

Sec. 2310. [Form of ballot.] The ballots for such election shall have printed thereon "Discharge of treasurer and sureties —yes." "Discharge of treasurer and sureties—no." Such ballot shall have a place at the left of each proposition for the voter to mark according to law, the proposition he favors. [98 v. 122 § 3.]

Sec. 2311. [Proceedings on result of election.] If a majority of the votes cast upon such proposition at the election are in favor of the discharge of such treasurer and his sureties, the county commissioners, township trustees, city or village council or board of education, as the case may be, shall cause the result of the election to be entered in the record book of its proceedings ordering such election, and thereupon shall release and discharge such treasurer and his sureties on his official bond from all liability on account of such loss. If a majority of the votes cast are against the discharge, the result of the election shall be made in the record book of proceedings of the council or board, and no further action therein shall be taken by such council or board. [98 v. 122 § 4.]

County Auditor.

Sec. 2602. [Accounts with townships, cities, villages, and special school districts.] The auditor[1] shall open an account with each township, city, village, and special school district in the county, in which, immediately after his semi-annual settlement with the treasurer in February and August of each year, he shall credit each with the net amount so collected for its use.

On application of the township, city, village, or school treasurer the auditor shall give him a warrant on the county treasurer, for the amount then due to such treasurer, and charge him with the amount of the warrant but the person so applying for such warrant shall deposit with the auditor a certificate from the clerk of the township, city, village, or district, stating that he is treasurer thereof, was duly elected or appointed, and that he has given bond according to law.[2] [R. S. Sec. 1047; 56 v. 128 § 22; (S. & C. 100).]

(1) This refers to county auditor.

(2) **Mandamus to compel treasurer to pay over money,** may be allowed, where treasurer refuses, upon presentation of the proper orders. Cass Tp. v. Dillon, 16 O. S. 38.

Old section 1047 R. S. (now 2602 G. C.) cited, Brown v. Van Wert, 4 C. C. 407, 422.

Sec. 2604. [Annual return to auditor of state of live stock statistics.] On or before the first day of July each year, the

auditor shall make and transmit to the auditor of state an abstract of the number of horses, neat cattle, sheep, hogs, mules, and asses in the county, as returned to his office by the assessors. On or before the first day of October each year, he shall transmit to the auditor of state a complete abstract of the funded and unfunded indebtedness of his county, and of each township, city, village, and school district therein as it was on the first day of September preceding, with the rate of interest payable thereon, the date of maturity, and the purpose for which it was created, and also what provision has been made for the payment of any such indebtedness, what amount has been collected, and whether remaining in the county, township, city, village, or school district treasury. To enable the county auditor to make this statement, the various officers of townships, cities, villages and school districts shall furnish him with the information thereof, at such time and in such manner as he requires, and he shall furnish them blanks for that purpose. [R. S. Sec. 1049; 70 v. 251 §§ 1, 2, 3; 66 v. 26 § 2.]

Sec. 2689. [Payment of proceeds of special tax levy to local treasurers.] Immediately after each semi-annual settlement with the county auditor, on demand, and presentation of the warrant of the county auditor therefor, the county treasurer shall pay to the township treasurer, city or village treasurer, the treasurer of the school district, or the treasurer of any legally constituted board authorized by law to receive the funds or proceeds of any special tax levy, or other properly designated officers delegated with authority to receive such funds or proceeds by such boards and subdivisions, all moneys in the county treasury belonging to such boards and sub-divisions.[1] [110 v. 408; 108 v. 1192; 108 v. 561; R. S. Sec. 1122; 86 v. 168; 56 v. 101.]

(1) See § 4301 in Part I.

Sec. 2690. [Money may remain in county treasury.] If a township treasurer or other proper officer so requires, or the trustees of a township, the council of a city, village, or the board of education of a school district, respectively, so direct, such moneys shall remain in the county treasury, to be drawn

by the proper treasurer on the warrant of the county auditor, in sums of not less than one hundred dollars. [R. S. Sec. 1122; 86 v. 168; 56 v. 101.]

Sec. 2691. [Moneys shall not be held without authority.] If a county treasurer retains, or if such local treasurer permits such moneys to remain in the county treasury, in any manner other than herein provided, he shall forfeit and pay for such offense not less than one hundred nor more than one thousand dollars, to be recovered in an action at the suit of the state, for the use of the county. [R. S. Sec. 1122; 86 v. 168; 56 v. 101.]

Sec. 2692. [Advance payments to local authorities.] When the local authorities so request,[1] the county auditor may draw, and the county treasurer shall pay on such draft to township, city and village treasurers, and the treasurer of any board of education, from June twentieth and December twentieth to the date of the semi-annual distribution, each year, any sum not exceeding two-thirds of the current collection of taxes for such local authorities, respectively, including, as to boards of education, the estimated distribution of the state common school fund and the levy for school purposes retained in the county, to become due to the school district, in advance of the semi-annual settlements. [108 v. 1303; R. S. Sec. 1123; 97 v. 378; 86 v. 43; 70 v. 184.]

(1) Demand upon county auditor and treasurer for advance payment of municipal taxes must be made by city treasurer. Op. Atty. Gen. (1914), p. 1290.

Advance of taxes, when not allowed. See Op. Atty. Gen. (1923) No. 1050.

Sec. 4763. [Treasurer of the school funds.] In each city school district, the treasurer of the city funds shall be the treasurer of the school funds. In all exempted village, village and rural school districts which do not provide legal depositories as provided in sections 7604 to 7608 inclusive, the county treasurer shall be the treasurer of the school funds of such districts. [109 v. 552; 104 v. 158; R. S. Sec. 4042; 97 v. 367; 85 v. 102, 193; 70 v. 24, § 44.]

Sealer of Weights and Measures.

Sec. 7965. [State sealer; duties.] The secretary of agriculture shall be state sealer, and shall make, promulgate and enforce such rules and regulations as may be necessary to the prompt and effective enforcement of the weights and measures laws of this state. The standards of weights and measures adopted by the state shall be deposited in a suitable room at Columbus, and be kept in suitable cases, to be opened only for the purpose of comparing them with such standards and copies which by law are furnished for the use of the several counties or villages unless by joint resolution of the general assembly, or upon a call of either house for information, or by order of the governor for scientific purposes. The secretary of agriculture shall, upon the passage of this act, and once every three years thereafter, require each county auditor and city or village sealer, in this state, to present all standards of weights and measures in their possession to him for comparison with the standards adopted by the state, and he shall condemn and destroy all of such standards as do not conform with the standards adopted by the state. Each county auditor and each city and village sealer shall be required to procure copies of all the original standards adopted by the state named in section 7966 of the General Code, except such standards now in their possession as the secretary of agriculture shall find to conform with the standards adopted by the state. It shall be the duty of the secretary of agriculture to advise and assist all county, city and village sealers, and generally be charged with the enforcement of all laws relating to weights and measures, and in the performance of such duties it may use the service of any person employed in his department. The secretary of agriculture or any person employed by him for that purpose may try and prove any weights, measures, balance, and any other weighing or measuring device, or request from any person, and when the same are found or made to conform to the state standards shall cause the same to be sealed and marked, as provided in section 2616 of the General Code. [107 v. 460, 491; 106 v. 143; 103 v. 304; 103 v. 71.]

Sec. 7968. [Like copies to be furnished to cities and villages.] The state sealer shall furnish like copies of the original standards to the sealer of any city or village upon application therefor, and payment of the cost thereof, by such city or village.[1] [R. S. Sec. 145; 58 v. 78 § 9; (S. & S. 924).]

(1) **Application of section.**— § 7965 provides for the deposit and safe keeping of standards of weights and measures adopted by the state. § 7966 requires copies of the original standards for each county of the state to be delivered to the county auditors.

Appointment of sealers or inspectors of weights and measures by municipalities was held to be authorized by a section such as this; and incident to the creation of the office, the municipalities would have power to prescribe duties of such officers. Huddleson v. Ruffin, 6 O. S. 604.

See § 3651 in Part I.

Fire and Police Officers.

Sec. 824. [Investigation of cause of fire.] The state fire marshal, the chief[1] of the fire department of each city or village in which a fire department is established, the mayor of each incorporated village in which no fire department exists, and the township clerk of each organized township without the limits of a village or city, shall investigate the cause, origin and circumstances of each fire occurring in such city, village or township by which property has been destroyed or damaged, and shall make an investigation to determine whether the fire was the result of carelessness or design. The investigation shall be commenced within two days, not including Sunday, if the fire occurred on that day, and the state fire marshal may superintend and direct the investigation if he deems it necessary. [R. S. Sec. 409-51; 94 v. 387; 95 v. 472.]

(1) Chief has authority to enter buildings for inspection. Op. Atty. Gen. (1917), p. 1153.

Sec. 825. [Report of fires.] The officer making an investigation of a fire occurring in a city, village or township, shall forthwith notify the state fire marshal, and within one week of the occurrence of the fire shall furnish him a written statement of all facts relating to its cause and origin, and such other infor-

mation as is required by forms provided by the state fire marshal. [R. S. Sec. 409-51; 94 v. 387; 95 v. 472.]

Sec. 826. [Penalty for official neglect.] An officer named in the last two preceding sections who neglects to comply with any requirement of this chapter, shall be fined not less than twenty-five dollars nor more than two hundred dollars. [R. S. Sec. 409-55; 94 v. 388; 95 v. 474.]

Sec. 834. [Examination of structures or premises.] The state fire marshal, his deputies and subordinates, the chief of the fire department of each city or village where a fire department is established, the mayor of a city or village where no fire department exists, or the clerk of a township in territory without the limits of a city or village, at all reasonable hours may enter into all buildings and upon all premises within their jurisdiction for the purpose of examination. [R. S. Sec. 409-54; 94 v. 388; 95 v. 473.]

Sec. 835. [Further duties of state fire marshal.] If the state fire marshal, a deputy state fire marshal, or assistant fire marshal, or any officer mentioned in the preceding section, upon an examination or inspection finds a building or other structure, which for want of proper repair, by reason of age and dilapidated condition, defective or poorly installed electrical wiring and equipment, defective chimneys, defective gas connections, defective heating apparatus, or for any other cause or reason is especially liable to fire and which building or structure is so situated as to endanger other buildings or property, such officer shall order such building or buildings to be repaired, torn down, demolished, materials removed and all dangerous conditions remedied. If such officer finds in a building or upon any premises any combustible or explosive material, rubbish, rags, waste, oils, gasoline or inflammable conditions of any kind, dangerous to the safety of such buildings or premises, buildings or property, he shall order such materials removed or conditions remedied. Such order shall be made against and served personally or by registered letter upon the owner, lessee, agent, or occupant of such building or premises, and thereupon such order shall be complied with by

the owner, lessee, agent or occupant and within the time fixed in said order.[1] [102 v. 430; R. S. Sec. 409-54; 95 v. 473; 94 v. 388.]

(1) **Appeal from order.**— Section 836 G. C. provides for appeal to the state fire marshal, and Section 836-1 provides for appeal from the decision of the state fire marshal to the probate court.

Sec. 836-2. [Effect of failure to comply with order.] If any person fail to comply with an order of an officer under the last three preceding sections and within the time fixed, then such officer is empowered and authorized to cause such building or premises to be repaired, torn down, demolished, materials removed and all dangerous conditions remedied, as the case may be and at the expense of such person, and if such person within thirty days thereafter fail, neglect or refuse to repay said officer the expense thereby incurred by him, such officer shall certify said expenses, together with twenty-five percentum penalty thereon to the county auditor of the county in which said property is situate and said county auditor shall enter said expense on the tax duplicates of said county as a special charge against the real estate on which said building is or was situate and the same shall be collected as other taxes and when collected, shall together with the penalty thereon be refunded to such officer. [102 v. 430.]

Sec. 837. [Penalty.] Any person or persons, being the owner, occupant, lessee or agent of buildings or premises who wilfully fails, neglects or refuses to comply with any order of any officer named in the last four preceding sections, shall be guilty of a misdemeanor and shall be fined not more than fifty dollars nor less than ten dollars for each day's neglect. [102 v. 432; R. S. Sec. 409-54; 95 v. 473; 94 v. 388.]

Sec. 3024. [No witness fees to policeman in cases specified.] No watchman or other police officer is entitled to witness fees in a cause prosecuted under a criminal law of the state, or an ordinance of a city before a police judge or mayor of such city, justice of the peace, or other officer having jurisdiction in such causes. [R. S. Sec. 1315; 56 v. 22 § 1; (S. & C. 647).]

Sec. 12860. [Impersonating an officer.] Whoever, not a member of a regularly organized municipal police department, a legally elected public official or commissioned by the proper legal authority, falsely represents himself to be a police officer, sheriff, deputy sheriff or constable, or, being any person not a member of a municipal police department, for the purpose of such false representation, wears a uniform or part thereof similar to the uniform worn by a member of a municipal police department shall be fined not less than twenty-five dollars nor more than one hundred dollars or imprisoned in the workhouse not less than thirty days nor more than six months, or both. [R. S. Sec. 6913a; 97 v. 319.]

Sec. 12937. [Policeman failing to deposit stolen property.] Whoever, being an officer, patrolman, or other member of the police force in a municipal corporation, neglects or refuses to deposit, in the place designated by the mayor thereof, property taken or found by him in possession of a person arrested, shall be fined not more than three thousand dollars nor less than twice the value of the property, or imprisoned in the county jail not more than one month, or both. Such sentence shall vacate the office of the person so sentenced. [R. S. Sec. 6858-2; 98 v. 60.]

Sec. 13492. [Who may arrest.] A sheriff, deputy sheriff, constable, marshal, deputy marshal, watchman or police officer, shall arrest and detain a person found violating a law of this state, or an ordinance of a city or village, until a warrant can be obtained.[1] [R. S. Sec. 7129; 74 v. 317 § 1; 66 v. 291 § 21.]

(1) **Arrest without warrant, when justified,** Wolf v. State, 19 O. S. 248; Ballard v. State, 43 O. S. 340; State v. Lewis, 50 O. S. 179; Raitz v. Green, 13 C. C. 455; Britton v. Granger, 13 C. C. 281; Ringland v. Grannan, 31 C. C. 587; 12 C. C. (N. S.) 255; Kendall v. Scheve, 3 C. C. 526; Murray v. State, 6 N. P. (N. S.) 155; Erie Ry. Co. v. Reigherd, 166 Fed. 247; Dunning v. Cincinnati, 21 N. P. (N. S.) 468.

When not justified.—A police officer is not authorized to arrest without warrant a person passing peaceably along a highway, without any knowledge or reliable information, though in fact as, afterwards discovered, concealed weapons were found on the person so arrested. Rasey, et al., v. Ciccolino, 18 C. C. (N. S.) 331.

Defenses to charge of false arrest, see Wolf v. State, 19 O. S. 248; Reinhart v. City, 49 O. S.

257, 266; State v. Pate, 7, N. P. 543.

Village officials are not liable to respond in damages for false imprisonment because of the alleged infirmity of the ordinance under which the arrest was made, where they acted in good faith and with an honest belief in its validity. Middletown v. Bloomdale, 26 C. C. (N. S.) 565.

City is not liable for the action of a police officer in making an arrest under a state law. Burwell v. Columbus, 32 O. C. A. 96.

Authority of council to authorize arrest, see White v. Kent, 11 O. S. 550.

Notice of official character of person making arrest and charge upon which made, when necessary, see Wolf v. State, 19 O. S. 248.

Use of force.—Right of officer to use force in making arrest, and resistance, see Wolf v. State, 19 O. S. 248; State v. Pate, 7 N. P. 543; Ringland v. Grannan, 31 C. C. 587; 12 C. C. (N. S.) 255.

Right to search.—A police officer has no authority to search a person passing peaceably along a highway of a municipality until he has placed such person under arrest, and the circumstances must be such as to give reasonable and probable grounds to justify such arrest. Rasey v. Ciccolino, 18 C. C. (N. S.) 331.

Completed offenses. — Arrest without warrant illegal when offense has been completed and was not committed in presence of officer. Hopper v. Mabley, 14 Dec. 236, 237.

Marshal.—Power of marshal of municipal corporation to make arrest without warrant, see § 4386 and Ballard v. State, 43 O. S. 340.

IX.

CIVIL SERVICE.[1]

Sec. 486-1. [Definitions]:

1. The term "civil service" includes all offices and positions of trust or employment in the service of the state and the counties, cities and city school districts thereof.

2. The "state service" shall include all such offices and positions in the service of the state or the counties thereof, except the cities and city school districts.

3. The term "classified service" signifies the competitive classified civil service of the state, the several counties, cities and city school districts thereof.

4. The term "state commission" signifies the state civil service commission of Ohio.

5. The term "municipal commission" signifies the municipal civil service commission of a city.

6. The term "appointing authority" signifies the officer, commission, board, or body having the power of appointment to or removal from positions in any office, department, commission, board or institution.

7. The term "commission" shall signify either the state civil service commission of Ohio or the civil service commission of any municipality.

8. The term "employe" or "subordinate" signifies any person holding a position subject to appointment, removal, promotion or reduction by an appointing officer. [106 v. 400; 103 v. 698, § 1.]

(1) **Terms of incumbents.**—This and the succeeding sections relating to Civil Service, do not repeal existing statutes which fix the terms of certain officials; nor do they extend such terms. State, ex. rel., v. Schneller, 15 N. P. (N. S.) 438.

Civil Service does not apply to villages and village school districts. Op. Atty. Gen. (1916), p. 1186.

Sec. 486-2. [Method of appointment.] On and after the taking effect of this act, appointments to and promotions in the civil service of the state, the several counties, cities and city school districts thereof, shall be made only according to merit and fitness to be ascertained as far as practicable by competitive examination; and thereafter no person shall be appointed, removed, transferred, laid off, suspended, reinstated, promoted or reduced as an officer or employe in the civil service of the state, the several counties, cities and city school districts thereof, in any manner or by any means other than those prescribed in this act or by the rules of the state or municipal civil service commissions within their respective jurisdictions as herein provided. [106 v. 400; 103 v. 698, § 2.]

Sec. 486-3. [Commissioners.][1] After this act goes into effect the governor shall appoint, by and with the advice and consent of the senate, two persons of recognized character and ability to serve, one for two years and one for four years, as civil service commissioners, who shall constitute the state civil service commission of Ohio. Upon the expiration of the term of office of each commissioner so appointed, his successor shall be appointed by the governor to serve for a period of four years from the date of his appointment and until a successor is appointed and qualified. A vacancy in the office of commissioner shall be filled by the governor for the remainder of the unexpired term.

The governor may remove any member of the state civil service commission at any time for inefficiency, neglect of duty, or malfeasance in office, having first given to the commissioner a copy of the charges against him and an opportunity to be publicly heard in person or by counsel in his own defense, and any such act or removal by the governor shall be final. A statement of the findings of the governor, the reasons for his action, and the answer, if any, of the commissioner, shall be filed by the governor with the secretary of state and shall be open to public inspection. At the time of any appointment both commissioners shall not be adherents of the same political party.

No commissioner shall hold any other office of profit or

trust under the government of the United States, the state of Ohio, or any political subdivision thereof. [106 v. 400, 401; 103 v. 698, § 3.]

(1) Right to hold another office in addition to that of civil service commissioner. Op. Atty. Gen. (1914), p. 404.

Sec. 486-4. [Salaries and expenses.] Each commissioner shall devote his entire time to the duties of his office and shall receive an annual salary of four thousand dollars, and his necessary traveling expenses incurred in the discharge of his official duties. [106 v. 400, 401; 103 v. 698, § 4.]

Sec. 486-5. [Organization and expenses.] The governor at the time of the appointment of the commission, or member thereof, shall designate one of its members as chairman. The commission shall appoint, from an eligible list to be prepared by said commission, within thirty days after its appointment, a secretary who shall be ex-officio chief examiner, whose duty it shall be, under the direction of the commission, to keep minutes of the proceedings of the commission, preserve all reports made to the commission, keep the records of all examinations, superintend the examinations, and perform such other and further duties as the commission shall prescribe. The salary of the secretary shall be not to exceed thirty-six hundred dollars per annum, to be fixed by the commission.

Two members of the commission shall constitute a quorum for the transaction of business.

The commission may also appoint such examiners, inspectors, clerks and other assistants as may be necessary to carry out the provisions of this act, and fix their salaries within the limits of the appropriation made by the general assembly for that purpose. The commission may designate persons in or out of the official service of the state to serve as examiners or assistants under its direction. Each such person shall receive such compensation for each day actually and necessarily spent in the discharge of his duties as examiner or assistant as shall be determined by the commission; provided, however, that if any such examiner or as-

sistant is in the official service of the state, or any political subdivision thereof, it shall be a part of his official duties to render such services in connection with such examinations, without extra compensation. The secretary, examiners, inspectors, clerks and assistants shall, in addition to their salaries, receive such necessary traveling and other expenses as are incurred in the actual discharge of their official duties. The commission may also incur the necessary expenses for stationery, printing and other supplies incident to the business of the department. All salaries and expenses shall be approved and allowed by the commission and paid out of the treasury of the state on the warrant of the auditor, in the same manner as the salaries and expenses of other state officers are paid. [106 v. 400, 402; 103 v. 698, § 5.]

Sec. 486-6. [Rooms and accommodations.] The state commission shall maintain suitable offices in the city of Columbus; and it shall be the duty of the officers of the state, or any political subdivision thereof, at any place where examinations are directed to be held by the commission, to allow the reasonable use of public buildings and rooms and to furnish the same with heat and light, for holding such examinations, and in all proper ways to facilitate the work of the commission in carrying out the provisions of this act. [106 v. 400, 402; 103 v. 698, § 6.]

Sec. 486-7. [Powers and duties.] The commission shall,

First: Prescribe, amend and enforce administrative rules for the purpose of carrying out and making effectual the provisions of this act.[1]

Second: Keep minutes of its own proceedings and records of its examinations and other official actions. All such records, except recommendations of former employers, shall be open to public inspection under reasonable regulations; provided, however, that the governor or any person designated by him, may, for the purpose of investigation, have free access to all such records, whenever he has reason to believe that the provisions of this act or the administrative rules of the commission prescribed thereunder, are being violated.

Third: The commission shall prepare, continue and keep

in its office, a complete roster of all persons in the classified service. This roster shall be open to public inspection at all reasonable hours. It shall show in reference to each of such persons, his name, address, the date of his appointment to or employment in such service, his salary or compensation, the title of the place or office which he holds, the nature of the duties thereof, and, in case of his removal or resignation, the date of the termination of such service.

Fourth: Make investigations, either sitting in banc or through a single commissioner or the chief examiner, concerning all matters touching the enforcement and effect of the provisions of this act and the administrative rules of the commission prescribed thereunder.[2] In the course of such investigations each commissioner and the chief examiner shall have the power to administer oaths and affirmations and to take testimony relative to any matter which the commission has authority to investigate.

Fifth: Have the power to subpoena and require the attendance and testimony of witnesses[3] and the production thereby of books, papers, public records and other documentary evidence pertinent to the investigations, inquiries, or hearings on appeal from the action or decision of an appointing officer as is herein authorized, and to examine them as it may require in relation to any matter which it has authority to investigate, inquire into or hear. Fees shall be allowed to witnesses, and on their certificate, duly audited, shall be paid by the state treasurer, or in the case of municipal commissions by the county treasurer, for attendance and traveling, as is provided in section 3012 of the General Code for witnesses in courts of record. All officers in the civil service of the state or any of the political subdivisions thereof and their deputies, clerks, subordinates and employes shall attend and testify when summoned so to do by the commission. Depositions of witnesses may be taken by the commission in the manner prescribed by law for like depositions in civil actions in the courts of common pleas. In case any person, in disobedience to any subpoena issued by the commission, or any of them, or their chief examiner, fails or refuses to attend and testify to any matter regarding

which he may be lawfully interrogated, or produce any documentary evidence pertinent to any investigation, inquiry or hearing, it shall be the duty of the court of common pleas of any county, or any judge thereof, where such disobedience, failure or refusal occurs, upon application of the state commission, or a municipal commission, or any commissioner thereof, or their chief examiner, to compel obedience by attachment proceedings for contempt as in the case of disobedience of the requirements of a subpoena issued from such courts or a refusal to testify therein;

Sixth: Hear appeals from the decisions of appointing officers of persons in the classified service who have been reduced in pay or position, laid off, suspended, discharged or discriminated against by such appointing authority;

Seventh: Make a report to the governor annually, on or before the first day of January of each year, showing its own actions, the rules and all exceptions thereto in force, and any recommendations for the more effectual accomplishment of the purposes of this act. The commission shall also furnish any special reports to the governor whenever the same are requested by him. Such reports shall be printed for public distribution, under the same regulations as are the reports of other state officers, boards or commissions. [106 v. 400, 403; 103 v. 698, § 7; compare G. C. 4483, 4486, 4492, 4493, 4494, repealed, 103 v. 698, 713.]

(1) **Validity.**—The provision of the civil service act which empowers the commission to prescribe, amend and enforce rules for carrying the act into effect, which rules have the force and effect of law, is not a delegation of the power to make laws, but of administrative powers and duties for the making of this particular act effective. Green v. Commission, 15 N. P. (N. S.) 385; aff'd Green v. Commission, 90 O. S. 252.

(2) **Investigation of Mayor.**—This act does not confer power to investigate the act and conduct of a Mayor of a City, with reference to the enforcement by him of that enactment. Green v. Commission, 90 O. S. 252.

(3) Authority to procure the attendance of witnesses and to issue process therefor is conferred only upon state and municipal civil service commissions; Witnesses so summoned paid, how. Op. Atty. Gen. (1916), p. 701.

Civil service commission may not punish witnesses for contempt; it must appeal to common pleas court. Op. Atty. Gen. (1916), p. 307.

Fees of witnesses subpoenaed in

hearing before civil service commission are payable out of County Treasury. Op. Atty. Gen. (1916), p. 924.

Sec. 486-8. [Service—classified and unclassified defined.] The civil service of the state of Ohio and the several counties, cities and city school districts thereof shall be divided into the unclassified service and the classified service.

(a) The unclassified service shall comprise the following positions which shall not be included in the classified service, and which shall be exempt from all examinations required in this act.

1. All officers elected by popular vote or persons appointed to fill vacancies in such offices.

2. All election officers and the employes and clerks of persons appointed by boards of deputy supervisors and inspectors of elections.

3. The members of all boards and commissions and heads of principal departments, boards and commission appointed by the governor or by and with his consent; and the members of all boards and commissions and all heads of departments appointed by the mayor, or if there be no mayor such other similar chief appointing authority of any city or city school district. Provided, however, that nothing contained in this act shall exempt the chiefs of police departments and chiefs of fire departments of municipalities from the competitive classified service as provided in this act.

4. The members of county or district licensing boards or commissions, and boards of revision and assistant assessors.

5. All officers and employes elected or appointed by either or both branches of the general assembly, and such employes of the city council as are engaged in legislative duties.

6. All commissioned, non-commissioned officers and enlisted men in the military service of the state including military appointees in the offices of the adjutant-general.

7. All presidents, directors, superintendents, principals, instructors and teachers connected with the public school system, colleges and universities; and the library staff of any library in the state supported wholly or in part at public expense.

8. Three secretaries, assistants[1] or clerks and one per-

sonal stenographer for each of the elective state officers; and two secretaries, assistant or clerks and one personal stenographer for other elective officers and each of the principal appointive executive officers, boards or commissions, except civil service commissions, authorized by law to appoint such secretary, assistant or clerk and stenographer.

9. The deputies of elective or principal executive officers authorized by law to act for and in the place of their principals and holding a fiduciary relation to such principals.

10. Bailiffs, constables, official stenographers and commissioners of courts of record, and such officers and employes of courts of record as the commission may find it impracticable to determine their fitness by competitive examination.

11. Assistants to the attorney-general, special counsel appointed or employed by the attorney-general, assistants to county prosecuting attorneys and assistants to city solicitors.

12. Such teachers and employes in the agricultural experiment stations; such teachers in the benevolent, penal or reformatory institutions of the state; such student employes in normal schools, colleges and universities of the state; and such unskilled labor positions as the state commission or any municipal commission may find it impracticable to include in the competitive classified service; provided, that such exemptions shall be, by order of the commission, duly entered on the record of the commission with the reasons for each such exemption.

(b) The classified service shall comprise all persons in the employ of the state, the several counties, cities and city school districts thereof, not specifically included in the unclassified service, to be designated as the competitive class and the unskilled labor class.

1. The competitive class shall include all positions and employments now existing or hereafter created in the state, the counties, cities and city school districts thereof, for which it is practicable to determine the merit and fitness of applicants by competitive examinations.[2] Appointments shall be made to, or employment shall be given in, all positions in the competitive class that are not filled by promotion, rein-

statement, transfer or reduction, as provided in this act, and the rules of the commission, by appointment from those certified to the appointing officer in accordance with the provisions of this act.

2. The unskilled labor class shall include ordinary unskilled laborers. Vacancies in the labor class shall be filled by appointment from lists of applicants registered by the commission. The commission shall in its rules require an applicant for registration in the labor class to furnish such evidence or take such tests as it may deem proper with respect to age, residence, physical condition, ability to labor, honesty, sobriety, industry, capacity and experience in the work or employment for which he applies. Laborers who fulfill the requirements shall be placed on the eligible list for the kind of labor or employment sought and preference shall be given in employment in accordance with the rating received from such evidence or in such tests. Upon the request of an appointing officer, stating the kind of labor needed, the pay and probable length of employment, and the number to be employed, the commission shall certify from the highest on the list, double the number to be employed, from which the appointing officer shall appoint the number actually needed for the particular work. In the event of more than one applicant receiving the same rating, priority in time of application shall determine the order in which their names shall be certified for appointment. [106 v. 400, 404; 103 v. 698, § 8; compare G. C. 4479, repealed 103 v. 698, 713.]

(1) Who is an "assistant" in contemplation of this section. Op. Atty. Gen. (1916), p. 201.

(2) Heads of sub-departments of the Department of Public Service and the Department of Public Safety are within classified service as herein defined. Op. Atty. Gen. (1915), p. 2481.

Sec. 486-9. [Rules and classification.] As soon as practicable after the taking effect of this act, the commission shall put into effect rules for the classification of offices, positions and employments, in the civil service of the state and the several counties thereof; for appointment, promotions, transfers, lay-offs, suspensions, reductions, reinstatements and re-

movals therein and examinations and registrations therefor; and for maintaining and keeping records of the efficiency of officers and employes in accordance with the provisions of this act. Due notice of the contents of such rules and of all changes therein shall be given to appointing officers affected thereby, and such rules shall also be printed for public distribution: provided, however, that until such rules are adopted and in force, the rules existing when this law takes effect shall continue in force. [106 v. 400, 406; 103 v. 698, § 9; compare G. C. § 4486, repealed 103 v. 698, 713.]

Sec. 486-10. [Examinations; exception as to soldiers, sailors and nurses.] All applicants for positions and places in the classified service shall be subject to examination which shall be public, competitive and free for all, within certain limitations, to be determined by the commission, as to citizenship, residence, age, sex, experience, health, habits and moral character; provided, however, that any soldier, sailor, marine or Red Cross nurse who has served in the army or navy or hospital service in the United States in the war of the Rebellion, the war with Spain, or the war with the Central Powers of Europe who has been honorably discharged therefrom and is a resident of Ohio, may file with the civil service commission a certificate of service and honorable discharge, whereupon his name shall be placed upon an eligible list by the commission, from which eligible list he may be appointed to any position in the civil service of the state which such appointing power may deem him qualified to fill.[1] Such examinations shall be practical in character and shall relate directly to those matters which will fairly test the relative capacity of the person examined to discharge the particular duties of the position for which appointment is sought, and shall, when appropriate, include tests of physical qualifications, health and manual skill.

[Notice of time and place of examination.] The state commission shall have control of all examinations, except as otherwise provided in this act. No questions in any examination shall relate to political or religious opinions or affiliations. Reasonable notice of the time and place and general

scope of every competitive examination for appointment to a position in the civil service, except as otherwise provided for in this act, shall be given by the commission. Written or printed notices of every examination for the state classified service shall be sent by the commission to the county clerk of each county in the state, and to the city clerk of each municipality of the state, and such notices, promptly upon receipt by them, shall be posted in conspicuous public places in the court house of the county and in the city hall of the municipality, respectively. Such notices shall also be posted in a conspicuous place in the office of the commission for at least two weeks before any examination. In case of examinations limited by the commission to a district, county or city, the commission shall provide in its rules for adequate publicity of such examinations in the district, county or city, within which competition is permitted. [108 v. 1198; 106 v. 400; 103 v. 698; compare G. C. § 4480, repealed 103 v. 698, 713.]

(1) **Examination and eligible list.**—The civil service commission may refuse to admit to examination an applicant who lacks the established requirements, and after examination may refuse to certify one who has passed the examination but has thereafter been found lacking; but the commission has no authority to remove from the eligible list names which have been certified for appointment in answer to the requisition of an appointing officer. Tiernan v. Cincinnati, 18 N. P. (N. S.) 145.

Council cannot fix qualifications.—A municipal council has no authority to fix by ordinance the qualifications which shall be required of applicants for any office or position in the competitive service in the respect specified by the statute, and determination of the amount of experience which shall be required of such applicants is specifically conferred on the civil service commission. Tiernan v. Cincinnati, 18 N. P. (N. S.) 145.

This section is applicable to both state and municipal commissioners. Eligibility of soldiers and sailors. See Op. Atty. Gen., Aug. 12, 1921.

Sec. 486-11. [Applications.] The commission shall require persons applying for admission to any examination, provided for by this act or by the rules of the commission prescribed thereunder, to file with the commission within a reasonable time prior to the proposed examination a formal ap-

plication in which the applicant shall state under oath or affirmation:

(1) Full name, residence and postoffice address.

(2) Nationality, age and place and date of birth.

(3) Health and physical capacity for the public service sought.

(4) Business and employments and residences for five previous years.

(5) Such other information as may be reasonably required touching the applicant's merit and fitness for the public service sought; but no inquiry shall be made as to any religious or political opinions or affiliations of the applicant.

No fee or other assessment shall be charged for examination for positions, provided for by this act or by the rules of the commission prescribed thereunder, where the annual salary does not exceed six hundred dollars; for positions where the annual salary exceeds six hundred dollars and is less than one thousand dollars, an examination fee of fifty cents shall be charged; for positions where the annual salary is one thousand dollars or more, an examination fee of one dollar shall be charged. All fees collected under the provisions of this act shall be paid into the state treasury to the credit of the general revenue fund, or in the case of cities into the city treasury.

Blank forms for applications shall be furnished by the commission without charge to any persons requesting the same. The commission may require in connection with such application such certificate of persons having knowledge of the applicant as the good of the service may demand. The commission may refuse to examine an applicant, or after an examination to certify an eligible, who is found to lack any of the established preliminary requirements for the examination or who is physically so disabled as to be rendered unfit for the performance of the duties of the position which he seeks, or who is addicted to the habitual use of intoxicating liquors or drugs to excess, or who has been guilty of any crime or of infamous or notoriously disgraceful conduct, or who has been dismissed from either branch of the civil ser-

vice for delinquency or misconduct, or who has made false statements of any material fact, or practiced, or attempted to practice, any deception or fraud in his application or in his examination, in establishing his eligibility or securng his appointment. [106 v. 400, 407; 103 v. 698, § 11.]

Sec. 486-12. [Eligible lists.] From the returns of the examinations the commission shall prepare an eligible list of the persons whose general average standing upon examinations for such grade or class is not less than the minimum fixed by the rules of the commission and who are otherwise eligible; and such persons shall take rank upon the eligible list as candidates in the order of their relative excellence as determined by the examination without reference to priority of time of examination. In the event of two or more applicants receiving the same mark in an examination, priority in the time of application shall determine the order in which their names shall be placed on the eligible list. The term of eligibility of each list shall be fixed by the commission at not less than one year nor more than two years. When an eligible list is reduced to three names or less a new list shall be prepared. [106 v. 400, 407; 103 v. 698, § 12; compare G. C. § 4481, repealed 103 v. 698, 713.]

Sec. 486-13. [Appointments.][1] The head of a department, officer or institution in which a position in the classified service is to be filled shall notify the commission of the fact, and the commission shall, except as provided in sections 486-14 and 486-15 of the General Code, certify to the appointing officer thereof the names and addresses of the three candidates standing highest on the eligible list for the class or grade to which said position belongs. In the event that an eligible list becomes exhausted, through inadvertence or otherwise, and until a new list can be created, or when no eligible list for such position exists, names may be certified from eligible lists most appropriate for the group or class in which the position to be filled is classified. A person certified from an eligible list more than three times to the same appointing officer for the same or similar positions, may be omitted from future certifications to such officer, provided

that certification for a temporary appointment shall not be counted as one of such certifications.

Appointments to all positions in the classified service, as herein defined, that are not filled by promotion, transfer or reduction, as provided for in this act and the rules of the commission prescribed thereunder, shall be made only from those persons whose names are certified to the appointing officer in accordance with the provisions of this act, and no employment, except as provided in this act, shall be otherwise given in the classified service of this state or any political subdivision thereof. The appointing officer shall notify the commission of each position to be filled and shall fill such position by appointment of one of the three persons certified to him as provided in this act.[2] Forthwith, upon such appointment and employment, each appointing officer shall report to the proper civil service commission the name of such appointee or employe, the title and character of his office, the duties of same, the date of the commencement of same, and the salary or compensation thereof, and such other information as the commission requires in order to keep the roster herein mentioned. All original and promotional appointments shall be for a probationary period of not to exceed three months to be fixed by the rules of the commission, and no appointment or promotion shall be deemed finally made until the appointee has satisfactorily served his probationary period. At the end of the probationary period the appointing officer shall transmit to the commission a record of the employe's service, and if such service is unsatisfactory, the employe may, with the approval of the commission, be removed or reduced without restriction; but dismissal or reduction may be made during such period as is provided for in section 486-17 and 486-17a of the General Code. Any person who is appointed to a position in the classified service under the provisions of this act, except temporary and exceptional appointments, shall be or become forthwith a resident of the state. [106 v. 400, 408; 103 v. 698, § 13; compare G. C. §§ 4481, 4482, repealed 103 v. 698, 713.]

(1) **Filling vacancies.**— Former Municipal Code § 166 provided that the mayor should notify the board of public safety of any vacancy which might exist in the classified service, and that the board should certify to the mayor the names of the three candidates standing highest upon the register. It was held that this provision as to examination did not apply to men who were in office when the code went into effect. State, *ex rel.*, v. Hall, 25 C. C. 361; 2 C. C. (N. S.) 237.

Certifying names. — Whether mandamus will lie to compel certification of names, *quaere*. State, *ex rel.*, v. Hall, 25 C. C. 361; 2 C. C. (N. S.) 237.

Appointments made other than in the way prescribed are void, and mandamus will lie to compel compliance with statutory provisions. State, *ex rel.*, v. Lea, 10 N. P. (N. S.) 364; aff'd., Lea v. State, *ex rel.*, 15 C. C. (N. S.) 28 and 83 O. S. 518. For an appointing officer to refuse to appoint persons who have been certified to him as eligible and to have such names removed from the list is in violation of law, even though he believed such persons are incompetent or inefficient or even immoral or vicious. Tiernan v. Cincinnati, 18 N. P. (N. S.) 145.

Creating vacancies.—A vacancy can not be created in a position in the municipal service by an ordinance which abolishes the position and then re-establishes exactly the same position under a different name. Tiernan v. Cincinnati, 18 N. P. (N. S.) 145.

(2) Permanent appointments in competitive class may not be legally made from a fewer number than three names. Op. Atty. Gen. (1916), p. 201.

Sec. 486-14. [Temporary and exceptional appointments.][1] Positions in the classified service may be filled without competition as follows:

1. Whenever there are urgent reasons for filling a vacancy in any position in the classified service and the commission is unable to certify to the appointing officer, upon requisition by the latter, a list of persons eligible for appointment after a competitive examination, the appointing officer may nominate a person to the commission for non-competitive examination, and if such nominee shall be certified by the commission as qualified after such non-competitive examination, he may be appointed provisionally to fill such vacancy until a selection and appointment can be made after competitive examination; but such provisional appointment shall continue in force only until regular appointment can be made from eligible lists prepared by the commission, and such eligible lists shall be prepared within

ninety days thereafter. In case of an emergency an appointment may be made without regard to the rules of this act, but in no case to continue longer than thirty days, and in no case shall successive appointments be made: provided, however, that interim or temporary appointments, made necessary by reason of sickness or disability of regular officers, employes or subordinates shall continue only during such period of sickness or disability, subject to rules to be provided for by the commission.

2. In case of a vacancy in a position in the classified service where peculiar and exceptional qualifications of a scientific, managerial, professional, or educational character are required, and upon satisfactory evidence that for specified reasons competition in such special case is impracticable and that the position can best be filled by a selection of some designated person of high and recognized attainments in such qualities, the commission may suspend the provisions of the statute requiring competition in such case, but no suspension shall be general in its application to such place, and all such cases of suspension shall be reported in the annual report of the commission with the reasons for the same.

3. Where the services to be rendered by an appointee are for a temporary period, not to exceed one month, and the need of such service is important and urgent, the appointing officer may select for such temporary service any person on the proper list of those eligible for permanent appointment. Successive temporary appointments to the same position shall not be made under this provision. The acceptance or refusal by an eligible of a temporary appointment shall not affect his standing on the register for permanent employment; nor shall the period of temporary service be counted as a part of the probationary service in case of subsequent appointment to a permanent position. [106 v. 400, 409; 103 v. 698, § 14; compare G. C. § 4488, repealed 103 v. 698, 713.]

(1) **Validity.** — Held constitutional. Green v. Commission, 15 N. P. (N. S.) 385; aff'd 90 O. S. 252.

The section number, doubtless intended for 486-14 is carried in the amended act as here shown.

Sec. 486-15. [Promotions.][1] Vacancies in positions in the classified service shall be filled in so far as practicable by promotions. The commission shall provide in its rules for keeping a record of efficiency for each employe in the classified service, and for making promotions in the classified service on the basis of merit, to be ascertained as far as practicable by promotional examinations, by conduct and capacity in office, and by seniority in service; and shall provide that vacancies shall be filled by promotion in all cases where, in the judgment of the commission, it shall be for the best interest of the service so to fill such vacancies. All examinations for promotions shall be competitive. In promotional examinations efficiency and seniority in service shall form a part of the maximum mark attainable in such examination. In all cases where vacancies are to be filled by promotion, the commission shall certify to the appointing authority only the name of the person having the highest rating. The method of examination for promotions, the manner of giving notice thereof, and the rules governing the same shall be in general the same as those provided for original examinations, except as otherwise provided herein. [106 v. 400, 410; 103 v. 698, § 15; compare G. C. § 4480, repealed 103 v. 698, 713.]

(1) **Promotion.**—When an officer is required by law to appoint and promote city employes from a list of those who have attained a certain grade in competitive civil service examinations, he can not, in the exercise of his discretion, promote one who has failed to attain the prescribed grade, even though it be by the fraction of one percent, and there are special reasons why he believed that one will be more efficient in the position to which he desires to promote him. State, ex rel., v. Hyman, 25 C. C. (N. S.) 361.

Determination not subject to reversal.—Where the commission has once determined that a member of the police force is eligible for promotion, and promotion is duly made after competitive examination, it is without power to subsequently reverse its decision with respect thereto, and a subsequent board is bound by such former action. State, ex rel., v. Keefer, et al., 20 C. C. (N. S.) 366; 3 Ohio App. 426.

Sec. 486-16. [Transfers and reinstatements.] With the consent of the commission, a person holding an office or po-

sition in the classified service may be transferred to a similar position in another office, department or institution having the same pay and similar duties; but no transfer shall be made from an office or position in one class to an office or position in another class, nor shall a person be transferred to an office or position for original entrance to which there is required by this act, or the rules adopted pursuant thereto, an examination involving essential tests or qualifications or carrying a salary different from or higher than those required for original entrance to an office or position held by such person.

Any person holding an office or position under the classified service who has been separated from the service without delinquency or misconduct on his part may, with the consent of the commission, be reinstated within one year from the date of such separation to a vacancy in the same or similar office or position in the same department; and whenever any permanent office or position in the classified service is abolished[1] or made unnecessary, the person holding such office or position shall be placed by the commission at the head of an appropriate eligible list, and for a period of not to exceed one year shall be certified to an appointing officer as in the case of original appointments. [106 v. 400, 411; 103 v. 698, § 16]

(1) The sole purpose of the rule and the statute requiring the head of a department to notify the commission when any position is abolished and to furnish the names of incumbents thus losing their places, is to compel the commission to put back on the eligible list the names of such incumbents. Tiernan v. Cincinnati, 18 N. P. (N. S.) 145.

Sec. 486-17. [Reductions, lay-offs and suspensions.] No person shall be reduced in pay or position, laid off, suspended, discharged or otherwise discriminated against by an appointing officer for religious or political reasons or affiliations.[1] In all cases of reduction, lay-off or suspension of an employe or subordinate, whether appointed for a definite term or otherwise, the appointing authority shall furnish such employe or subordinate with a copy of the order of lay-off, reduction or suspension and his reasons for the

same, and give such employe or subordinate a reasonable time in which to make and file an explanation.[2] Such order together with the explanation, if any, of the subordinate shall be filed with the commission. Nothing in this act contained shall limit the power of an appointing officer to suspend without pay, for purposes of discipline, an employe or subordinate for a reasonable period, not exceeding thirty days; provided, however, that successive suspensions shall not be allowed, and provided further that the provisions of this section shall not apply to temporary and exceptional appointments made under the authority of section 486-14 of the General Code. [106 v. 400, 411; 103 v. 698, § 17; compare G. C. § 4412, 4485, 4487, repealed 103 v. 698, 713.]

(1) **Religious or political.**— Where the matters of fact assigned as reasons would, if true, afford ground for discharge and it is not claimed that the discharge was made for "religious or political reasons," the court can not inquire into the truth or falsity of the assigned reasons. State, ex rel., v. Fosdick, 17 N. P. (N. S.) 486.

(2) **Salary during suspension.**— Contempt proceedings against mayor and other city officials who had failed to pay salary of chief of police after restoration to office. See State, ex rel., v. Hamilton, 19 C. C. (N. S.) 229; (aff'd State, ex rel., v. Cassingham, 88 O. S. 603).

Reduction in rank.—The power conferred by Section 1545-24, Revised Statutes, upon the head of a department of a municipal corporation to remove or suspend any officer or employe of that department, includes a power to reduce in rank as it is the exercise of a power of the same inherent nature as the power granted. State, ex rel., v. Lapp, 24 C. C. (N. S.) 321.

Sec. 486-17a. [Tenure of office, removals.][1] The tenure of every officer, employe or subordinate in the classified service of the state, the counties, cities and city school districts thereof, holding a position under the provisions of this act, shall be during good behavior and efficient service; but any such officer, employe or subordinate may be removed for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of the provisions of this act or the rules of the commission, or any other failure of good behavior, or any other acts of misfeasance, malfeasance or nonfeasance in office.

In all cases of removal the appointing authority shall furnish such employe or subordinate with a copy of the order of removal and his reasons for the same, and give such officer, employe or subordinate a reasonable time in which to make and file an explanation. Such order with the explanation, if any, of the employe or subordinate shall be filed with the commission. Any such employe or subordinate so removed may appeal from the decision or order of such appointing authority to the state or municipal commission, as the case may be, within ten days from and after the date of such removal, in which event the commission shall forthwith notify the appointing authority and shall hear, or appoint a trial board to hear, such appeal within thirty days from and after its filing with the commission, and it may affirm, disaffirm or modify the judgment of the appointing authority, and the commission's decision shall be final; provided, however, that in the case of the removal of a chief of police or chief of the fire department of a municipality an appeal may be had from the decision of the municipal commission to the court of common pleas[2] of the county in which such municipality is situated to determine the sufficiency of the cause of removal. Such appeal shall be taken within ten days from the finding of the commission. [106 v. 400, 412; 103 v. 698, § 17; compare G. C. § 4412, 4477, 4484, 4485, 4487, 7690-2, repealed 103 v. 698, 713, and 4505, repealed 106 v. 400, 419.]

(1) **Terms of incumbents unchanged.**—The terms of such public offices and positions as are fixed by statute, remain unchanged by the civil service act of May 10, 1913, and an incumment on January 1, 1914, of such office or position, while protected from removal, suspension, reduction or transfer except for cause as therein provided, is not thereby given a new term of office, nor is his existing term thereby lengthened or extended. State, ex rel. v. Schneller, 15 N. P. (N. S.) 438.

Incumbents of office and positions whose statutory terms expired December 31, 1913, are not continued in office or position thereafter by the civil service act aforesaid. *Ib.*

Term of appointee.—An appointment made, the employment to "cease at the pleasure of the Board," was held under provision in former § 167 M. C., similar to provision above to be contrary to the spirit and letter of such provision. Bender v. Cushing, 14 Dec. 65.

No right of appeal to the com-

mission exists where a removal has been made from the classified service otherwise than in accordance with law. State, ex rel., v. Bigbee, 20 N. P. (N. S.) 113; (aff'd by Court of Appeals without report).

Demurrer does not lie to a petition in mandamus filed by a police officer who alleges that he has been removed from office without cause and without being furnished a statement of the reasons for his removal. *Ib.*

If charges upon which a member of the police force of a city was tried by the director of public safety and the civil service commission and discharged from the force, are indefinite or trivial, or not such as are recognized by law or the rules made by the police department in pursuance of the law as causes for which an officer may be suspended, the judgment of suspension is void; but if the charges or any of them, are of the kind and character which the law recognizes as sufficient to authorize the discharge or suspension of the officer from the police department, then the court will not inquire into the question whether the charges were sustained by the evidence or not, unless fraud is alleged. State, ex rel., v. Cleveland, 20 C. C. (N. S.) 250.

Superintendent of waterworks of a city, having held position continuously for more than seven years prior to January 1, 1915, may be removed only by § 486-17a. Op. Atty. Gen. (1916), p. 1115.

This section requiring appeal within ten days is mandatory in effect, and if not complied with, such employe is without remedy in a court of law. State, ex rel., v. Fosdick, et al., 21 N. P. (N. S.) 187.

(2) **Review by court.**—The action of the proper tribunal for the removal of a police officer was under former statutes, held final so far as the question of the truth of the charges is concerned. State, *ex rel.*, v. Barrett, 22 C. C. 104; State, *ex rel.*, v. Hyman, 22 C. C. 213; State, *ex rel.*, v. Hyman, 21 C. C. 187.

This section gives common pleas court jurisdiction to try question of removal of chief of police or fire department, *de novo*. Landry v. Harmon, 27 O. C. A. 301; 5 Ohio App. 217.

As to definiteness of charges, see State *ex rel.*, v. Barrett, 22 C. C. 104.

A finding "from the evidence and also from facts within personal knowledge" is not a proper exercise of power, unless the facts are shown and an opportunity to refute them given. State v. Sullivan, 58 O. S. 504.

Sec. 486-18. [Efficiency.] The commission shall from time to time make investigations for the purpose of ascertaining the duties imposed by law and practice upon each officer and employe or subordinate in the classified service, the manner in which such duties are performed, the cost thereof, and such other facts as will enable the commission to determine

the efficiency of such officers and employes and subordinates. The commission shall establish grades in the classified service, based upon similarity of duties and salaries; shall standardize employment in each grade; shall prescribe factors or quantities to be used in marking the relative efficiency of each officer and employe or subordinate in such grades; shall fix standards of efficiency to be maintained by officers and employes or subordinates; and shall keep a record of the efficiency markings for each officer and employe or subordinate in the classified service.

All officers and employes or subordinates in the state, the several counties, cities and city school districts thereof, whether in the classified service or not, shall promptly and correctly report to the commission any information required by the rules of the commission relative to the conduct, capacity, and efficiency of any officer, employe or subordinate in the classified service under his supervision. The records, reports and markings of efficiency in each department, office and institution shall be open at all times to inspection by the commission and shall be subject to review and correction by the commission. The efficiency records of the commission respecting each department, board, commission, or institution; shall be open to the heads of such department, board, commission or institution; and each officer and employe or subordinate shall have the right to be informed of the efficiency markings recorded for him by the commission.

The commission shall report to the officer in charge of a department, board, commission or institution its findings and recommendations relative to increasing the efficiency therein; and all cases of failure of officers, employes or subordinates therein to maintain a satisfactory efficiency record, shall be sufficient ground for the dismissal of any such officer, employe or subordinate. Such reports shall be deemed public records. [106 v. 400, 412; 103 v. 698, § 18.]

Sec. 486-19. [Municipal civil service.][1] The mayor or other chief appointing authority of each city in the state shall appoint three persons, one for a term of two years, one for four years, and one for six years, who shall consti-

tute the municipal civil service commission of such city and of the city school district in which such city is located; provided, however, that members of existing municipal commissions shall continue in office for the terms for which they have been appointed and until their successors are appointed and have qualified. Each alternate year thereafter the mayor or other chief appointing authority shall appoint one person, as successor of the member whose term expires, to serve six years and until his successor is appointed and qualified. A vacancy shall be filled by the mayor or other chief appointing authority of a city for the unexpired term. At the time of any appointment not more than two commissioners shall be adherents of the same political party. Such municipal commission shall prescribe, amend and enforce rules not inconsistent with the provisions of this act for the classification of positions in the civil service of such city and city school district; for examinations and registrations therefor; and for appointments, promotions, removals, transfers, layoffs, suspensions, reductions and reinstatements therein; and for standardizing positions and maintaining efficiency therein. Said municipal commission shall have and exercise all other powers and perform all other duties with respect to the civil service of such city and city school district, as herein prescribed and conferred upon the state civil service commission with respect to the civil service of the state; and all authority granted to the state commission with respect to the service under its jurisdiction shall, except as otherwise provided in this act, be held to grant the same authority to the municipal commission with respect to the service under its jurisdiction. The procedure applicable to reductions, suspensions and removals, as provided for in section 486-17 and 486-17a of the General Code, shall govern the civil service of municipalities. The expense and salaries of any of such municipal commission shall be determined by the council of such city and a sufficient sum of money shall be appropriated each year to carry out the provisions of this act in such city.

If the appointing authority of any such city fails to appoint a civil service commission or commissioner, as pro-

vided by law, within sixty days[2] after he has the power to so appoint, or after a vacancy exists, the state commission shall make the appointment, and such appointee shall hold office until the expiration of the term of the appointing authority of such city and until the successor of such appointee is appointed and qualified. If any such municipal commission fails to prepare and submit such rules and regulations in pursuance of the provisions of this act within six months after this act goes into effect, the state commission shall forthwith make such rules. The provisions of this act shall in all other respects, except as provided in this section, be in full force and effect in such cities.

It shall be the duty of each municipal commission to make reports from time to time, as the state commission may require, of the manner in which the law and the rules and regulations thereunder have been and are being administered, and the results of their administration in such city and city school district. A copy of the annual report of each such municipal commission shall be filed in the office of the state commission as a public record.

Whenever the state commission shall have reason to believe that a civil service commission of any city is violating or is failing to perform the duties imposed upon it by law, or that any member of such municipal commission is wilfully or through culpable negligence violating the provisions of the law or failing to perform his dutes as a member of such commission, it may institute an investigation, and if it shall find any such violation or failure to perform the duties imposed by law, it shall make a report of such violation in writing to the chief executive authority of such city, which report shall be a public record. The chief executive authority of such city may at any time remove any municipal civil service commissioner for inefficiency, neglect of duty, or malfeasance in office, having first given to such commissioner a copy of the charges against him and an opportunity to be publicly heard in person or by counsel in his own defense, and any such act of removal shall be final.[3]

The mayor shall have the exclusive right to suspend the chief of the police department or the chief of the fire depart-

ment for incompetence, gross neglect of duty,[4] gross immorality, habitual drunkenness, failure to obey orders given him by the proper authority or for any other reasonable and just cause. If either the chief of police or chief of the fire department is so suspended the mayor forthwith shall certify such fact, together with the cause of such suspension, to the municipal civil service commission, who within five days from the date of receipt of such notice shall proceed to hear such charges and render judgment thereon,[5] which judgment may affirm, disaffirm or modify the judgment of the appointing officer, and an appeal may be had from the decision of the commission to the court of common pleas as is provided for in section 486-17a of the General Code to determine the sufficiency of the cause of removal. [106 v. 400, 413; 103 v. 698, § 19; compare G. C. §§ 4381, 4478, 4487, 4490, 7690-2, repealed 103 v. 698, 713; 4405, repealed 106 v. 400, 419; and see former R. S. §§ 1749, 1545-165a.]

(1) **Home Rule Cities.** — Civil service provisions in a charter adopted by a municipality under the provisions of Sec. 7 of Art. XVIII supersede the general civil service law so long as such charter provisions comply with the requirements of Sec. 10 of Art. XV. State, ex rel., v. Edwards, 90 O. S. 305; State, ex rel., v. Baker, 92 O. S. 506.

(2) **The sixty day provision is directory** and not mandatory. The power to appoint continues in the mayor after the sixty days in event the Civil Service Commission fails to appoint. State, ex rel., v. George, 92 O. S. 344. See Op. Atty. Gen. (1916), p. 201.

(3) **Removal of commissioners.** —Injunction will not lie to prevent the mayor of a city from proceeding to remove from office the municipal civil service commissioners, even though the petitions allege that the mayor is about to cause such removals without any sufficient charges being filed, or without any charges whatever and without a hearing. Paine v. Kellar, Mayor, 22 C. C. (N. S.) 81; 4 Ohio App. 138. But in such a case, prohibition held proper remedy. Lewis v. Lingrel, 25 C. C. (N. S.) 55.

The state civil service commission has no authority under this law to investigate the acts and conduct of the mayor of a city with reference to its enforcement by him. Green v. Commission, 90 O. S. 253. See also, Lewis v. Lingrel, 25 C. C. (N. S.) 55.

(4) **A charge** that an officer collected money belonging to a city and failed and refused to pay the same over to the city treasury, charges gross neglect of duty and is sufficient cause for his removal from office. State, ex rel., v. Lesser, 94 O. S. 387.

(5) **Finding of commission not subject to reconsideration.** — The civil service commission having

found an officer guilty of charges preferred against him, conducted an examination and certified an applicant as his successor who was duly appointed and installed, can not subsequently reconsider its findings. State, ex rel., v. Lesser, 94 O. S. 387.

Sec. 486-20. [Civil service districts.] For the purpose of administration the state civil service commission may divide the state into civil service districts and establish an officer in each of such districts. The commission may place in charge of each such district an assistant whose duties and compensation shall be determined and fixed by the rules of the commission. [106 v. 400, 415; 103 v. 698, § 20.]

Sec. 486-21. [Pay-rolls.] After the taking effect of this act it shall be unlawful for the auditor of state, or for any fiscal officer of any county, city or city school district thereof, to draw, sign or issue or authorize the drawing, signing or issuing of any warrant on the treasurer or other disbursing officer of the state, or of any county, city or city school district thereof, to pay any salary or compensation to any officer, clerk, employe, or other person in the classified service unless an estimate, pay-roll or account for such salary or compensation containing the name of each person to be paid, shall bear the certificate of the state civil service commission, or, in case of the service of a city, the certificate of the municipal service commission of such city, that the persons named in such estimate, pay-roll or account have been appointed, promoted, reduced, suspended, or laid off or are being employed in pursuance of this act and the rules adopted thereunder.

Any sum paid contrary to the provisions of this section may be recovered from any officer or officers making such payment in contravention of the provisions of law and of the rules made in pursuance of law; or from any officer signing or countersigning or authorizing the signing or countersigning of any warrant for the payment of the same, or from the sureties on his official bond, in an action in the courts of the state, maintained by a citizen resident therein. All moneys recovered in any action brought under the provisions of this section must, when collected, be paid into the

treasury of the state or appropriate civil division thereof, except that the plaintiff in any action shall be entitled to recover his own taxable costs of such action. [106 v. 400, 415; 103 v. 698, § 21; compare G. C. § 4491, 4504, repealed 103 v. 698, 713.]

Sec. 486-22. [Investigations.] Whenever a civil service commission shall have reason to believe that any officer, board, commission, head of a department, or person having the power of appointment, lay-off, suspension or removal, has abused such power by making an appointment, lay-off, reduction, suspension, or removal in violation of the provisions of this act, it shall be the duty of the commission to make an investigation, and if it shall find that such violation of the provisions or the intent and spirit of this act has occurred, it shall make a report thereof to the governor, or in the case of a municipal officer or employe to the mayor or other chief appointing authority, who shall have the power to remove forthwith such guilty officer, board, commission, head of department, or person; an opportunity first having been given to such officer, employe or subordinate of being publicly heard in person or by counsel in his own defense, and such action of removal by the governor, mayor or other chief appointing authority shall be final except as otherwise provided herein. [106 v. 400, 416; 103 v. 698, § 22; compare G. C. § 4489, repealed 103 v. 698, 713.]

Sec. 486-23. [Political assessments.] No officer, employe or subordinate in the classified service of the state, the several counties, cities and city school districts thereof, shall directly or indirectly, orally or by letter, solicit or receive, or be in any manner concerned in soliciting or receiving any assessment, subscription or contribution for any political party or for any candidate for public office; nor shall any person solicit directly or indirectly, orally or by letter, or be in any manner concerned in soliciting any such assessment, contribution or payment from any officer, employe or subordinate in the classified service of the state, the several counties, cities or city school districts thereof; nor shall any officer or employe in the classified service of the state, the

several counties, cities and city school districts thereof be an officer in any political organization or take part in politics[1] other than to vote as he pleases and to express freely his political opinions. [106 v. 400, 416; 103 v. 698, § 23; compare G. C. 4497, 4500 and 4501, repealed 103 v. 698, 713.]

(1) One holding position in classified Civil Service cannot be an active candidate for public office. Op. Atty. Gen. (1916), p. 375.

Sec. 486-24. [Frauds in examination prohibited.] No person or officer shall wilfully or corruptly by himself or in cooperation with one or more persons defeat, deceive, or obstruct any person in respect of his or her right of examination, appointment or employment according to this act, or to any rules or regulations prescribed pursuant thereto; or wilfully or corruptly, falsely mark, grade, estimate or report upon the examination or proper standing of any person examined, registered or certified pursuant to the provisions of this act, or aid in so doing; or wilfully or corruptly make any false representations concerning the same, or concerning the person examined; or wilfully or corruptly furnish to any person any special or secret information for the purpose of either improving or injuring the prospects or chances of any person so examined, registered or certified, or to be examined, registered or certified; or personate any other person, or permit or aid in any manner any person to personate him, in connection with any examination, registration or appointment or application or request to be examined, registered or appointed; or who shall furnish any false information about himself, or any other person, in connection with any examination, registration or appointment or application or request to be examined, registered or appointed. [106 v. 400, 416; 103 v. 698, § 24; compare G. C. § 4496, repealed 103 v. 698, 713.]

Sec. 486-25. [Payment for places prohibited.] No applicant for appointment or promotion in the classified service shall, directly or indirectly, pay or promise to pay any money or other valuable thing, nor shall he ask or receive any recommendation or assistance from any person, upon the con-

sideration of any political service to be rendered, for or on account of his appointment or promotion, or proposed appointment or promotion. [106 v. 400, 417; 103 v. 698, § 25; compare G. C. §§ 4498, 4499, repealed 103 v. 698, 713.]

Sec. 486-26. [Abuse of official power.] No officer or employe of the state, the several counties, cities and city school districts thereof shall appoint, promote, reduce, suspend, lay-off, discharge, or in any manner change the official rank or compensation of any officer, employe or subordinate in the classified service, or promise or threaten to do so, for giving or withholding, or neglecting to make any contribution of money or other valuable thing for any party or political purpose, or for refusal or neglect to render any party or political service. [106 v. 400, 417; 103 v. 698, § 26; compare G. C. § 4502, repealed 103 v. 698, 713.]

Sec. 486-27. [Abuse of political influence.] No person who holds any public office, or who has been nominated for, or who seeks a nomination or appointment to any public office, shall corruptly use or promise to use either directly or indirectly, any official authority or influence in order to secure or aid any person in securing for himself or another any office or employment in the classified service, or any promotion or increase of salary therein, as a reward for political influence or service. Nor shall any person, by means of threats or coercion, induce or seek to induce anyone in the classified service to resign his position or to waive his right to certification, appointment or promotion. [106 v. 400, 417; 103 v. 698, § 27; compare G. C. § 4503, repealed 103 v. 698, 713; and see also R. S. 1545-20-109.]

Sec. 486-28. [Violations.] Whoever, after a rule has been duly established and published by any civil service commission according to the provisions of this act, makes an appointment to office or selects a person for employment contrary to the provisions of such rule, or wilfully refuses or neglects otherwise to comply with or to conform to the provisions of this act, or wilfully violates any of such provisions, shall be deemed guilty of a misdemeanor and upon

conviction thereof shall be punished by a fine of not less than fifty dollars nor more than five hundred dollars, or by imprisonment in the county jail for a term not to exceed six months, or by both such fine and imprisonment, in the discretion of the court. If any person so convicted shall hold any public office or place of public employment such office or position shall by virtue of such conviction be rendered vacant. [106 v. 400, 417; 103 v. 698, § 28; compare G. C. §§ 4496, 12895, 12896, repealed 103 v. 698, 713.]

Sec. 486-29. [Taxpayers' right of action.] The right of any taxpayer to bring an action to restrain the payment of compensation to any person appointed to or holding any office or place of employment in violation of provisions of this act, shall not be limited or denied by reason of the fact that said office or place of employment shall have been classified as, or determined to be classified as, not subject to competitive examination; provided, however, that any judgment or injunction granted or made in any such action shall be prospective only, and shall not affect payments already made or due to such persons by the proper disbursing officers, in accordance with the civil service rules in force at the times of such payments. [106 v. 400, 418; 103 v. 698, § 29.]

Sec. 486-30. [Prosecutions.] Prosecutions for the violation of the provisions of this act, or the rules and regulations of the state commission established in conformity thereto, shall be instituted by the attorney-general or by the state commission acting through special counsel, or by the county prosecutor for the county in which the offense is alleged to have been committed; and prosecutions for violations of this act and the rules and regulations of any municipal commission by any officer or employe of such city, shall be instituted by such municipal commission through the legal department of such city or by such municipal commission acting through special counsel. [106 v. 400, 418; 103 v. 698, § 30.]

Sec. 486-31. [Schedule.][1] All officers, employes and subordinates in the classified service of the state, the several counties, cities and city school districts thereof, holding

their positions under existing civil service laws, and who are holding such positions by virtue of having taken a regular competitive examination as provided by law, shall, when this act takes effect, be deemed appointees within the provisions of this act; but no person holding a position in the classified service by virtue of having taken a non-competitive examination shall be deemed to have been appointed or to be an appointee in conformity with the provisions of this act; provided, however, that all persons who have served the state or any political subdivision thereof continuously and satisfactorily for a period of not less than seven years next preceding January 1, 1915, shall be deemed appointees within the provisions of this act.

The name of each officer, employe and subordinate holding a position in the classified service of the state, the counties, cities and city school districts thereof at the time this act takes effect, who has not passed a regular competitive examination and who has not been in the service seven years as herein provided, shall, within ten days after this act becomes effective, be reported by the appointing authority to the commission and shall be certified to the appointing authority in addition to the three candidates for appointment to such position. If any such person is reappointed, he shall be deemed to have been appointed under the provisions of this act. If no eligible list exists such person may be retained as a provisional employe until such time, consistent with reasonable diligence, as the commission can prepare eligible lists when such position shall be filled as prescribed in this act; provided that nothing contained in this section shall be deemed to vacate the office of existing chiefs of police departments or chiefs of fire departments of municipalities. All existing eligible lists of persons who have taken regular competitive examinations shall continue in force for the term of eligibility to be fixed by the commission as provided herein. All property of the existing state commission shall become the property of the commission to be appointed hereunder. [106 v. 400, 418; 103 v. 698, § 31.]

(1) **Validity.**—The placing of certain positions in the classified service or in the unclassified service, or employes being protected

by the civil service law, or not being protected by the civil service law, is a legislative function and not the exercise of executive duties, and § 486-31 of the General Code of Ohio, known as the Moore-Barnes Act, is constitutional and not violative of Section 1 of Article II of the Constitution of Ohio. State, *ex rel.*, v. Fosdick, et al., 21 N. P. (N. S.) 187.

One who was given a temporary appointment to the municipal service during the year 1912 and prior to the furnishing of an eligible list by the civil service commission, was an incumbent at the time the civil service law of 1913 went into effect, and was entitled to hold his position until he failed to qualify therefor or was discharged for cause. State, *ex rel.*, v. Fosdick, 25 C. C. (N. S.) 241. See also State, ex rel., v. Keefer, et al., 20 C. C. (N. S.) 417; Keefer v. State, *ex rel.*, 20 C. C. (N. S.) 474, affirming 16 N. P. (N. S.) 145.

See Op. Atty. Gen. (1916), p. 803.

X.

BOARD OF HEALTH.[1]

BUREAU OF VITAL STATISTICS.[2]

Sec. 197. [State system of vital statistics; central bureau and registration districts.] A state system of registration of births and deaths is hereby established, which shall consist of a central bureau of vital statistics and primary registration districts. The central bureau shall be maintained at the capitol of the state. Each city, village and township shall constitute a primary registration district. The secretary of state shall have charge of such system, and general supervision of the central bureau. [99 v. 296 §§ 1, 2, 3.]

(1) **Municipal Code provisions** relating to the board of health will be found in §§ 4404 to 4476 *ante*, in Part I.

Inspector of plumbing.—For provisions relating to inspection of plumbing under authority of the State Board of Health in municipalities where plumbing is not regulated by ordinance, see 101 O. L. p. 395.

(2) **For other sections,** not carried here, relating to the duties of registrars and physicians as to reporting births, deaths, etc., see §§ 202 to 234, G. C.

Invalidity of sections (§§ 14, 17 and 21 of act 99 O. L. 296) relating to duties of physicians and midwives in making reports, see State v. Boone, 84 O. S. 346.

Sec. 198. [Duties of secretary of state.] The secretary of state shall prescribe methods, forms and blanks and furnish necessary postage for obtaining registration of births, and deaths in each district, and of preserving the records thereof and those of the central bureau. He shall enforce the provisions of this chapter thoroughly and uniformly throughout the state, and from time to time, shall recommend necessary legislation for that purpose. He shall provide for necessary clerical and other assistance to carry out the provisions of this chapter. No system of registration of births and deaths in municipalities in conflict with this chapter shall be maintained or continued. [103 v. 194; 99 v. 296, §§ 1, 2.]

Sec. 199. Repealed.

Sec. 200. [Duties of state registrar.[1]] The state registrar of vital statistics shall prepare and print blanks and forms to be used by registrars in registering, recording and preserving the returns, or in otherwise carrying out the provisions of this chapter. He shall prepare and issue detailed instructions necessary to secure the uniform observance thereof and the maintenance of a perfect system of registration. No blanks shall be used other than those supplied by the state registrar. He shall inform registrars of diseases considered by the state board of health infectious, contagious, or communicable and dangerous to the public health, in order that, when deaths occur therefrom, proper precautions may be taken against such diseases. He may combine two or more primary registration districts into one primary registration district. [99 v. 303 §§ 17, 3.]

(1) By the terms of the new Administrative Code (109 O. L., p. 105), the powers and duties of the state registrar of vital statistics are lodged with the state department of health. See § 154-43. Section 199 was repealed.

Sec. 201. [Local registrar designated.][1] In villages the village clerk and in townships the township clerk shall be the local registrar, and in cities the city board of health shall appoint a local registrar of vital statistics, and each shall be subject to the rules and regulations of the state registrar, the provisions of this chapter and to the penalties provided by law. With the approval of the state registrar, each local registrar, shall appoint a deputy who, in case of absence, illness or disability of the local registrar, shall act in his stead. Acceptance of such appointment shall be in writing and such deputy shall be subject to the rules, regulations and provisions governing local registrars. [101 v 393; 99 v. 297 § 4.]

(1) See § 1261-32, *post.*

RELATIONS WITH STATE BOARD.[1]

Sec. 1237. [General powers and duties.] The state board of health shall have supervision of all matters relating to the preservation of the life and health of the people and have su-

preme authority in matters of quarantine, which it may declare and enforce, when none exists, and modify, relax or abolish, when it has been established. It may make special or standing orders or regulations for preventing the spread of contagious or infectious diseases, for governing the receipt and conveyance of remains of deceased persons, and for such other sanitary matters as it deems best to control by a general rule. It may make and enforce orders in local matters when emergency exists, or when the local board of health has neglected or refused to act with sufficient promptness or efficiency, or when such board has not been established as provided by law. In such cases the necessary expense incurred shall be paid by the city, village or township for which the services are rendered. [99 v. 493 § 6; Bates, 409-25; 90 v. 94; 86 v. 223; 83 v. 77.]

(1) By amendment to §§ 1232 *et seq.*, G. C. (107 O. L. 522) there was provided a commissioner of health who shall exercise all the powers and duties of the state board of health. There was also provided a public health council, which by § 1235 is empowered to prescribe sanitary regulations of general application, to be known as the "sanitary code." This code will be found in Page's Compact Edition, G. C., following § 1235.

Sec. 1238. [Enforcement of rules and regulations.] Local boards of health, health authorities and officials, officers of state institutions, police officers, sheriffs, constables and other officers and employes of the state or any county, city or township, shall enforce the quarantine and sanitary rules and regulations adopted by the state board of health. [99 v. 493 § 7; Bates, 409-25; 90 v. 94; 86 v. 223; 83 v. 77.]

Sec. 1239. [Special duties of the board.] The state board of health shall make careful inquiry as to the cause of disease, especially when contagious, infectious, epidemic or endemic, and take prompt action to control and suppress it. The reports of births and deaths, the sanitary conditions and effects of localities and employments, the personal and business habits of the people and the relation of the diseases of man and beast, shall be subjects of careful study by the board. It may make and execute orders necessary to protect the people against diseases of lower animals, and shall collect and preserve information in

respect to such matters and kindred subjects as may be useful in the discharge of its duties, and for dissemination among the people. When called upon by the state or local governments, or municipal or township boards of health it shall promptly investigate and report upon the water supply, sewerage, disposal of excreta of any locality and the heating, plumbing and ventilation of a public building. [99 v. 494 § 8; Bates, 409-25; 90 v. 94; 86 v. 223; 83 v. 77.]

Sec. 1240. [Approval of the board required in certain cases.] No city, village, public institution, corporation or person shall provide or install for public use, a water supply or sewerage system, or purification works for a water supply or sewage, of a municipal corporation or public institution, or make a change in the water supply, water works intake, water purification works of a municipal corporation or public institution, until the plans therefor have been submitted to and approved by the state board of health. No city, village, corporation or person shall establish a garbage disposal or manufacturing plant having a liquid waste which may enter any stream within twenty miles above the intake of a public water supply until the location of such garbage or manufacturing plant, including plans for disposing of such liquid waste, is approved by the state board of health. Whoever violates any provision of this section shall be fined not less than one hundred nor more than five hundred dollars. [99 v. 494 § 9; Bates, 409-25; 90 v. 94; 86 v. 223; 83 v. 77.]

Sec. 1243. [Report as to contagious or infectious diseases.] Boards of health, health authorities or officials, and physicians in localities where there are no health authorities or officers, shall report to the state board of health promptly upon the discovery thereof, the existence of any one of the following diseases: asiatic cholera, yellow fever, smallpox, scarlet fever, diphtheria, membranous croup, typhus or typhoid fever, and such other contagious or infectious diseases as the state board specifies. [99 v. 495 § 13; Bates, 409-28; 95 v. 421.]

Sec. 1244. [Powers of board when local authorities fail to act.] When a contagious or infectious disease becomes or

threatens to become epidemic in a city, village or township, and the local authorities neglect or refuse to enforce efficient measures for its prevention, the state board of health or its secretary, on the order of its president, may appoint a medical or sanitary officer and such assistants as he may require, and authorize him to enforce such orders or regulations as the board or its secretary deems necessary. [99 v. 495 § 14; Bates, 409-28; 95 v. 421.]

Sec. 1245. [Annual conference; expenses.] The state department of health shall make provision for annual conferences of district health commissioners for the consideration of the cause and prevention of dangerous communicable diseases and other measures to protect and improve the public health. Each board of health or other body or person appointed or acting in place of a board of health shall appoint its health commissioner or health officer a delegate to such annual conferences. The district board of health shall pay the necessary expenses of such delegate upon presentation of a certificate from the state commissioner of health that the delegate attended the sessions of such conference. [108 v. 236, 247; 99 v. 495, § 15; Bates, 409-34a; 98 v. 205.]

Sec. 1246. [District commissioner may be required to attend school of instruction.][1] The state commissioner of health may require any district health commissioner to attend immediately after his appointment, a school of instruction to be conducted by the state department of health at Columbus. The course at such school of instruction shall not exceed four weeks in duration, and the necessary expenses of the district health commissioner in attending such school shall be paid by the district board of health upon certification from the state commissioner of health that such officer has attended the school of instruction. [108 v. 236, 247; 99 v. 495, § 16; Bates, 409-34a; 98 v. 205.]

(1) The act of Dec. 18, 1919 (108 v. 1085), indicates in its title an intention to repeal sec. 1246, but the repealing section does not mention it.

PUBLIC WATER SUPPLY.

Sec. 1249. [Investigation by state department of health on written complaint.][1] Whenever the council or board of health, or the officer or officers performing the duties of a council or board of health, of a city or village, the commissioners of a county, the trustees of a township or fifty of the qualified electors of any city, village or township, or the managing officer or officers of a public institution set forth in writing to the state department of health that a city, village, public institution, corporation, partnership or person is discharging or is permitting to be discharged sewage or other wastes into a stream, water course, canal, lake or pond, and is hereby creating a public nuisance detrimental to health or comfort, or is polluting the source of any public water supply, the commissioner of health shall forthwith inquire into and investigate the conditions complained of. [108 v. 297; 107 v. 184; 99 v. 74.]

(1) **Validity.**—This Act held to be a valid and reasonable exercise of the police power of the state. State Board of Health, et al. v. Greenville, 86 O. S. 1.

Limitations.—A municipal corporation issuing bonds under orders of state board of health pursuant to § 1249, *et seq.*, shall not be bound by the limitation of §§ 3940 and 3952. But may, if necessary to provide funds to comply with such order, issue its bonds to the extent of five percent of such property so listed and assessed for taxation, although the limitations provided for by §§ 3940 and 3952 have been reached. The full issue of five percent may, if necessary, be issued in any one fiscal year, without submission to a vote of the electors. State, *ex rel.*, v. Dean, Auditor, 95 O. S. 108.

Sec. 1250. [Notice of findings and hearing, how given.] If the commissioner of health finds that the discharge of sewage or other wastes from a city, village or public institution, or by a corporation, partnership or person, has so corrupted a stream, water course, canal, lake or pond, as to give rise to foul and noxious odors or to conditions detrimental to health or comfort, the source of public water supply of a city, village, community or public institution is subject to contamination, or has been rendered impure by such discharge of sewage or other wastes, he shall notify the mayor or managing officer or officers of such city, village,

public institution or corporation, partnership or person of his findings and of the time and place when and where a hearing may be had before the public health council. The notice herein provided shall be by personal service or by registered letter. [108 v. 297; 107 v. 184; 99 v. 74.]

Sec. 1251. [Order by commissioner to make improvement; approval by council.] After such hearing if the public health council shall determine that improvements or changes are necessary and should be made, the commissioner of health shall notify the mayor or managing officer or officers of such city, village, public institution, or corporation, partnership or person to install works or means, satisfactory to the commissioner of health, for purifying or otherwise disposing of such sewage or other wastes, or to change or enlarge existing works, in a manner satisfactory to the commissioner of health. Such works or means must be completed and put into operation within the time fixed in the order. The order of the commissioner of health and the time fixed for making the improvements or changes shall be approved by the public health council, and notification shall be had by personal service upon or by registered letter to the mayor or managing officer or officers of the city, village, public institution or corporation, partnership or person to whom said order shall apply. But no city or village discharging sewage into a river which separates the state of Ohio from another state shall be required to install sewage purification works so long as the unpurified sewage of cities or villages of another state is discharged into such river above such city or village of this state. [108 v. 297; 107 v. 184; 99 v. 74.]

Sec. 1252. [Complaint of impure water supply; investigation.] Whenever the board of health, or officer or officers performing the duties of a board of health of a city or village or ten per cent of the electors thereof or the managing officer or officers of a public institution, shall file with the state department of health a complaint, in writing, setting forth that it is believed that the public water supply of such city or village, or public institution, is impure and

dangerous to health, the state commissioner of health shall forthwith inquire into and investigate the conditions complained of. [108 v. 297; 99 v. 75.]

Sec. 1252-1. [Supervisory control of public water supplies by state department of health.] The state department of health shall exercise general supervision of the operation and maintenance of the public water supply and water works systems throughout the state. For the purposes of this act a public water supply and water works system shall include any such system publicly or privately owned which is of a public or quasi-public nature installed for a municipality or part thereof, an unincorporated community, a county sewer district or other land outside a municipality, a state, county, district or municipal public institution, a privately owned institution, university, college, seminary or school, club, church, factory or other place of employment, or other public, quasi-public or privately owned institution, building or place used for the assemblage or employment of persons. Such general supervision shall include all features of construction, operation and maintenance of systems for supply, treatment, storage and distribution, which do or may affect the sanitary quality of the water supply. For the purpose of exercising such general supervision, the state department of health shall investigate the public water supplies throughout the state as frequently as is deemed necessary by the department, and whenever requested to do so by the local health officials; and may adopt and enforce orders and regulations governing the construction, operation and maintenance of such public water supply and water works systems, and may require the submission of records of construction, operation and maintenance including plans and descriptions of existing works. When the state department of health shall have required the submission of such records or information the public officials or person, firm or corporation having the works in charge shall promptly comply with such request. [109 v. 319, § 1.]

Sec. 1252-2. [Analyses of water required at intervals; records.] For the purpose of controlling the sanitary quality of public water supplies, every city, village or other subdivision

or district, public institution, or person, firm or corporation owning or operating a public water supply or water works system shall have analyses of the water made at such intervals and in such manner as may be ordered by the state department of health; and records of the results of such analyses shall be maintained and reported as required by the said department. [109 v. 319, 320, § 2.]

Sec. 1252-3. [Connection with private auxiliary or emergency water supply, prohibited.] It shall be unlawful for any official, officer, or employe having in charge or being employed in the maintenance and operation of a public water supply and water works system or for any other person, firm or corporation to establish or permit to be established any connection whereby a private, auxiliary or emergency water supply other than the regular public water supply may enter the supply or distributing system, unless such private, auxiliary or emergency water supply, and the method of connection and use of such supply shall have been approved by the state department of health. [109 v. 319, 320, § 3.]

Sec. 1252-4. [Notice when danger of contamination or inadequate supply; investigation.] When the commissioner of health finds upon investigation that a public water supply is subject to the danger of contamination by reason of unsatisfactory location, protection, construction, operation, or maintenance of the system, or by reason of the existence of an unsafe emergency supply or connection to an unsafe private or auxiliary supply, or if the commissioner of health finds upon investigation that the public health is endangered by reason of the existence of an inadequate public water supply or water works system, he shall notify the city, village, county, public institution, corporation, partnership or person owning or operating such public water supply or water works system of his findings and of the time and place, when and where a hearing may be had before the public health council. Such notice shall be by personal service, or shall be sent by registered letter to the mayor or managing officer or officers of the city, village, county or public institution or to the corporation, partnership or person owning or operating such sup-

ply. Investigations made in accordance with this section may be at the initiative of the commissioner of health. [109 v. 319, 320, § 4.]

Sec. 1252-5. [Corrections and changes may be ordered; notice; procedure.] After such hearing, if the public health council shall determine that improvements or changes are necessary and should be made, the commissioner of health shall notify the mayor or managing officer or officers of the city, village, county, or public institution or the corporation, partnership or person owning or operating such water supply or water works system to make improvements, corrections and changes in the location, protection, construction, operation or maintenance of the water supply or water works system satisfactory to the commissioner of health, so as to prevent the contamination of the water supply or to provide a water supply not subject to the danger of contamination, or to provide a water supply and water works system adequate to avoid endangering the public health. The order of the commissioner of health and the time fixed for making the improvements or changes shall be approved by the public health council and the notification shall be made by personal service upon or by registered letter to the mayor or managing officer or officers of the city, village, county or public institution or to the officials, corporation, partnership or person to whom said order shall apply. When such order is issued subsequent procedures shall be in accordance with and governed by the provisions of sections 1257, 1258, 1258-1, 1258-2, 1258-3, 1258-4, 1258-5, 1258-6, 1258-7, 1258-8, 1259, 1259-1, 1260 and 1261 of the General Code. [109 v. 319, 321, § 5.]

Sec. 1252-6. [Penalty for violation of law.] Whoever violates any of the provisions of sections 1, 2 or 3 of this act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not exceeding five hundred dollars ($500). [109 v. 319, 321, § 6.]

Sec. 1253. [Notice of findings and time and place of hearing.] If the commissioner of health finds that the public water supply of a city, village or public institution is im-

pure and dangerous to health, and that it is not practicable to sufficiently improve the character of such supply by removing the source or sources of pollution affecting it, or if the commissioner of health finds that such water supply is being rendered impure and dangerous to health by reason of improper construction or inadequate size of existing water purification works, he shall notify such city, village, or public institution, corporation, partnership or person owning or operating such water supply or water works of his findings and of the time and place when and where a hearing may be had before the public health council. Such notice shall be by personal service or shall be sent by registered letter to the mayor or managing officer or officers of the city, village, public institution, or corporation, partnership or person owning or operating such water supply or water works. [108 v. 297; 99 v. 75.]

Sec. 1254. [Changes may be required on approval of public health council.] After such hearing, if the public health council shall determine that improvements or changes are necessary and should be made, the commissioner of health shall notify the mayor or managing officer or officers of the city, village, public institution or corporation, partnership or person owning or operating such water supply or water works to change the source of supply or to install and place in operation water purification works or device satisfactory to the commissioner of health, or to change or enlarge existing water purification works in a manner satisfactory to said commissioner. The order of the commissioner of health and the time fixed for making the improvements or changes shall be approved by the public health council and notification shall be had by personal service upon or by registered letter to the mayor or managing officer or officers of the city, village, public institution or corporation, partnership or person to whom said order shall apply. [108 v. 297; 99 v. 75.]

Sec. 1255. [Order for improvement of water works.] When the commissioner of health finds, upon investigation, that any water purification or sewage treatment works, on ac-

count of incompetent supervision or inefficient operation is not producing an effluent of such quality as might be reasonably obtained from such water purification or sewage treatment works, and by reason of such neglect the public water supply has become impure and dangerous to health,[1] or that a stream, water course, canal, lake, pond, or body of water has become offensively polluted or has become a public nuisance or that a public water supply taken from such stream, water course, canal, lake, pond or body of water has been rendered impure and dangerous to health, the commissioner of health shall issue an order to the mayor or managing officer or officers of the city, village, public institution, or corporation, partnership or person having charge of or owning such water purification or sewage treatment works, to secure an effluent of such quality as might be reasonably expected from such works and satisfactory to the commissioner of health. [108 v. 297; 99 v. 76.]

(1) **Municipal liability.**—A municipal corporation, in the construction and maintenance of a sewage disposal plant, acts in a purely governmental and not in a private or proprietary capacity, and it follows that no cause of action is stated for a personal injury against a municipality by the allegation that the basin of a sewage disposal plant was so negligently constructed that the contents leaked therefrom and, percolating through the earth, contaminated the well from which plaintiff obtained her water, causing her to be stricken with typhoid fever. Waugh v. Marble Cliff, 19 N. P. (N. S.) 17.

Sec. 1256. [Order to appoint and pay competent person on failure to comply.] If the managing officer or officers of such city, village, public institution, or corporation, partnership or person fails, for a period of five days after receiving such order, to secure an effluent satisfactory to the commissioner of health, the commissioner of health shall report the fact to the public health council and upon its approval may order such managing officer or officers or person owning such works to appoint within ten days, and pay the salary of a competent person to be approved by the commissioner of health, to take charge of and operate such works as to secure the results demanded by the commissioner of health. [108 v. 297; 99 v. 76.]

Sec. 1257. [Right of appeal; procedure.] If the findings or order of the commissioner of health, when approved by the public health council and made in pursuance of the provisions of this chapter relating to stream pollution and public water supply, are not acceptable to any city, village, public institution, corporation or owner effected thereby, such city, village, public institution, corporation or owner shall have the right of appeal as follows: Two reputable and experienced sanitary engineers shall be chosen, one by the city, village, public institution, corporation or owner, and the other by the commissioner of health, who shall not be a regular employe of the state department of health. Such persons shall act as referees. If the referees so chosen are unable to agree, they shall choose a third engineer of like standing and the vote of the majority shall be final. As soon as such referees are chosen, the commissioners of health shall file with them a certified copy of the complaint and the findings and order of the state department of health, and it shall be the duty of such referees to investigate the conditions complained of and to determine if such findings are correct and if the order provides a proper remedy for such conditions. The appeal provided for in this section shall be made within thirty days from the date of service of the order upon the mayor or managing officer or officers of the city, village, public institution or corporation or owner, and notice thereof in writing shall be served upon the commissioner of health by personal service for which there shall be acknowledgment, or sent by registered letter. [108 v. 297; 99 v. 76.]

Sec. 1258. [Powers of referees; fees and expenses, how paid.] Such referees may affirm or reject the findings or order of the commissioner of health or may modify such order as to the time within which improvements or changes shall be made, and their decision, which must be in writing and be made within a reasonable time, shall be reported to the commissioner of health and to the city, village, public institution, corporation or owner, and shall be final except as hereinafter provided. If such findings and order shall be approved or modified by said referees, the order shall be enforced by the commissioner of health in the manner provided

for in this chapter. The fees and expenses of the referee appointed by the commissioner of health shall be paid from funds appropriated to the state department of health for such purpose. The fees and expenses of the referee appointed by the city, village, public institution, corporation or owner shall be paid by the city, village, public institution, corporation or owner making such appeal. The fees and expenses of the third referee shall be equally divided between the state department of health and the city, village, public institution, corporation or owner making appeal. [108 v. 297; 99 v. 76.]

Sec. 1258-1. [When and how additional charges for supply obtained.] Where an order of the commissioner of health to a corporation, partnership or person owning and operating a water works is approved or modified by the referees provided for in sections 1257 and 1258 of the General Code, or if such corporation, partnership or person shall accept such order without appeal to such referees and it shall be claimed by such corporation, partnership or person that the revenues derived from the operation of such water works are not sufficient to warrant the expense of making the improvements or changes so ordered, an application may be made to the public utilities commission of Ohio for authority to make and collect additional charges from the water consumers and user of the utility's service. Upon the filing of such application the commission shall fix a time for the hearing thereof and give notice thereof to the mayor of the municipality and the state commissioner of health, and if upon hearing the public utilities commission shall determine and find that the rates theretofore authorized to be charged will not provide revenue sufficient to operate said water works and make a reasonable return upon the investment after such improvements and changes are made, it shall by order authorize the collection of such additional charges and compensation as may under all the circumstances be just and reasonable. [108 v. 297.]

Sec. 1258-2. [Vacating or modifying order.] An order as made by the commissioner of health or as approved or modified by the referees as herein provided, shall be reversed, vacated or modified by the supreme court on a petition of error,

if upon consideration of the record such court is of the opinion that such order was unlawful and unreasonable. [108 v. 297.]

Sec. 1258-3. [Proceeding by petition in error; service of summons; waiver.] The proceeding to obtain such reversal, vacation or modification shall be by petition in error, filed in the supreme court by the municipal corporation, managing board or officer of a public institution, corporation, partnership or person to which such order of the commissioner of health shall apply, setting forth the errors conplained of; thereupon, unless the same is duly waived, a summons shall issue and be served, as in other cases, upon the commissioner of health, or in his absence by leaving a copy at his office at the city of Columbus. [108 v. 297.]

Sec. 1258-4. [Transcript to supreme court.] Upon service or waiver of summons in error the commissioner of health shall forthwith transmit to the clerk of the supreme court a transcript of his journal entries, original papers or transcripts thereof and a certified copy of all evidence adduced upon the hearing before the public health council in the proceeding complained of, which shall be filed in said court. [108 v. 297.]

Sec. 1258-5. [When proceeding deemed commenced.] No proceeding to reverse, vacate or modify an order of the commissioner of health shall be deemed commenced unless the petition therefor is filed within thirty days after service of the order upon the mayor or managing officer or officers of the municipal corporation, public institution, or corporation, partnership or person to whom such order shall apply. Or if there has been an appeal to referees then such petition shall be filed within two weeks after the determination of such appeal and due notice thereof. A proceeding to reverse, vacate or modify an order of the commissioner of health shall operate to stay execution thereof until the supreme court shall render a decision thereon. [108 v. 297.]

Sec. 1258-6. [Supreme court only has power to suspend order.] No court other than the supreme court shall have

the power to review, suspend or delay any order of the commissioner of health, or enjoin, restrain or interfere with the commissioner of health or public health council in the performance of official duties required or power exercised under the provisions of this act. [108 v. 297.]

Sec. 1258-7. [Former orders shall continue in full force.] All orders heretofore issued or promulgated by the state board of health or by the state department of health shall continue in full force and have the same effect as though they had been lawfully made, issued or promulgated under the provisions of this act. [108 v. 297.]

Sec. 1258-8. [Section or part held void does not affect others.] Each section of this act and every part thereof is hereby declared to be an independent section, and part of a section, and the holding of a section or part of a section thereof to be void or ineffective for any cause shall not be deemed to affect any other section or part thereof. [108 v. 297.]

Sec. 1259. [How funds provided.] Each municipal council, department or officer having jurisdiction to provide for the raising of revenues by tax levies, sale of bonds, or otherwise, shall take all steps necessary to secure the funds for any such purpose or purposes.[1] When the funds are so secured, or the bonds therefor have been authorized by the proper municipal authority, such funds shall be considered as in the treasury and appropriated for such particular purpose or purposes, and shall not be used for any other purpose. The bonds authorized to be issued for any such purpose or purposes shall not exceed three per cent of the total value of all property in any city or village, as listed and assessed for taxation, and may be in addition to the total bonded indebtedness of such city or village otherwise permitted by law. The question of the issuance of such bonds shall not be required to be submitted to a vote of the electors. [108 v. 297; 107 v. 185; 99 v. 76.]

(1) Vote required to issue bonds. See Op. Atty. Gen. (1923), No. 231.

Sec. 1259-1. [Levies exempt from all limitations.][1] Interest and sinking fund levies on account of bonds issued under section 1259 of the General Code, in compliance with orders of the state commissioner of health, shall be exempt from all the limitations on tax levies provided by sections 5649-2 and 5649-3a of the General Code. Such levies shall also be exempt from the limitations provided by section 5649-5b of the General Code, if the question of making such additional levy shall be submitted to the electors of the municipality issuing, or proceeding to issue, such bonds in the manner provided in sections 5649-5 and 5649-5a of the General Code, and the same is approved by a majority of the electors voting on such question; and the proper legislative authorities of any such municipal corporation are hereby authorized to submit such question in the manner provided in said sections of the General Code at any regular election or at a special election. The number of years for which such levy shall be authorized shall not be required to be printed on the ballot, and the approval of the electors shall constitute sufficient authority for the making of such additional levy annually, during the time for which the bonds are to run, or until the same are redeemed, or the redemption thereof with interest is fully provided for. [108 v. 297; 106 v. 461.]

(1) **Validity.**—This section held constitutional. Cleveland v. Davis, 95 O. S. 52.

Mandamus to compel tax levy.—Mandamus will lie to require the county auditor to place on duplicate a tax which has been voted by electors under this section, even before the bonds have been issued. State, *ex rel.*, v. Zangerle, 95 O. S. 58.

Sec. 1260. [Forfeiture for failure to obey orders.] If a council, department or officer of a municipality, or person, partnership or private corporation fails or refuses for a period of thirty days, after notice given him or them by the commissioner of health of his findings and order and the approval thereof by the public health council, to perform any act or acts required of him or them by this chapter relating to stream pollution and public water supply, the members of such council or department, or such officer or officers, person,

partnership or private corporation shall be personally liable for such default, and shall forfeit and pay to the state of Ohio five hundred dollars to be paid into the state treasury to the credit of the general revenue fund. [108 v. 297; 99 v. 77.]

Sec. 1261. [Action for recovery.] An action may be begun for the recovery of such penalty by the prosecuting attorney of a county in the name of the state in the court of common pleas of such county having jurisdiction of any such party or parties, or it may be begun by the attorney general in such county or the county of Franklin, as provided by law. The court of common pleas, upon good cause shown, may, at its discretion, remit such penalty or any part thereof. [108 v. 297; 99 v. 77.]

HEALTH DISTRICTS.[1]

Sec. 1261-16. [Health districts.] For the purposes of local health administration the state shall be divided into health districts. Each city shall constitute a health district, and for the purposes of this act shall be known as and hereinafter referred to as a city health district. The townships and villages in each county shall be combined into a health district and for the purposes of this act shall be known as and hereinafter referred to as a general health district. As hereinafter provided for, there may be a union of two general health districts or a union of a general health district and a city health district located within such district. [108 v. 1085; 108 v. 236.]

(1) §§ 1261-16 to 1261-73 formerly related to the State Liquor Licensing Board. After their repeal (108 O. L. 418, 719, 724) section numbers 1261-16 to 1261-43 inc., were assigned to the sections here given relating to health districts.

City health district in municipality advanced from village to city. See Op. Atty. Gen. (1922), p. 167.

Application to villages having health officer elected under village charter. See Op. Atty. Gen. (1922), p. 961.

Sec. 1261-17. [District boards of health; filling of vacancy; quorum.] In each general health district, except in a

district formed by the union of a general health district and a city health district, there shall be a district board of health consisting of five members to be appointed as hereinafter provided and as provided in section 4406 of the General Code. The members of the board of health of a general health district shall receive no compensation for their services, but shall be reimbursed for all necessary and lawful expenses incurred in attending meetings of the board. A vacancy in the membership of the board of health of a general health district shall be filled in like manner as an original appointment and shall be for the unexpired term. Provided, that when a vacancy shall occur more than ninety days prior to the annual meeting of the district advisory council the remaining members of the district board of health may select a resident of the district to fill such vacancy until such meeting. A majority of the members of the district board of health shall constitute a quorum. [108 v. 1085; 108 v. 236.]

Sec. 1261-18. [District advisory council; organization; appointment of members of district board.] Within sixty days after this act shall take effect the mayor of each municipality not constituting a city health district and the chairman of the trustees of each township in a general health district shall meet at the county seat and shall organize by selecting a chairman and a secretary. Such organization shall be known as the district advisory council. The district advisory council shall proceed to select and appoint a district board of health as hereinbefore provided, having due regard to the equal representation of all parts of the district. Where the population of any municipality represented on such district advisory council exceeds one-fifth of the total population of the district, as determined by the last preceding federal census, such municipality shall be entitled to one representative on the district board of health for each fifth of the population of such municipality. Of the members of the district board of health, one shall be a physician. Annually thereafter the district advisory council shall meet on the first Monday in May for the purpose of electing its officers and a member of the district board of health and shall also receive and consider the annual or special report of the dis-

trict board of health and make recommendation to the district board of health or to the state department of health in regard to matters for the betterment of health and sanitation within the district or for needed legislation. It shall be the duty of the secretary of the district advisory council to notify the district health commissioner and the state commissioner of health of the proceedings of such meeting. Special meetings of the district advisory council shall be held on request of the district board of health or on the order of the state commissioner of health. On certification of the chairman and secretary the necessary expenses of each delegate to an annual or special meeting shall be paid by the village or township he represents. The district health commissioner shall attend all meetings of the district advisory council. [108 v. 1085, 1086; 108 v. 236.]

Sec. 1261-19. [Organization of district board; appointment of health commissioner; duties.] Within thirty days after the appointment of the members of the district board of health in a general health district, they shall organize by selecting one of the members as president and another member as president pro tempore. The district board of health shall appoint a district health commissioner upon such terms, and for such period of time, not exceeding two years, as may be prescribed by the district board. Said appointee shall be a licensed physician and shall be secretary of the board and shall devote such time to the duties of his office as may be fixed by contract with the district board of health. Notice of such appointment shall be filed with the state commissioner of health. The district health commissioner shall be the executive officer of the district board of health and shall carry out all orders of the district board of health and of the state department of health. He shall be charged with the enforcement of all sanitary laws and regulations in the district, and shall have within the general health district all the powers now conferred by law upon health officers of municipalities. It shall be the duty of the district health commissioner to keep the public informed in regard to all matters affecting the health of the district. [108 v. 1085, 1086; 108 v. 236.]

Sec. 1261-20. [Union of city with general health district; vote on question.] When it is proposed that a city health district unite with a general health district in the formation of a single district, the district advisory council of the general health district shall meet and vote on the question of union, and it shall require a majority vote of the total number of townships and villages entitled to representation voting affirmatively to carry the question. The council or body performing the duties of council of the city shall likewise vote on the question and a majority voting affirmatively shall be required for approval. When the majority of the district advisory council and council of the city have voted affirmatively, the chairman of the district advisory council and the mayor or chief executive officer of the city shall enter into a contract for the administration of health affairs in the combined district. Such contract shall state the proportion of the expenses of the board of health or health department of the combined district to be paid by the city and by that part of the district lying outside such city; shall provide for the amount and character of sanitary service to be rendered in the parts of the district lying outside such city and the date on which the board of health or health department of the city shall take over the administration of the combined health district. A copy of such contract shall be filed with the state commissioner of health.

After such union is completed the board of health or health department of the city health district shall have within the combined district all the powers hereinafter granted to and perform all the duties herein or hereafter required of the board of health of a general health district. [108 v. 1085, 1087; 108 v. 236.]

Sec. 1261-21. [Union of general health districts; procedure.] Where it is proposed that two general health districts shall unite in the formation of one general health district, the district advisory council of each general health district shall meet and vote on the question of union and an affirmative majority vote of the total number of townships and villages entitled to representation on the district advisory council shall be required for approval. When the two dis-

trict advisory councils have voted affirmatively on the question, they shall meet in joint session and shall elect a district board of health for the combined districts and not more than three members shall be from any one original district.

[Location of office.] When such union is completed such district shall constitute a general health district and shall be governed in the manner herein provided for general health districts. Where two general health districts unite to form one district, the office of the district board of health shall be located at the county seat of the most populous county, except that for good cause such office may, with the approval of the state commissioner of health, be located in the municipality most accessible by usual means of transportation to the whole of the district. [108 v. 1085, 1087; 108 v. 236.]

Sec. 1261-22. [Appointment of clerk, nurses, physicians and others; infant welfare stations, prenatal clinics, etc.] In any general health district the district board of health may upon the recommendation of the health commissioner appoint for whole or part time service a public health nurse and a clerk and such additional public health nurses, physicians and other persons, as may be necessary for the proper conduct of its work. Such number of public health nurses may be employed as is necessary to provide adequate public health nursing service to all parts of the district. The district health commissioner and other employes of the district board of health may be removed for cause by a majority of the board. The board of health of each district may provide such infant welfare stations, prenatal clinics and other measures for the protection of children as it may deem necessary. It may also provide for the prevention and treatment of trachoma and may establish clinics or detention hospitals and provide the necessary medical and nursing service therefor. [108 v. 1085, 1088; 108 v. 236.]

Sec. 1261-24. [Appointment of board by state commissioner, when.] If in any general health district the district advisory council shall fail to meet or to select a district

board of health, within ninety days after this act shall take effect, the state commissioner of health may, with the consent of the public health council, appoint a district board of health for such district which shall have and exercise all powers conferred by this act on district boards of health. [108 v. 236, 240.]

Sec. 1261-25. [Preferment of charges on failure or neglect of duty; removal; vacancies.] If the state commissioner of health shall find that the district health commissioner or the members of the board of health of a general or city health district, or any member thereof, has failed to perform any or all the duties required by this act, he shall prefer charges against such district health commissioner or such members of the board or such member before the public health council, and shall notify such commissioner or the members of such board or such member as to the time and place at which such charges will be heard. If the public health council shall, after hearing, find the district health commissioner or members of such board or such member guilty of the charge or charges, it may remove such district health commissioner, members of the board, or such member from office. When all, or a majority of the members of the board of health of a general or city health district are so removed from office, the district advisory council or the mayor of the city, upon notice of such removal, shall within thirty days after receipt of such notice select a new board of health or members to fill the vacancies caused by removal, and if the district advisory council or mayor fails within sixty days to select such board or such member or members, the state commissioner of health with the approval of the public health council may appoint a board of health for such general or city health district or fill the vacancies caused by removal. [108 v. 1085, 1088; 108 v. 236.]

Sec. 1261-26. [Duties of district board.] In addition to the duties now required of boards of health, it shall be the duty of each district board of health to study and record the prevalence of disease within its district and provide for the prompt diagnosis and control of communicable diseases.

The district board of health may also provide for the medical and dental supervision of school children, for the free treatment of cases of venereal diseases, for the inspection of schools, public institutions, jails, workhouses, children's homes, infirmaries, and other charitable, benevolent, correctional institutions. The district board of health may also provide for the inspection of dairies, stores, restaurants, hotels and other places where food is manufactured, handled, stored, sold or offered for sale, and for the medical inspection of persons employed therein. The district board of health may also provide for the inspection and abatement of nuisances dangerous to public health or comfort, and may take such steps as are necessary to protect the public health and to prevent disease.

Provided that in the medical supervision of school children as herein provided, no medical or surgical treatment shall be administered to any minor school child except upon the written request of a parent or guardian of such child; and provided further, that any information regarding any diseased condition or defect found as a result of any medical school examination shall be communicated only to the parent or guardian of such child, and if in writing shall be in a sealed envelope addressed to such parent or guardian. [108 v. 1085, 1088; 108 v. 236.]

Sec. 1261-27. [Provisions for laboratory work.] Each district board of health may provide for the carrying on of such laboratory work as is necessary for the proper conduct of its work. It may establish a district laboratory or may contract with any existing laboratory within or convenient to the district for the performance of such work, or may unite with another district in the establishment of a joint laboratory. It shall be the duty of all state institutions supported in whole or in part by public funds to furnish such laboratory service as may be required by any district board of health under terms to be agreed upon. Any contract for the furnishing of laboratory service to a district board of health and any proposal for the establishment of a joint laboratory, shall be subject to the approval of the state commissioner of health. In the operation of such laboratories

standard methods approved by the state commissioner of health shall be used. [108 v. 1085, 1089; 108 v. 236.]

Sec. 1261-28. [Free treatment for venereal diseases.] Each district board of health may provide for the free treatment of cases of gonorrhea, syphilis and chancroid. It may establish and maintain one or more clinics for such purpose and may provide for the necessary medical and nursing service therefor. The district board of health may provide for the quarantine of such carriers of syphilis, gonorrhea, or chancroid, as the state commissioner of health shall order to be quarantined. It shall use due diligence in the prevention of such venereal diseases and shall carry out all orders and regulations of the state department of health in connection therewith. [108 v. 1085, 1089; 108 v. 236.]

Sec. 1261-29. [Free distribution of antitoxin.] Each district board of health shall provide for the free distribution of antitoxin for the treatment of cases of diphtheria and shall establish sufficient distributing stations to render such antitoxin readily available in all parts of the district. [108 v. 236, 241.]

Sec. 1261-30. [Supersedes existing board of health.] The district board of health hereby created shall exercise all the powers and perform all the duties now conferred and imposed by law upon the board of health of a municipality, and all such powers, duties, procedure and penalties for violation of the sanitary regulations of a board of health shall be construed to have been transferred to the district board of health by this act. The district board of health shall exercise such further powers and perform such other duties as are herein conferred or imposed. [108 v. 236, 242.]

Sec. 1261-31. [Inspection of county institutions.] The district health commissioner may make or cause to be made frequent inspection of all county infirmaries, children's homes, workhouses, jails, or other charitable, benevolent or penal institutions in the district, including physical examination of the inmates whenever necessary, and may make or cause to be made such laboratory examinations of such in-

mates as may be requested by any state or county official having jurisdiction over such institution. [108 v. 1085, 1090; 108 v. 236.]

Sec. 1261-32. [District commissioner shall be deputy registrar of vital statistics; reports.] The district health commissioner shall be a deputy of the state registrar of vital statistics and shall under his direction enforce all laws governing the registration of births and deaths. Each local registrar of vital statistics shall on or before the fifth day of each month transmit to the health commissioner of the district having jurisdiction, all certificates of births or deaths received by such registrar during the preceding month, and a copy of all such certificates of births and deaths to the probate judge of the county in which such local registrar resides. The health commissioner shall within five days transmit such certificates to the state registrar of vital statistics. When any registrar shall receive any certificate of a death from any contagious or communicable disease, he shall within twenty-four hours after receipt of such certificate notify the health commissioner of the district having jurisdiction of such death on a form to be furnished by the district board of health. [109 v. 403; 108 v. 236, 242.]

Sec. 1261-33. [Detention hospitals may be established; cost of care, etc.] The district board of health may establish detention hospitals for cases of communicable diseases and provide for the support and maintenance thereof. It may collect from persons committed to such hospitals the cost of the care and treatment of such persons while inmates therein. The expenses of such indigent persons as are committed to such detention hospitals shall be a proper charge against and shall be collected from the township or municipality from which such person was sent to the hospital. [108 v. 236, 242.]

Sec. 1261-36. [Suitable quarters furnished.] The county commissioners of any county or the council of any city may furnish suitable quarters for any board of health or health department having jurisdiction over all or a major part of

such county or city in accordance with the provisions of this act. [108 v. 1085, 1090; 108 v. 236.]

Sec. 1261-37. [Legal adviser of district board.] In general health districts the prosecuting attorney of the county constituting all or a major part of such district shall act as the legal advisor of the district board of health. In a proceeding in which the board of health of any general health district is a party the prosecuting attorney of the county in which such proceeding is instituted shall act as the legal representative of the district board of health. [108 v. 236, 243.]

Sec. 1261-38. [Custodian of health fund; auditor.] The treasurer of a city which constitutes a health district shall be the custodian of the health fund of such city health district. The county treasurer of a county which constitutes all or the major portion of a general health district shall be the custodian of the health fund of that health district. The auditor of a county which constitutes all or a major portion of a general health district shall act as the auditor of the general health district. The auditor of a city which constitutes a city health district shall act as the auditor of a city health district. Expenses of the district board of health of a general health district shall be paid on the warrant of the county auditor issued on vouchers approved by the district board of health and signed by the district health commissioner. Expenses of a board of health or health department of a city health district shall be paid on the warrant of the auditor of the city issued on vouchers approved by the board of health or health department of a city health district and signed by the city health commissioner. [108 v. 1085, 1090; 108 v. 236.]

Sec. 1261-39. [When vouchers on state fund shall be issued.] When any general or city health district has been duly organized as provided by this act and has employed for whole or part time service a health commissioner, the chairman of the board of health, or the principal executive officer of the department of health as the case may be shall semi-annually, on the first day of January and of July, cer-

tify such fact to the state commissioner of health, stating the salary paid such health commissioner, and to the public health nurse and clerk, if any, during the preceding six months. If such board of health or health department has complied with the orders and regulations of the state department of health and has truly and faithfully complied with the provisions of this act, the state commissioner of health shall endorse such facts on the certificate and shall transmit the certificate to the auditor of state, who shall thereupon draw a voucher on the treasurer of state to the order of the custodian of the funds of such health district, payable out of the general revenue fund, in amount equal to one-half of the amount paid by the district board of health or health department to such health commissioner, public health nurse, and clerk, during such semi-annual period. Provided, that if the amount paid by such district board of health or health department during any six months is in excess of two thousand dollars, the amount to be paid by the auditor of state shall be one thousand dollars and no more, and no payment shall be made unless the certificate of the district board of health or health department shall have been endorsed by the state commissioner of health as herein provided. [108 v. 1085, 1090; 108 v. 236.]

Sec. [1261-40][1] 2161-40. [Annual estimate for current expenses of district; apportionment by county auditor.] The board of health of a general health district shall annually, on or before the first Monday of April, estimate in itemized form the amounts needed for the current expenses of such districts for the fiscal year beginning on the first day of January next ensuing. Such estimate shall be certified to the county auditor and by him submitted to the budget commissioners which may reduce any item or items in such estimate but may not increase any item or the aggregate of all items. The aggregate amount as fixed by the budget commissioners shall be apportioned by the county auditor among the townships and municipalities composing the health district on the basis of taxable valuations in such townships and municipalities. The district board of health shall certify to the county

auditor the amount due from the state as its share of the salaries of the district health commissioner and public health nurse and clerk, if employed, for the next fiscal year, which shall be deducted from the total of such estimate before an apportionment is made. The county auditor, when making his semi-annual apportionment of funds shall retain at each such semi-annual apportionment one-half the amount so apportioned to each township and municipality. Such monies shall be placed in a separate fund, to be known as the "district health fund." When a general health district is composed of townships and municipalities in two or more counties, the county auditor making the original apportionment shall certify to the auditor of each county concerned the amount apportioned to each township and municipality in such county. Each auditor shall withhold from the semi-annual apportionment to each such township or municipality the amount so certified, and shall pay the amounts so withheld to the custodian of the funds of the health district concerned, to be credited to the district health fund. Where any general health district has been united with a city health district located therein, the mayor of the city shall annually on or before the first day of June certify to the county auditor the total amount due for the ensuing fiscal year from the municipalities and townships in the district as provided in the contract between such city and the district advisory council of the original health district. The county auditor shall thereupon apportion the amount so certified to the townships and municipalities, and withhold the sums so apportioned as herein provided. [108 v. 1085, 1091; 108 v. 236.]

(1) This section, in the latest amendment is given the number 2161-40; this is evidently an error as the section intended to be amended is 1261-40.

Sec. 1261-41. [Additional expense in case of epidemic, etc.; apportionment.][1] In case of epidemic or threatened epidemic or during the unusual prevalence of a dangerous communicable disease, if the moneys in the district health fund of a general health district are not sufficient, in the judgment of the board of health of such district, to defray the expenses necessary to prevent the spread of such disease, such board

of health shall estimate the amount required for such purpose and apportion it among the townships and municipalities in which the condition herein described exists, on the basis provided for in section 25 of this act. Such estimate and apportionment shall be certified to the county auditor of the proper county or counties, who shall draw an order on the clerk, auditor or other similar officer of each township or municipality affected thereby, for the amount to it apportioned. Such clerk, auditor or other similar officer shall forthwith draw his warrant on the treasurer of such township or municipality for the amount of such certification, which shall be honored by the treasurer from any general treasury balances subject to his control, regardless of funds. The clerk, auditor or other similar officer shall thereupon set up an account to be designated "emergency health account," showing a deficit therein, and certify the action taken to the trustees or council or other body having the power to borrow money. Thereupon the trustees or council or other similar body may exercise the powers provided for in sections 4450 and 4451 of the General Code. Tax levies made for the purpose set forth in this section shall be subject to the provisions of section 5649-4 of the General Code. Moneys raised under the authority herein conferred shall be placed in the treasury of the borrowing subdivision and credited to the "emergency health account," which shall thereupon be closed; so that the moneys taken from general cash balances shall be restored thereto and the regular funds of the subdivision shall be restored thereby.

[Power to borrow money.] If there is not sufficient money in the general cash balances of such subdivisions to satisfy the warrant so drawn by the clerk, auditor or other similar officer, the treasurer thereof shall honor the same to the extent of the cash in such treasury and the balance shall be certified by the clerk, auditor or other officer and the treasurer, jointly, to the trustees, council or other borrowing authority, which shall immediately exercise the powers provided for in this section, to raise the amount of the warrant. The proceeds of such action shall be paid into the general cash

balance in the treasury of the subdivision, and the balance due on the warrant shall then be paid.

[Separate account of expenditures.] The warrants provided for in this section shall be drawn in favor of the county treasurer, as treasurer of the district health fund, and the proceeds shall go into such fund. A separate account shall be kept of expenditures under this section. If a greater amount is expended in any township or municipality than the amount drawn therefrom by action hereunder, the excess shall be charged against such subdivision at the next annual apportionment in addition to the amount apportionable to such subdivision under section 25 of this act. If the amount drawn under this section is not wholly expended in any subdivision, the unexpended remainder shall be credited to the next annual apportionment to such subdivision.

[Enforcement of official duties.] Performance of the official duties by this section imposed on officers, boards and legislative bodies, may be enforced by mandamus on the relation of the district board of health, which is hereby given special capacity to sue in such action. In any such case the return day of the alternative writ shall not be more than three days after the filing of the petition. [108 v. 236, 245.]

(1) When board and auditor not to proceed under this section. See Op. Atty. Gen. (1923), No. 632.

Sec. 1261-42. [Orders and regulations for board and for general public; publication.] The board of health of a general health district may make such orders and regulations as it deems necessary for its own government, for the public health, the prevention or restriction of disease, and the prevention, abatement or suppression of nuisances. All orders and regulations not for the government of the board, but intended for the general public, shall be adopted, recorded and certified as are ordinances of municipalities and record thereof shall be given in all courts of the state the same force and effect as is given such ordinances, but the advertisements of such orders and regulations shall be by publication in one newspaper published and of general circulation within the

general health district. Publication shall be made once a week for two consecutive weeks and such orders and regulations shall take effect and be in force ten days from date of first publication. Provided, however, that in cases of emergency caused by epidemics of contagious or infectious diseases, or conditions or events endangering the public health, such boards may declare such orders and regulations to be emergency measures, and such orders and regulations shall become immediately effective without such advertising, recording and certifying. [108 v. 236, 246.]

Sec. 1261-43. [Section or part held void shall not affect others.] In case any section or sections or part of any section or sections of this act shall be found unconstitutional, the remainder of the act shall not thereby be invalidated, but shall remain in full force and effect. [108 v. 236, 247.]

MATERNITY BOARDING HOUSES.

Sec. 6259. [Licenses granted; applications must be approved; record and notice.] The commissioner of health may grant licenses to maintain maternity hospitals or homes, lying-in hospitals, or places where women are received and cared for during parturition. An application therefor shall first be approved by the board of health of the city, village or township in which such maternity hospital or home, lying-in hospital, or place where women are received and cared for during parturition is to be maintained. A record of the license so issued shall be kept by the state department of health, which shall forthwith give notice to the board of health of the city, village or township, in which the licensee resides, of the granting of such license and of the terms thereof. [108 v. 46; 99 v. 13.]

Sec. 6260. [Term and contents of license.] Such license shall be granted for a term not exceeding one year and shall state the name of the licensee, the particular premises in which the business may be carried on, the number of women and infants that may be boarded, treated or maintained there at any one time, and, if required by the board of health of the city, village or township in which such maternity boarding

house or lying-in hospital is located, it shall be posted in a conspicuous place on the licensed premises. [99 v. 13 § 2.]

Sec. 6261. [Limitation of women and children.] No greater number of women and infants shall be kept at one time on such premises than is authorized by the license and no woman or infants shall be kept in a building or place not designated in the license. [99 v. 13 § 2.]

Sec. 6262. [Visitation and inspection.] The commissioner of health and the boards of health of cities, villages or townships shall annually, and may, at any time, visit and inspect, or designate a person to visit and inspect the system, condition and management of the institutions and premises so licensed. [108 v. 46; 99 v. 13.]

Sec. 6263. [Revocation of license.] The state board of health may revoke such license when a provision of this chapter is violated, or when, in the opinion of such board, such maternity boarding house or lying-in hospital is maintained without regard to the health, comfort or morality of the inmates thereof, or without due regard to sanitation and hygiene. [99 v. 14 § 3.]

Sec. 6264. [Record thereof.] Such board shall note such revocation upon the face of the record thereof and give written notice of the revocation to the licensee by delivering the notice to him in person or leaving it on the licensed premises, and shall forthwith notify the board of health of such city, village or township in which the maternity boarding house or lying-in hospital is situated. [99 v. 14 § 3.]

Sec. 6265. [Reporting births.] A birth which takes place in a maternity boarding house or lying-in hospital shall be attended by a legally qualified physician who shall forthwith report it to the board of health of the city, village or township in which the maternity boarding house or lying-in hospital is located. [99 v. 14 § 4.]

Sec. 6266. [Adopting children.] A person holding such license shall keep a record, in a form to be prescribed by the

state board of health, wherein he shall enter the name and address of the physician who attended at the birth taking place in such house or hospital of any infant who may be sick, the name, age and sex of children born on the premises or brought thereto, and age of a child who is given out, adopted or taken away to or by any person, together with the name and residence of the person so adopting or taking away such child. [99 v. 14 § 5.]

Sec. 6267. [Copy of record.] Within twenty-four hours after such child is given out or taken away, the person licensed as aforesaid shall cause a correct copy of the record relating thereto to be sent to the board of health of the city, village or township wherein such house or hospital is located. [99 v. 14 § 5.]

Sec. 6268. [Coroner's inquest.] A person licensed as aforesaid, immediately after the death of an inmate of such boarding house or lying-in hospital, whether a woman or an infant born therein or brought thereto, shall cause notice thereof to be given to the board of health of the city, village or township in which such house or hospital is located. [99 v. 14 § 6.]

Sec. 6269. [Local board of health.] Such board of health shall forthwith call the coroner of the county in which said person died to hold an inquest on the body of the person, unless a certificate under the hand of a legally qualified physician is exhibited to said board by the licensee that such physician had personally attended and examined the person so dying, and specifying the cause of death, and the board of health is satisfied that there is no ground for holding an inquest. [99 v. 14 § 6.]

Sec. 6271. [Duty of licensee.] The officers and authorized agents of the state board of health and the boards of health of the cities, villages or townships in which such licensed premises are located may inspect such house or hospital at any time and examine every part thereof, call for and examine the records which are required to be kept by the provisions of this chapter, and inquire into all matters concerning such house or hospital and the inmates thereof. The licensee shall give all

reasonable information to such persons so inspecting and afford them every reasonable facility for viewing and inspecting the premises and seeing the inmates thereof. And when complaint is made or a reasonable belief exists that a maternity boarding house or lying-in hospital is being conducted without license, the board of health may cause such house to be inspected by its health officer or the state board of health may designate a person to visit and inspect such premises. [101 v. 122; 99 v. 15 § 8.]

Sec. 6274. [Secrecy of records.] No officer or authorized agent of the state board of health or the board of health of the cities, villages or townships where such licensed homes or hospitals are located, or a keeper of such house or hospital, shall divulge or disclose the contents of the records or of the particulars entered therein, except upon inquiry before a court of law, at a coroners inquest or before some other competent tribunal, or for the information of the state board of health or the board of health of the city, village or township in which said house or hospital is located. [99 v. 15 § 11.]

OFFENSES AGAINST PUBLIC HEALTH.

Sec. 12649. [Deposit of dead animals, offal, etc., upon land or water.] Whoever puts the carcass of a dead animal[1] or the offal from a slaughter house, butcher's establishment, packing house or fish house, or spoiled meat, spoiled fish, or other putrid substance or the contents of a privy vault, upon or into a lake, river, bay, creek, pond, canal, road, street, alley, lot, field, meadow, public ground, market space, or common, or, being the owner or occupant of such place, knowingly permits such thing to remain therein to the annoyance of any citizen or neglects to remove or abate the nuisance occasioned thereby within twenty-four hours after knowledge of the existence thereof, or after notice thereof in writing from a road superintendent, constable, trustee or health officer of a municipal corporation or township in which such nuisance exists or from a county commissioner of such county, shall be fined not less than ten dollars nor more than fifty dollars, and in default of the payment of such fine and

costs, shall be imprisoned not more than thirty days. [R. S. Sec. 6923; 98 v. 339; 93 v. 298; 87 v. 349; 85 v. 268; 63 v. 102.]

(1) **Ownership of dead animals.** —Regulations governing the disposal of dead animals must be framed and exercised so as not to deprive owners of their property in the carcasses. Stadler v. Cleveland, 16 C. C. (N. S.) 603.

Sec. 12650. [Contents of vault deposited.] The next preceding section shall not prohibit the deposit of the contents of privy vaults and catch basins into trenches or pits not less than three feet deep excavated in a lot, field or meadow, the owner thereof consenting, outside of the limits of a municipal corporation and not less than thirty rods distant from a dwelling, well or spring of water, lake, bay, pond, canal, run, creek, brook or stream of water, public road or highway, provided that such contents so deposited are forthwith covered with at least twelve inches of dry earth; nor prohibit the deposit of such contents in furrows, as specified for such trenches or pits, to be forthwith covered with dry earth by plowing or otherwise, and with the consent of the owner or occupant of the land in which such furrows are plowed. [R. S. Sec. 6923; 98 v. 339; 93 v. 298; 87 v. 349; 85 v. 268; 63 v. 102.]

Sec. 12651. [Board of health.] The board of health of a municipal corporation may allow such contents to be deposited within corporate limits into such trenches, pits or furrows. [R. S. Sec. 6923; 98 v. 339; 93 v. 298; 87 v. 349; 85 v. 268; 63 v. 102.]

Sec. 12663. [Depositing poison on thoroughfares.] Whoever leaves or deposits poison or a substance containing poison in a common,[1] street, alley, lane or thoroughfare, or a yard or enclosure occupied by another, shall be fined not less than five dollars nor more than fifty dollars or imprisoned not less than five days nor more than thirty days, or both, and be liable to the person injured for all damages sustained thereby. [R. S. Sec. 6958; 74 v. 13.]

(1) **Common,** definition of, see Ferguson v. Powder Co., 9 C. C. 445.

Sec. 12689. [Refusal to deliver corpse.] Whoever, being a superintendent of a city hospital, city or county infirmary, workhouse, asylum for the insane, or other charitable institution founded and supported in whole or in part at public expense, coroner, infirmary director, sheriff, or township trustee, fails to deliver a body of a deceased person when applied for, in conformity to law, or charges, receives or accepts money or other valuable consideration for such delivery, shall be fined not less than twenty-five dollars nor more than one hundred dollars or imprisoned not more than six months. [R. S. Sec. 3763; 93 v. 84; 78 v. 33; 67 v. 25.]

Sec. 12690. [Body may be retained twenty-four hours.] The next preceding section shall not require the delivery of such body until twenty-four hours after death. [R. S. Sec. 3763; 93 v. 84; 78 v. 33; 67 v. 25.]

Sec. 12716. [Definition of adulterated milk.][1] In all prosecutions under this chapter, if milk is shown upon analysis to contain more than eighty-eight per cent of watery fluid, or to contain less than twelve per cent of solids or three per cent of fats, it shall be deemed to be adulterated. [97 v. 119 § 4; 92 v. 149; 88 v. 12; 86 v. 229.]

(1) Standard of milk herein provided may be enforced even though a Charter City has provided a different standard. Op. Atty. Gen. (1916), p. 391.

Sec. 12717. [Sale of adulterated milk.] Whoever sells, exchanges, or delivers, or has in his custody or possession with intent to sell or exchange, or exposes or offers for sale or exchange, adulterated milk, or milk to which water or any foreign substance has been added, or milk from cows fed on wet distillery waste or starch waste, or from cows kept in a dairy or place which has been declared to be in an unclean or unsanitary condition by certificate of any duly constituted board of health or duly qualified health officer within the county in which said dairy is located, or from diseased or sick cows, shall be fined not less than fifty dollars nor more than two hundred dollars; and, for a second offense, shall be fined

not less than one hundred dollars nor more than three hundred dollars, or imprisoned in the jail or workhouse not less than thirty days nor more than sixty days.[1] [99 v. 239 § 1; 86 v. 229.]

(1) **Evidence** of authority of agent who made the sale, what necessary, see Diersing v. State, 29 C. C. 469; 9 C. C. (N. S.) 214.

Sec. 12718. [Penalty for subsequent offense.] For a subsequent offense, a person violating the next preceding section shall be fined fifty dollars and imprisoned in the jail or workhouse not less than sixty days nor more than ninety days. [99 v. 239 § 1; 86 v. 229.]

Sec. 12784. [Jurisdiction of municipality to prevent water pollution.] Whoever pollutes a running stream, the water of which is used for domestic purposes by a municipality, by putting therein a putrid or offensive substance, injurious to health, shall be fined not less than five dollars nor more than five hundred dollars. The director of public service or board of trustees of public affairs of a municipal corporation shall enforce the provisions of this section. The jurisdiction of a municipal corporation to prevent the pollution of its water supply and to provide penalty therefor, shall extend twenty miles beyond the corporation limits. [R. S. Sec. 2433; 97 v. 135; 66 v. 209.]

Sec. 12785. [Exposure in public having contagious disease; giving or selling articles in charge of such person; penalty.] Whoever, while suffering from smallpox, cholera, plague, yellow fever, diphtheria, membranous croup, scarlet fever or other dangerous contagious disease, wilfully or unlawfully exposes himself in a street, shop, inn, theater or other public place or public conveyance, or, being in charge of a person so suffering, so exposes such sufferer, or gives, lends, sells, transmits or exposes without previous disinfection by the board of health bedding, clothing, rags, or other thing, which has been exposed to infection from such disease, or knowingly lets for hire a house, room or part of a house in which a person has been suffering from such disease, prior to the disinfection thereof by the board of health, shall be fined not more

than one hundred dollars or imprisoned not more than ninety days, or both. [108 v. 236, 250; R. S. Sec. 2127; 95 v. 425; 66 v. 202.]

Sec. 12786. [First offense.] A person violating the next preceding section shall not be imprisoned for the first offense, and the prosecution shall always be as and for the first offense unless the affidavit on which it is instituted contains a contrary allegation. [R. S. Sec. 2127; 95 v. 425; 66 v. 202.]

Sec. 12787. [Failure to report infant with diseased eyes.] Whoever, being a midwife, nurse or relative in charge of an infant less than ten days old, fails within six hours after the appearance thereof, to report in writing to the physician in attendance upon the family, or if there be no such physician, to a health officer of the city, village or township in which such infant is living, or, in case there be no such officer, to a practitioner of medicine legally qualified to practice, that such infant's eye is inflamed or swollen or shows an unnatural discharge, if that be the fact, shall be fined not less than five dollars nor more than one hundred dollars or imprisoned not less than thirty days nor more than six months, or both. [91 v. 75 §§ 1, 2.]

XI.

POLICE COURTS[1]

AND

MUNICIPAL COURTS.

BILLS OF EXCEPTIONS.

Sec. 10359. [Bills of exception.] In all cases before a justice of the peace, mayor or police judge, whether tried by jury or the justice, mayor or police judge, either party shall have the right to except to the decisions of the justice, mayor or police judge, upon any matters of law arising in the case.[2] [R. S. Sec. 6565; 99 v. 78; 95 v. 121; 93 v. 104; 90 v. 358; 80 v. 81; 66 v. 7.]

(1) **Police courts.**—For general provisions relating to police courts and mayor's courts, see §§ 4527-4599 in Part I.

Fines.—For provision requiring fines and penalties assessed and collected by police court for offenses and misdemeanors prosecuted in the name of the state, except portions allowed by the county commissioners to judges, etc., to be paid to trustees of law library associations, see § 3056, G. C.

(2) **Bills of exceptions.**—See § 4551 and notes thereunder, in Part I.

Plea in bar, judgment on, reviewable, see Whitman v. State, 27 C. C. 735.

Review on weight of evidence.—See Koch v. State, 73 O. S. 131, 137.

Applies to both civil and criminal cases.—See State v. Ransick, 62 O. S. 283; Koch v. State, 73 O. S. 131, 138; State v. Langenstroer, 67 O. S. 7.

Time of filing.—Need not be attached to petition in error, see State v. Langenstroer, 67 O. S. 7.

Sec. 10360. [Exceptions, when to be presented.] The party objecting to the decision must except at the time it is made and shall have ten days from the date of overruling the motion for a new trial, if such motion be made, or from the date on which the decision, judgment or sentence of the justice, mayor or police judge is entered to reduce his exceptions to writing and present them to the said court. [101 v. 94; R. S. Sec. 6565; 99 v. 78; 95 v. 121; 93 v. 104; 90 v. 358; 80 v. 81; 66 v. 7.]

Sec. 10361. [Grounds of objection in entry.] If the decision objected to is entered on the record and the grounds of the objection appear in the entry, the exception may be taken by the party causing to be noted at the end thereof that he excepts. But when the decision is not entered on the record or the grounds of the objection do not sufficiently appear in the entry, or exception is to the decision of the court on a motion to direct a non-suit or to arrest the testimony from the jury, or for a new trial because the verdict, or if a jury is waived, the finding of the court is against the law and the evidence, or on the admission or rejection of evidence, the party excepting must reduce this exception to writing, and present it to the trial justice, mayor or police judge, or his successor, within the time above limited. [R. S. Sec. 6565; 99 v. 78; 95 v. 121; 93 v. 104; 90 v. 358; 80 v. 81; 66 v. 7.]

Sec. 10362. [Incorrect bill.] If such bill of exceptions be not correct he shall make the necessary corrections therein within three days after it is so presented, and when correct must sign and file it with the papers in the case, note such signing and filing in his docket, and transmit the bill with the transcript of his docket and original papers, within ten days of the date of such signing, to the clerk of the court of common pleas, who must file and enter it upon his trial docket as in other cases.[1] [R. S. Sec. 6565; 99 v. 78; 95 v. 121; 93 v. 104; 90 v. 358; 80 v. 81; 66 v. 7.]

(1) **Failure of mayor** to transmit bill of exceptions within required time, will not prejudice rights of plaintiff in error. Capple v. State, 17 Dec. 75; 4 N. P. (N. S.) 339.

Where a case is tried before a justice of the peace, mayor or police judge, and the defendant, during the progress of such trial, "excepts to the decisions of the justice of the peace, mayor or police judge upon matters of law arising in the case," and a bill of exceptions is prepared, signed and filed in accordance with Section 10359, *et seq.*, it is not essential to the jurisdiction of the court of common pleas where such bill is filed for a review of said decisions, that the justice of the peace, mayor or police judge "note such signing and filing in his docket" as required by § 10361. The failure of the officer to make the notation in docket does not warrant the court of common pleas in refusing to consider and pass upon the questions contained in the bill of exceptions. Burchard v. State, 83 O. S. 1.

Sec. 10363. [Fees.] The party demanding such transcript if required, shall pay the fees of the justice, mayor or police judge, therefor in advance. [R. S. Sec. 6565; 99 v. 78; 95 v. 121; 93 v. 104; 90 v. 358; 80 v. 81; 66 v. 7.]

JURISDICTION.[1]

Sec. 13423. [Special jurisdiction of justices, police judges and mayors.] Justices of the peace, police judges and mayors of cities and villages shall have jurisdiction, within their respective counties, in all cases of violation of any law relating to:

1. Adulteration or deception in the sale of dairy products and other food, drink, drugs and medicines.
2. The prevention of cruelty to animals and children.
3. The abandonment, non-support or ill treatment of a child by its parent.
4. The abandonment or ill treatment of a child under sixteen years of age by its guardian.
5. The employment of a child under fourteen years of age in public exhibitions or vocations injurious to health, life, morals, or which will cause or permit it to suffer unnecessary physical or mental pain.
6. The regulation, restriction or prohibition of the employment of minors.
7. The torturing, unlawfully punishing, ill treating, or depriving anyone of necessary food, clothing or shelter.
8. The selling, giving away or furnishing of intoxicating liquors as a beverage, or keeping a place where such liquor is sold, given away or furnished, in violation of any law prohibiting such acts within the limits of a township and without the limits of a municipal corporation.
9. The shipping, selling, using, permitting the use of, branding or having unlawful quantities of illuminating oil for or in a mine.
10. The sale, shipment or adulteration of commercial feed stuffs.
11. The use of dust creating machinery in workshops and factories.
12. The conducting of a pharmacy, or retail drug or

chemical store, or the dispensing or selling of drugs, chemicals, poisons or pharmaceutical preparations therein.

13. The failure to place and keep in a sanitary condition a bakery, confectionery, creamery, dairy, dairy barn, milk depot, laboratory, hotel, restaurant, eating-house, packing-house, slaughter-house, ice cream factory, or place where a food product is manufactured, packed, stored, deposited, collected, prepared, produced or sold for any purpose.

14. Offenses for violation of laws in relation to inspection of steam boilers, and of laws licensing steam engineers and boiler operators.

15. The prevention of short weighing and measuring and all violations of the weights and measures laws.

16. The violation of any law in relation to the practice of medicine or surgery, or any of its branches. [108 v. 40; 103 v. 539; R. S. Secs. 306a, 3718a; 100 v. 15, § 4; 100 v. 64, § 6; 97 v. 397, § 9; 99 v. 32, § 3; 99 v. 507, §§ 77, 78; 95 v. 517; 94 v. 92; 91 v. 412; 90 v. 335; 85 v. 144; 81 v. 181.]

(1) **Peace warrants.** — Jurisdiction of mayor or police judge to issue peace warrants and procedure for examination of accused, see §§ 13463-13473, G. C.

Prize fights, etc.—Jurisdiction of mayor or police judge to hear complaints upon arrest by marshal or police officer of person about to engage in prize fight, etc., and procedure upon hearing, see §§ 13474-13481, G. C.

Search warrants.—Jurisdiction of mayor or police judge to issue search warrants and procedure thereupon, see §§ 13482-13491, G. C.

Arrest, examination and bail. —Jurisdiction of mayor or police judge to issue process for the apprehension of persons charged with offenses, see § 13494 G. C.

Jurisdiction of mayor or police judge to issue subpœnas to bring witnesses before them, see § 13495 G. C.

Procedure upon issuance of warrant for arrest, see §§ 13496-13505, G. C.

Examination of accused, see §§ 13506-13519, G. C.

As to arrest of fugitive from other state, see §§ 13520-13522 G. C.

Procedure as to giving and allowing bail, see §§ 13523-13553, G. C.

(2) **Validity.** See Beamer v. State, 21 C. C. 440, 443.

Jurisdiction of police judge or mayor, over offenses under this section, was formerly confined to offenses within his city or village, see State v. Peters, 67 O. S. 494.

The provisions of the act establishing a municipal court for Cincinnati, sections 41 and 43 constitute exceptions to this law restricting the jurisdiction of the justices mentioned. In re Hesse, 93 O. S. 230; affirming 24 C. C. (N. S.) 349.

Offenses included. — Sale of poison under former statute not included. Marvin v. State, 5 N. P. 209.

Coloring oleomargerine is an adulteration of food within the meaning of this section. State v. Ruedy, 57 O. S. 224.

Sale of milk not up to standard, see State v. Smith, 69 O. S. 196.

Intoxicating liquors; see also §§ 6212-17f and 6212-18.

PROCEDURE IN CRIMINAL CASES.

Sec. 13432. [When imprisonment is a part of the punishment a jury shall be impaneled.] In prosecutions before a justice, police judge or mayor, when imprisonment is a part of the punishment, if a trial by jury is not waived, the magistrate, not less than three days nor more than five days before the time fixed for trial, shall certify to the clerk of the court of common pleas of the county that such prosecution is pending before him.[1] [R. S. Sec. 3718a, 95 v. 517; 94 v. 92; 91 v. 412; 90 v. 335; 85 v. 144; 81 v. 181.]

(1) **Second offense.** — Unless the affidavit charges particular case to be a second offense, imprisonment can not be imposed and accused may be tried without a jury. State v. Smith, 69 O. S. 196. See also Peters v. State, 8 N. P. 595; 67 O. S. 494.

Waiver of jury need not be in writing. Martindale v. State, 2 C. C. 2, but must affirmatively appear if trial is without jury. Simmons v. State, 75 O. S. 346.

This section does not confer jurisdiction upon justices of the peace, police judges or mayors, but directs the method of procedure for obtaining a jury in cases in which such magistrates have final jurisdiction. State, ex rel., v. Renz, 26 C. C. (N. S.) 391; 5 Ohio App. 451.

Sec. 13433. [Clerk's duties.] Thereupon the clerk, in the presence of representatives of both parties, shall draw from the jury wheel or box containing the names of persons selected to serve as petit jurors in the court of common pleas in such county, twenty names which shall be drawn and counted in a like manner as for jurors in the court of common pleas. The clerk shall forthwith certify the names so drawn to the magistrate, who, thereupon, shall issue to any constable, chief of police or marshal in the county, a venire containing the names of the persons to serve as jurors in the case and make due return thereof. [R. S. Sec. 3718a; 95 v. 517; 94 v. 92; 91 v. 412; 90 v. 335; 85 v. 144; 81 v. 181.]

Sec. 13434. [Jurors.] The jurors shall be subject to like challenges as jurors in criminal cases, except capital cases, in the court of common pleas. If the venire is exhausted without obtaining the number required to fill the panel, the magistrate shall fill the panel with talesmen in the manner provided for criminal cases in the court of common pleas. [R. S. Sec. 3718a; 95 v. 517; 94 v. 92; 91 v. 412; 90 v. 335; 85 v. 144; 81 v. 181.]

Sec. 13435. [Second or subsequent offense.] In such prosecutions, where a different punishment is provided for a second or subsequent offense, the information or affidavit upon which the prosecution is based, must charge that it is the second or subsequent offense or the punishment shall be as for the first offense. [R. S. Sec. 3718a; 95 v. 517; 94 v. 92; 91 v. 412; 90 v. 335; 85 v. 144; 81 v. 181.]

Sec. 13437. [New trial.] In such prosecutions, if there is a verdict for conviction, a new trial may be granted for like reasons and subject to like conditions as a new trial in criminal cases in the court of common pleas. [R. S. Sec. 3718a; 95 v. 517; 94 v. 92; 91 v. 412; 90 v. 335; 85 v. 144; 81 v. 181.]

Sec. 13438. [Mileage of jurors; payment.] In such prosecutions, the jurors shall be entitled to the same mileage and fees as in criminal cases in the court of common pleas, and they shall be paid from the county treasury upon the certificate of the court. [109 v. 173; 108 v. 1203, 1221; R. S. Sec. 3718a; 95 v. 517; 94 v. 92; 91 v. 412; 90 v. 335; 85 v. 144; 81 v. 181.]

Sec. 13439. [Costs.] In such prosecutions, no costs shall be required to be advanced or secured by a person authorized by law to prosecute. [108 v. 1203, 1221; R. S. Sec. 3718a; 95 v. 517; 94 v. 92; 91 v. 412; 90 v. 335; 85 v. 144; 81 v. 181.]

Sec. 13440. [Humane society may employ an attorney.] A humane society or its agent may employ an attorney to prosecute the following cases, under this section, who shall be paid for his services out of the county treasury in such sum as the judge of the court of common pleas or the probate judge of

such county or the county commissioners thereof may approve as just and reasonable:

1. Violations of law relating to the prevention of cruelty to animals and children;

2. Violations of law relating to the abandonment, non-support or ill-treatment of a child by its parent;

3. Violations of law relating to the employment of a child under fourteen years of age in public exhibitions or vocations injurious to health, life or morals or which cause or permit such child to suffer unnecessary physical or mental pain;

4. Violations of law relating to neglect or refusal of adult to support destitute parent. [R. S. Sec. 3718a; 95 v. 517; 94 v. 92; 91 v. 412; 90 v. 335; 85 v. 144; 81 v. 181.]

MUNICIPAL COURTS.[1]

Sec. 11297-1. [Service of writs and process by registered mail; return of officer.] In addition to the methods of service and return of writs as provided by law, the judge or judges of the court of common pleas and probate judge in each of the counties of the state or of the municipal court of any city may, by rule, provide for the service of writs or process by mail registered or otherwise and for the service of persons summoned for jury duty by mail, registered or otherwise. When provisions for service by mail, registered or otherwise, is so made, a return of the sheriff or other officer or person charged by law with the duty of serving said writ or process, that a true copy of the writ or process was deposited in the mail registered, or otherwise shall be proof of residence service at the address on the envelope containing such writ or process; provided that such residence be the correct residence address of the party to be served and that such envelope be not returned by the postal authorities as undelivered. In the case of a corporation, domestic or foreign, or a partnership, or an insurance company a return of the sheriff or other officer or person charged by law with the duty of serving said writ or process, that a true copy of the writ or process was deposited in the mail enclosed in an envelope registered or otherwise addressed to the corporation, or partnership, or insurance company at its office

or place where it regularly receives mail, shall be proof of service, provided that such address be the office of the corporation, or partnership, or insurance company, or the place where the corporation, or partnership, or insurance company regularly receives mail and that such envelope be not returned by the postal authorities as undelivered; and provided further that, in any case any person requesting service by sheriff, or bailiff, shall be entitled thereto. [107 v. 653.]

(1) **Municipal courts.**—By special acts, municipal courts and special police courts have been established in a number of cities. For such acts see the following sections of the general code:

Akron, §§ 1579-497 to 1579-549.
Alliance, §§ 1579-195 to 1579-232.
Ashtabula, §§ 14693 to 14695.
Canton, §§ 14696 to 14705.
Cincinnati, §§ 1558-1 to 1558-45a.
Cleveland, §§ 1579-1 to 1579-45i.
Columbus, §§ 1553-46 to 1558-93b.
Dayton, §§ 1579-46 to 1579-89.
Hamilton, §§ 1579-90 to 1579-126a.
Lima, §§ 14740-24 to 14740-34.
Lorain, §§ 1579-601 to 1579-641.
Massillon, §§ 1579-416 to 1579-458.
Middletown, §§ 1579-183 to 1579-194.
Newark, §§ 1579-367 to 1579-415.
Piqua, §§ 1579-560 to 1579-600.
Portsmouth, §§ 1579-459 to 1579-496.
Sandusky, §§ 1579-233 to 1579-275.
Toledo, §§ 1579-276 to 1579-329.
Youngstown, §§ 1579-127 to 1579-182.
Zanesville, §§ 1579-330 to 1579-366.

XII.

PUBLIC BUILDINGS AND INSPECTION OF BUILDINGS.

Sec. 1031. [Inspection of schoolhouses and other buildings.] The department of industrial relations shall cause to be inspected all schoolhouses, colleges, opera houses, halls, theaters, churches, infirmaries, children's homes, hospitals, medical institutes, asylums and other buildings used for the assemblage or betterment of people in the state. Such inspection shall be made with special reference to precautions for the prevention of fires, the provision of fire escapes, exits, emergency exits, hallways, air-space, and such other matters which relate to the health and safety of those occupying, or assembled in, such structures.[1] [110 v. 280; 99 v. 232, § 1.]

(1) **Validity.**—Act of April 28, 1908 (99 O. L. 232), held valid. Board v. Sawyer, 7 N. P. (N. S.) 401; 19 Dec. 1.

Sec. 1032. [Written report of inspection filed; recommendations made to owner, and published.] Upon inspection of such structure, the inspector shall file with the department of industrial relations a written report of the condition thereof. If it is found that necessary precautions for the prevention of fire or other disaster have not been taken or that means for the safe and speedy egress of persons assembled therein have not been provided, such report shall specify what appliances, additions or alterations are necessary therefor. Thereupon the department of industrial relations shall issue an order in writing stating what necessary appliances, additions or alterations shall be added to or made in such structure and shall send a copy of such order to the owner or persons having control of such structure and thereafter shall publish in some newspaper of general circulation in the neighborhood of such structure, a copy of such order or a brief statement of the contents of such order.

If such structure is located in a municipality a copy of such order shall be mailed to the mayor or chief executive thereof, otherwise a copy of such order shall be mailed to the prosecuting attorney of such county. [110 v. 280, 281; 99 v. 232.]

Sec. 1032-1. [Appeal from order; procedure.] Any board of education, board of trustees, board of county commissioners, council of a city or village, city commission, or owner or person having control of such structure, may appeal from such order to the court of common pleas of the county in which such structure is situated, by filing an appeal with the clerk of such court within twenty (20) days after such publication of a copy of such order or such brief statement. The clerk of said court shall forthwith notify the department of the filing of such appeal. The department of industrial relations shall be plaintiff and the appellant shall be defendant. Within twenty (20) days after the filing of such appeal the department of industrial relations shall make a complete transcript of the proceedings had before it and certify the same together with all the original papers filed in its office and transmit them to the clerk of said court. Within ten days after filing such transcript the department of industrial relations shall file a petition in the ordinary form against such appellant as defendant and further pleading shall be had in such case according to the rules of civil procedure. The court shall hear the matter upon such evidence as may be introduced by either party, and determine the right of the appellant. If the court find from the evidence that such order should be set aside, such order shall thereafter be null and void and of no effect. If the court find in favor of such department of industrial relations and that such order should not be set aside, such order shall be continued in full force and effect. So far as consistent with the rights of others such appeal shall by the trial court be given precedence over other matters and the decision of such common pleas court shall be final. [110 v. 280, 281.]

Sec. 1033. [When use of structure is prohibited.] If no appeal is taken or if the court sustains the order, the mayor

or chief executive with the aid of the police or the prosecuting attorney with the aid of the sheriff, as the case may be, shall prevent the use of such structure for public assemblage until the appliances, additions or alterations required by such notice have been added to or made in such structure. [110 v. 280, 282; 99 v. 233.]

Sec. 1034. [Owner or agent shall comply with notice.] Upon receipt of such notice, if no appeal be taken or if the court shall find in favor of the department of industrial relations the owner or person in control of such structure shall comply with every detail embodied therein, and upon completion thereof report such fact in writing to the department of industrial relations and to such mayor or prosecuting attorney. [110 v. 280, 282; 99 v. 233.]

Sec. 1035. [Approval of plans.] The plans for the erection of such structure, and for any alterations in or additions to any structure, shall be approved by the department of industrial relations, except in municipalities having regularly organized building inspection departments, in which case the plans shall be approved by such department. [110 v. 280, 282; 99 v. 233.]

Sec. 1036. [Penalty.] Whoever, being an architect, builder or other person, alters the plans so approved or fails to construct or alter a building in accordance with such plans without the consent of the department that approved them, or without the court of common pleas finding that such order should be set aside, shall be fined not less than five hundred dollars nor more than one thousand dollars or imprisoned in the county jail not less than thirty days nor more than one year, or both. [110 v. 280, 282; 99 v. 233.]

Sec. 1037. [Penalty.] Whoever, being a person, firm or corporation or member of a board and being the owner or in control of any building mentioned in section ten hundred and thirty-one of this chapter, uses or permits the use of such building in violation of any order prohibiting its use issued as provided by law, unless the common pleas court

has made a finding setting aside such order, or fails to comply with an order so issued relating to the change, improvement or repair of such building, unless the common pleas court shall make a finding setting aside such order, shall be fined not less than ten dollars nor more than one hundred dollars, and each day that such use or failure continues shall constitute a separate offense. [110 v. 280, 282; 99 v. 234..]

Sec. 2419-2. [County may lease public buildings to municipality.] The county commissioners may by agreement with the city council, the director of public safety or his successor or the person, persons or board charged with the erection, maintenance or repair of police stations, jails, police and municipal court houses and court rooms, lease to any municipal corporation in said county suitable quarters in county buildings (erected or to be erected) for municipal courts, police stations, police courts, prosecutors' offices, probationers' offices and other similar municipal purposes. Whenever the commissioners of any county have made an agreement with a municipal corporation as herein provided, such commissioners may erect county building anticipating and making provision for such municipal quarters. [107 v. 502, 503.]

Sec. 3399. [Village and township may jointly enlarge, improve or erect public building.][1] The electors of a township in which a village is situated, and the electors of such village may if both so determine, as hereinafter provided, unite in the enlargement, improvement or erection of a public building. [97 v. 483 § 1.]

(1) City and township have no authority to unite for erection of city hall and township house. Op. Atty. Gen. (1916), p. 1293.

Sec. 3400. [Application to mayor and township trustees.] For such purpose an application shall be made to and filed with the trustees of the township, signed by not less than twenty-five resident free-holders of such township, who are not residents of the village, and application shall also be made to and filed with the mayor of the village, signed by

not less than twenty-five resident free-holders of the village. [97 v. 483 § 2.]

Sec. 3401. [Submission of question of tax to a vote.] At the next general township and municipal election after such applications have been so filed, the question as to whether or not a tax shall be levied upon all the property subject to taxation in such township and village for the enlargement, improvement or erection of a public building, shall be submitted to the electors of such township and of such village. Ten days' notice that the question will be submitted to the electors, shall be given by the trustees of the township and the mayor of the village, in a newspaper of general circulation in such township and village, which notice shall state the maximum amount of money proposed to be used for such purpose, and the rate of tax proposed to be levied. [97 v. 484 § 3.]

Sec. 3402. [Two-third vote necessary.] If at such election two-thirds of the electors of the township and of the village voting, vote in favor of such improvement, the trustees of such township and the council of the village shall jointly take such action as is necessary to carry out such improvement. [97 v. 484 § 4.]

Sec. 12598. [Asbestos or steel curtain to be provided; proscenium wall.] Whoever, being the owner or having ownership or control of an opera house, theater or hall having a seating capacity of seven hundred and fifty or more, computing each seat space at twenty by thirty inches, shall be fined not less than twenty-five dollars nor more than one thousand dollars if he permits it to be used for public assemblies without it is satisfactory to the mayor, chief of fire department and building inspector of the municipality in which it is located, or, if such municipality has no chief of fire department or building inspector, it is satisfactory to the mayor and two members of council, or, if located in a township, is satisfactory to the trustees thereof, in the following respects:

1. There must be an asbestos or steel stage curtain of standard quality that will stand a fire test, and it shall lap

over the stage opening at the sides and top not less than twelve inches;

2. Iron gas piping not less than one and one-half inches inside diameter, must be attached to said curtain at top and bottom for its entire width;

3. All guide wires of said curtain must be made of steel and not less than one-fourth of an inch in diameter;

4. There must be a proscenium wall in such building, of brick or other fireproof material, and every opening therein except the stage opening must be provided with fireproof doors. [97 v. 265 § 3.]

Sec. 12600-274. [Alterations.] [§ 2.] It shall be unlawful for any owner or owners, officers, board, committee or other person to construct, erect, build, equip or cause to be constructed, erected, built or equipped any opera house, hall, theater, church, schoolhouse, college, academy, seminary, infirmary, sanitarium, children's home, hospital, medical institute, asylum, memorial building, armory, assembly hall or other building used for the assemblage or betterment of people in any municipal corporation, county or township in this state, or to make any addition thereto or alteration thereof, except in case of repairs for maintenance without affecting the construction, sanitation, safety or other vital feature of said building or structure, without complying with the requirements and provisions relating thereto contained in this act.[1] [102 v. 586.]

(1) **Ohio State Building Code.** —The provisions of the Ohio State Building Code, providing regulations for the construction, repair, alteration, etc., of buildings, will be found in 102 Ohio Laws, pages 586 to 728 (§§ 12600-1 to 12600-282, General Code).

Sec. 12600-275. [Violations.] [§ 3.] It shall be unlawful for any architect, builder, civil engineer, plumber, carpenter, mason, contractor, sub-contractor, foreman or employe to violate or assist in violating any of the provisions contained in this act. [102 v. 586.]

Sec. 12600-276. [Each section independent.] [§ 4.] Each section of this act and every part of each section is hereby

declared to be independent sections and parts of sections, and the holding of any section or part thereof to be void and ineffective for any cause shall not be deemed to affect any other section or part thereof. [102 v. 586.]

Sec. 12600-277. [Council may make further regulations.] Nothing herein contained shall be construed to limit the council of municipalities from making further and additional regulations, not in conflict with any of the provisions of this chapter or with the rules and regulations of the board of building standards determining equivalents, nor shall the provisions of this chapter be construed to modify or repeal any portion of any building code adopted by a municipal corporation and now in force which are not in direct conflict with the provisions of this chapter, or with such rules and regulations. [110 v. 356; 102 v. 587.]

Sec. 12600-278. [Buildings and structures to which act does not apply.] The provisions of this act shall not apply to the construction or erection of any public building or any addition thereto or alteration thereof, the plans and specifications of which have been heretofore submitted to and approved by the chief inspector of workshops and factories; nor shall they apply to the construction, erection or equipment of any public building, addition thereto or alteration thereof, where any lot or land has been purchased for the erection or equipment of such public building or where the contract for the construction, erection or equipping of which has been let or entered into prior to the date at which this act takes effect; nor shall the provisions prescribing the minimum distance at which buildings or structures, or parts thereof, shall be located from any lot line, or the provisions relating to open courts and fireproof passage-ways, apply when the provisions of this act are, or can be complied with by or with the use of adjoining property, and when such adjoining property affords the widths and areas as prescribed by this act, and is available for the purposes intended, and when such adjoining property is so situated, used, dedicated or deeded, as to preclude the erection of any building or structure or part thereof on the widths and areas so used, during

the existence of the building or structure erected under the provisions of this act. [106 v. 441; 102 v. 587.]

Sec. 12600-279. [Penalty.] Whoever being the owner or having the control as an officer, or as a member of a board or committee or otherwise of any opera house, hall theater, church, school house, college, academy, seminary, infirmary, sanitarium, children's home, hospital, medicine institute, asylum, memorial buildings, armory, assembly hall or other building for the assemblage or betterment of people in any municipal corporation, township or county in this state, violates any of the provisions of the foregoing act or fails to conform to any of the provisions thereof, or fails to obey any order of the state fire marshal, unless the court shall sustain the appeal, the department of industrial relations, unless on appeal the court shall set aside such order, or building inspector or commissioner in cities having a building inspection department, or the state board of health in relation to the matters and things in this act contained shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than one thousand dollars and stand committed until said fine and costs be paid or secured to be paid or until otherwise discharged by the due process of law. [110 v. 280, 282; 102 v. 586.]

Sec. 12600-280. [Chapter penalties.] [§ 2.] Any architect, civil engineer, builder, plumber, carpenter, mason, contractor, sub-contractor, foreman, or employe who shall violate or assist in the violation of any of the provisions of this act or of any order issued thereunder shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than one thousand dollars and to stand committed until said fine and costs are paid or secured to be paid or until otherwise discharged by due process of law. [102 v. 588.]

Sec. 12600-281. [Specific officers' duty to enforce act.] [§ 1.] It shall be the duty of the state fire marshal or fire chief of municipalities having fire departments to enforce all the provisions herein contained relating to fire prevention.

It shall be the duty of the chief inspector of workshops and

factories or building inspector, or commissioner of buildings in municipalities having building departments to enforce all the provisions herein contained for the construction, arrangement and erection of all public buildings or parts thereof, including the sanitary condition of the same, in relation to the heating and ventilation thereof.

It shall be the duty of the state board of health or building inspector or commissioner, or health departments of municipalities having building or health departments to enforce all the provisions in this act contained, in relation and pertaining to sanitary plumbing. But nothing herein contained shall be construed to exempt any other officer or department from the obligation of enforcing all existing laws in reference to this act. [102 v. 586.]

Sec. 12600-282. [Jurisdiction.] [§ 7.] A justice of the peace, mayor or police judge shall have final jurisdiction within his county in a prosecution for a violation of any provision of the foregoing act. [102 v. 587.]

XIII.

MISCELLANEOUS STATUTES.

ADVERTISING.

Sec. 6251. [Rates for legal advertising.] Publishers of newspapers may charge and receive for the publication of advertisements,[1] notices and proclamations required to be published by a public officer of the state, county, city, village, township, school, benevolent or other public institution, or by a trustee, assignee, executor or administrator, the following sums, except where the rate is otherwise fixed by law, to-wit: For the first insertion, one dollar for each square, and for each additional insertion authorized by law or the person ordering the insertion, fifty cents for each square. Fractional squares shall be estimated at a like rate for space occupied. In advertisements containing tabular[2] or rule work fifty per cent may be charged in addition to the foregoing rates. Providing, however, newspapers having a circulation of over twenty-five thousand shall charge and receive for such advertisements, notices and proclamations, rates charged on annual contracts by them for like amount of space to other advertisers who advertise in its general display advertising columns; and the publisher shall make and file with his bill before its payment, an affidavit, that the newspaper had a bona fide circulation of more than twenty-five thousand at the time the advertisement, notice or proclamation was published, and that the price charged in the bill for same did not exceed the rates herein provided for such advertisement, notice or proclamation. [109 v. 247; 108 v. 475; R. S. Sec. 4366; 73 v. 75.]

(1) **Advertisement.** — Meaning of. See Murray v. Auglaize Co., 13 Dec. 723.

(2) **Tabular work.** — Meaning of. *Ib.*

Sec. 6254. [What constitutes a square; an em.] A square shall be a space occupied by two hundred and forty ems of

the type used in printing such advertisements. Legal advertising shall be set up in a compact form, without unnecessary spaces, blanks or headlines and printed in type not smaller than nonpareil. The type of whatever size used must be of such proportions that the body of the capital letter M be no wider than it is high and all other letters and characters in proportion. Except as may be done under sections 1695 to 1697, inclusive, of the General Code, all legal advertisements or notices shall be printed in newspapers published in the English language only. [108 v. 475; R. S. Sec. 4369; 77 v. 40; 73 v. 75.]

Sec. 6255. [Sufficient publication of legal notice defined.] Whenever any legal publication is required by law to be made in a newspaper or newspapers published or printed in a municipality, county, or other political subdivision, the newspaper or newspapers used shall have at least one side thereof printed in such municipality, county, or other political subdivision; and whenever any legal publication is required by law to be made in a newspaper or newspapers of general circulation in a municipality, county, or other political subdivision, without further restriction or limitation upon a selection of the newspaper to be used, such publication shall be made in a newspaper or newspapers at least one side of which is printed in such municipality, county, or other political subdivision, unless there be no such newspaper or newspapers so printed, in which event, only, such publication shall be made in any newspaper or newspapers of general circulation therein. [106 v. 492; 102 v. 487; R. S. Sec. 4370; 74 v. 208.]

BONDS.

Sec. 2295-1. [Endorsement.] That all bonds hereafter issued by any county, city or city school district within this state, except those issues permanently held by the sinking fund trustees of the municipality issuing same, may have, endorsed thereon, a certificate attesting the genuineness of the signatures thereto, signed by a registrar legally authorized and qualified to act therein. [101 v. 256.]

Sec. 2295-2. [Registrar; appointment and compensation.] That every county, city or city school district within this state having the power to issue such bonds, shall have the power to employ such registrar, the compensation of which together with all proper expenses incident to such certification shall be paid on the allowance of such authority out of the county, city or city school district treasury or fund benefited or to be benefited by the sale of such bonds, as the case may be. [101 v. 256.]

Sec. 2295-3. [Certified transcript of proceedings required to be furnished successful bidder for bonds by certain officers.] That it shall be the duty of the clerk, or other officer having charge of the minutes of the council of any municipal corporation, board of county commissioners, board of education, township trustees, or other district or political subdivisions of this state, that now has or may hereafter have, the power to issue bonds, to furnish to the successful bidder for said bonds, a true transcript certified by him of all ordinances, resolutions, notices, and other proceedings had with reference to the issuance of said bonds, including a statement of the character of the meetings at which said proceedings were had, the number of members present, and such other information from the records as may be necessary to determine the regularity and validity of the issuance of said bonds; that it shall be the duty of the auditor or other officer, having charge of the accounts of said corporation or political subdivision, to attach thereto a true and correct statement certified by him of the indebtedness, and, of the amount of the tax duplicate thereof, and such other information as will show whether or not said bond issue is within any debt or tax limitation imposed by law. [103 v. 179.]

Sec. 2295-4. [Penalty for certifying false transcript or statement.] Any such clerk or officer, or any deputy or subordinate thereof, who shall knowingly make or certify a false transcript or statement in respect to any of the matters hereinabove set forth, shall be guilty of a misdemeanor and be fined not less than twenty-five ($25.00) dollars, nor more than five hundred ($500.00) dollars, or imprisoned not exceeding one year, or both. [103 v. 179.]

Sec. 2295-5. [Reissue of lost or destroyed bonds or certificates.] Whenever bonds, notes, checks or certificates of indebtedness, issued by a municipal corporation, school district, county, township, or other political sub-division or taxing district of this state, are lost or destroyed, said corporation, school district, county, township, subdivision or district may re-issue to the holder or holders duplicates thereof in the same form and signed as the original obligations were signed, which obligations so issued shall show plainly upon its face as being a duplicate of such lost bond, note, check or certificate, upon proof of such loss or destruction and upon being furnished with a bond of indemnity against all loss or liability for or on account of the obligations so lost or destroyed. [110 v. 120; 106 v. 303.]

Sec. 2295-6. [Definition of terms used.] Definitions—The following definitions shall be applied to the terms used in this act:[1]

(a) "Political subdivision" shall mean any political subdivision or taxing district of the state incurring indebtedness or issuing bonds on the general credit of the political subdivision or taxing district;

(b) "Charter municipality" shall mean any municipality which at the time of incurring any indebtedness or issuing any bonds is operating under a charter framed and adopted under the provisions of Article XVIII of the constitution of Ohio;

(c) "Fiscal officer," in the case of a county, shall be the county auditor; in the case of a charter municipality, such officer as by virtue of the charter has the duties and functions provided in section 4284 of the General Code of Ohio; in the case of any other city, the city auditor, and of any other village, the village clerk; in the case of a school district, the clerk of the board of education; in the case of a township, the auditor of the county in which such township is located; in the case of any other political subdivision, the officer who by law performs the duties and functions similar to those of a city auditor;

(d) "Serial bonds" are those which provide for the retire-

ment of the indebtedness by means of installment maturities in lieu of a sinking fund;

(e) The "bond-issuing authority" shall, in the case of any bond issue, be the county commissioners, board of education, township trustees, city council or other board or officer who, under the provisions of law or charter, has the function of determining upon the issuance of such bonds. [109 v. 336, § 1.]

(1) **Act referred to.**—The reference is to the "Griswold Act", 109 O. L. 336.

Sec. 2295-7. [Subdivisions shall not incur indebtedness for current operating expenses.][1] No county, school district, township, municipality, including charter municipalities, or other political subdivision shall, with the exceptions hereinafter named, create or incur any indebtedness for current operating expense. The acquisition or construction of any property, asset or improvement with an estimated life or usefulness of less than five years shall be deemed current expense. This prohibition shall not apply to borrowing as provided by law in anticipation of collection of special assessments or in anticipation of special assessments or current revenues or for defraying the expenses of an extraordinary epidemic of disease or emergency expenses made necessary by sudden casualty which could not have reasonably been foreseen or for deficiencies created by enjoined taxes as provided in section 5659-1 of the General Code or for paying final judgments upon non-contractual obligations as provided in section 4 thereof. The estimate of the life of the property, asset or improvement proposed to be acquired or constructed from the proceeds of any bonds, shall be made in any case by the fiscal officer of the subdivision and certified by him to the bond-issuing authority and shall be binding upon such authority. [109 v. 336, § 2.]

(1) "Current operating expense" construed. See Op. Atty. Gen. (1921), p. 1166.

Sec. 2295-8. [When bonds may be issued to pay final judgment.] When the fiscal officer of any county or other political subdivision, including charter municipalities, certifies to the bond-issuing authority that, within the limits of its

funds available for the purpose, the subdivision is unable, with due consideration of the best interests of the subdivision, to pay a final judgment rendered against the subdivision in an action for personal injuries or based on other non-contractual obligation, then such subdivision may issue bonds, in an amount not exceeding the amount of the judgment and carrying interest not to exceed six per cent, for the purpose of providing funds with which to pay such final judgment. Providing also that when the fiscal officer of any such subdivision certifies to the bond issuing authority that, within the limits of its funds available for the purpose, the subdivision is unable with due consideration of the best interests of the subdivision, to pay a final judgment rendered against the subdivision in an action based upon an obligation of a contractual nature incurred prior to the fourteenth day of May, 1921, and reduced to judgment prior to the passage of this act, then said political subdivision may issue bonds in an amount not exceeding the amount of the judgment and the interest due thereon, and carrying interest not to exceed six per cent for the purpose of providing funds with which to pay such final judgment. [110 v. 160; 109 v. 336, 337, § 4.]

Sec. 2295-9. [Periods beyond which, bonds issued by subdivisions may not run; classification.][1] That the maturities of bonds issued by counties and other political subdivisions, including charter municipalities, shall not extend beyond the following limitations as specified in the following classification, the period to be measured from a date twelve months prior to the date of the earliest maturity, if maturity in annual installments, or six months prior thereto, if maturing in semi-annual installments:

Bonds issued for—

Class (a) The acquisition of real estate or easements or other interests in real estate, grade crossing elimination, and flood prevention, thirty years;

Class (b) The construction or improvement of fire-proof buildings or other structures, widening of roads, highways, streets or alleys, general waterworks improvements, sanitary

and storm sewers, sewage disposal works, and bridges, twenty-five years;

Class (c) The construction or improvement of non-fireproof buildings or other structure, electric light plant and equipment, police and fire alarm and telegraph systems, fifteen years;

Class (d) Waterworks meters, fire apparatus, road rollers, furniture and furnishings, machinery in garbage disposal plant, landscape planting, playground apparatus, sidewalks, curbs, gutters, and the construction, reconstruction, resurfacing, grading, or drainage of roads, highways, streets, or alleys, ten years;

Class (e) Motor vehicles other than fire apparatus, wagons and horses, bonds issued to pay judgments for personal injuries or other non-contractual obligations and also for defraying the expenses of an extraordinary epidemic of disease, five years;

Class (f) Lighting, sprinkling, sweeping or cleaning of streets or other public places or other service for which municipal corporations or other political subdivisions are authorized by law to levy special assessments, one year;

Class (g) Purposes not included in the foregoing classes, such number of years not exceeding thirty as is the estimated period of usefulness of the asset, improvement, or other purpose, such estimate to be made by the fiscal officer;

Class (h) A single bond issue for a purpose which includes two or more of the foregoing classes, the average number of years of usefulness as measured by the weighted average of the amounts proposed to be expended for said several classes in accordance with above table of maturities; such estimating and calculation of average to be made by the fiscal officer. [110 v. 456; 109 v. 336, 338, § 6.]

(1) **When not applicable.**—This section held not applicable where the legislation authorizing street improvement including the authorization of the bonds had been passed prior to Jan. 1, 1922, but the bonds had not been sold until after that date and such bonds may be made to mature more than ten years after their date. State ex rel. v. Chandler, 105 O. S. 499.

Sec. 2295-10. [Certification of maximum indebtedness by fiscal officer before passage of ordinance, resolution, etc., for

issue of bonds; contents of certification.] Before any resolution, ordinance or other measure providing for the issuance of bonds, notes or other evidences of indebtedness of any county or other political subdivision, including charter municipalities, is passed or adopted, the fiscal officer thereof shall certify to the bond-issuing authority the maximum maturity of such bonds or indebtedness, calculated in accordance with the provisions of the foregoing section, and no such bonds, notes or other evidences of indebtedness shall be authorized or issued with maturities extending beyond the maturities as thus certified by such fiscal officer. Where the proposed indebtedness falls within class (h), such certification shall also contain a schedule of the respective amounts of the proposed bonds falling within each of classes (a) to (g) inclusive. The amount expended from the proceeds of the bonds for any purpose or purposes falling within any class shall not exceed the amount allotted in said schedule to said class; provided, however, that whenever the bond-issuing authority deems such transfer to be necessary for the carrying out of the purpose of the bond issue, then such authority may transfer any unexpended portion of the amount allotted to any class from the class to which it was originally so allotted to any class with a longer maturity and, upon such transfer, the amount expended for any purpose or purposes falling within the class to which such transfer has been authorized may include the amount so transferred; but no transfer may be made from any class to a class with a shorter maturity. Each such certificate shall state whether or not the asset, property, construction or improvement has an estimated life or usefulness of at least five years; and the provisions of section 2295-7 of the General Code shall apply to any asset, property, construction or improvement certified as having an estimated life or usefulness of less than five years. [110 v. 456; 109 v. 336.]

Sec. 2295-11. **[What cost of construction may include.]** The cost of construction of any building, utility or improvement may be construed to include interest payable during construction on bonds issued for such construction. A sum not to exceed one-year's interest on any bond issue may be included

in the amount of the issue to the extent necessary to care for interest maturing previous to the receipt of the taxes or assessments from which such interest is to be ultimately paid. [109 v. 336, 343, § 13b.]

Sec. 2295-12. [General provisions relating to the issue of bonds.] All bonds hereafter issued by any county, municipality, including charter municipalities, school district, township or other political subdivision, shall be serial bonds maturing[1] in substantially equal semi-annual or annual installments. If issued with semi-annual maturities, the first installment shall mature not earlier than the date fixed by law for the semi-annual provisional tax settlement between the county treasurer and the political subdivision or taxing district next following the time fixed by law for the inclusion of a tax for such issue in the annual budget by the county auditor as provided by law; and if issued with annual maturities, the first installment shall mature not earlier than the date fixed by law for the final annual tax settlement next following the said time for said inclusion. In either case the first installment shall mature not later than eleven months after said earliest date thereof. [110 v. 459; 109 v. 344.]

(1) **Time of earliest maturity.**— The tax referred to is to be included in the budget by the county auditor (G. C. § 5649-1b) and laid before the budget commissioners on the first Monday in August (§ 5649-3b). The settlements with the local subdivision are to be made immediately following the settlements between the county auditor and county treasurer (§ 2689); the county treasurer makes his partial settlement with the county auditor on or before February 15th, and his final settlement on or before August 10th (§ 2683). In determining the time for earliest and latest maturities for bonds of a given class, these dates should be borne in mind, as well as the provisions of § 2295-9. The certificate of the fiscal officer required by §§ 2295-7 and 2295-10 should be made prior to the passage of the ordinance. See form of this certificate preceding forms of ordinances under §§ 3825 and 3939 in Part I.

Sec. 2295-13. ["Judgment fund," transfer to.] All moneys collected from taxes or other sources for the payment of final judgments against the political subdivision (other than condemnation of property cases) shall go into a separate fund of the subdivision, to be known as "judgment fund."[1]

The treasurer of the political subdivision shall receive all taxes, assessments and moneys collected for the payment of final judgments against the political subdivision or proceeds of bonds issued for such purpose and invest and disburse them in the manner provided by law and shall have charge of and provide for the payment of all such judgments. [110 v. 456, 460; 109 v. 345.]

(1) Investment of proceeds of the judgment fund levy. See Op. Atty. Gen. (1922), p. 593.

Sec. 2295-14. [Sinking fund officers continue to exercise powers until outstanding bonds are retired; thereafter powers transferred to treasurer.] The board of sinking fund trustees of any county or municipality or the board of sinking fund commissioners of any school district shall continue to exercise the powers provided in sections 2976-18 to 2976-27 inclusive, 4511 to 4522 inclusive, 3932 and 7613 to 7619 inclusive of the General Code and all other provisions of law relating to its powers, until all outstanding bonds of such county, municipality or school district issued previous to January 1, 1922, shall have been paid; and thereupon it shall be deemed to be abolished and its functions and powers relating to the purchase and sale of securities, receipt, deposit and investment of taxes, assessments and other funds raised for the payment of bonds and funded debts, the application of such funds to the payment of bonds and other indebtedness and all its other powers and functions as set forth in said provisions of law as amended in this act shall be deemed to be transferred to the treasurer of the county, municipality or school district, and all moneys, securities and other assets then in the custody and possession of such board shall be transferred and delivered to such treasurer. Thereafter all said moneys, securities and assets and all moneys received by the county, municipality or school district for the payment of the interest and principal of its bonds or other funded debts and all inheritance taxes and all other taxes and revenues which were theretofore payable, by virtue of provision of law, into sinking fund shall be paid to its treasurer and placed and held by him in a separate fund to be known as "bond payment fund" and, sub-

ject to the provisions of law relating to transfer to other funds, said fund shall be applied by him to the purposes for which the sinking fund had theretofore been applicable. [110 v. 456, 460; 109 v. 347.]

Sec. 2295-15. [Powers of trustees of railways, regarding bonds and sinking fund.] None of the provisions of section 2295-9 or 2295-12 shall apply to the bonds issued or to be issued on account of the line or railway constructed under the authority of the "Act relating to cities of the first class, having a population exceeding one hundred and fifty thousand inhabitants", passed May 4, 1869, and acts supplementary thereto and amendatory thereof; provided, however, that the issuance of sinking fund bonds on account of the said railway shall not affect or postpone the abolition of the sinking fund trustees of the city as provided in section 2295-14 of the General Code and after such abolition the rentals accruing on account of said railway shall be paid to the treasurer of the city and said treasurer shall maintain and apply the sinking fund charges accruing upon bonds issued for such purposes as provided in said section 2295-14 of the General Code. [110 v. 456, 460; 109 v. 347.]

BOUNDARIES OF TOWNSHIPS CHANGED.

Sec. 3249. [Change of boundaries in certain cases; erection of new township.] If the limits of a municipal corporation do not comprise the whole of the established township or townships in which it is situated, or if by change of the limits of such corporation, or otherwise, they include territory lying in more than one township, and the council of such corporation shall in either case, by a vote of the majority of the members thereof, petition the commissioners of the proper county for a change of township lines so as to make them identical in whole or in part with the limits of the corporation, or to erect a new township out of the portion of such township or townships included within the limits of such municipal corporation, the commissioners on presentation of such petition, with the proceedings of the council duly authenticated, at a regular or adjourned session, may change the boundaries

of the township or townships, or erect such new township accordingly. [R. S. Sec. 1380; 89 v. 63; 70 v. 4.]

Sec. 3250. [What to be done with parts of township left.] In making such change, if any township not having within its limits a city or village, is reduced in territory to less than twenty-two square miles, it may be by the commissioners thereupon annexed to any contiguous township or townships, or the commissioners may annex thereto territory from any contiguous township or townships, and erect a new township, as in their opinion will best promote justice and public convenience. If a majority of the householders of such reduced township outside the limits of such municipal corporation petition therefor, the commissioners may erect such reduced township into a new township. [R. S. Sec. 1381; 89 v. 64; 70 v. 4.]

Sec. 3251. [How change made.] When the change of boundaries of townships is required by reason of the extension of the limits of a corporation, the change shall be made by annexation to the township in which the corporation or the greater part of it was before situated, of such parts of other townships as are covered by such extension. [R. S. Sec. 1382; 70 v. 4.]

Sec. 3252. [When corporation in two or more counties; where application to be made.] When the corporation is situated in two or more counties, the application may be made to the commissioners of the county in which the change of boundaries is proposed, or if the change is to be made in two or more counties, to the commissioners of the several counties as to the territory situated within them, respectively. [R. S. Sec. 1383; 70 v. 4.]

CEMETERIES.

Sec. 3472. [Abandonment of cemetery owned by city or village.] Where a graveyard, burial ground or cemetery is located without the corporate limits of a city or village, and not further therefrom than one mile, and the title to and possession thereof is in such city or village, or is under the control of any of the authorities of a city or village, and such

city or village has failed to protect or keep it enclosed with fences for two years, any five freeholders whose property is in the vicinity of such graveyard, burial-ground or cemetery, may apply by petition to the probate court of such county, stating in their petition that such city or village has failed to protect such graveyard, burial-ground or cemetery, and asking for its abandonment or removal. In such action such city or village shall be made defendant, and served with summons as in other actions. Upon final hearing, if it appears to the court to be to the public interest to have such graveyard, burial-ground or cemetery abandoned and removed, it shall so order. [R. S. Sec. 1473a; 89 v. 272.]

Sec. 3473. [Proceedings if city or village neglects order.] Should such city or village fail to remove such graveyard, burial-ground or cemetery for a period of six months after it has been so ordered by the court, the court shall order such premises sold as upon execution. Such sale or other transfer of such land shall not operate to give a purchaser possession until the bodies therein interred shall have been removed, as provided by law for the abandonment of cemeteries in cities and villages. [R. S. Sec. 1473a; 89 v. 272.]

DANCE HALLS.

Sec. 13393. [Public dance, roller skating or like entertainment without permit.][1] Whoever gives a public dance, roller skating or like entertainment in a building, hall, room or rink in a city or village without having previously obtained a permit[2] from the mayor thereof, or permits another so to do, or, being the owner or lessor of a building containing a dance hall, room or rink fails to post in a conspicuous place therein a copy of this section, shall be fined not less than fifteen dollars nor more than one hundred dollars or imprisoned not more than sixty days, or both. [R. S. Secs. 6945a, 6945c; 98 v. 61.]

(1) **Validity.**—This section held constitutional. Rowland v. State, 104 O. S. 366.

(2) Mayor is vested with full authority to issue or refuse such permit, and such exercise of power under this section is not an arbitrary abuse of the statutory or constitutional power. Rowland v. State, 104 O. S. 366.

FLAGS ON BUILDINGS.

Sec. 12395. [Display of foreign flag on public buildings.] Whoever displays the flag or emblem of a foreign country upon a state, county, or municipal building, shall be fined not more than fifty dollars or be imprisoned thirty days, or both; provided that when a foreigner is the guest of the United States, the state or a city, and upon public proclamation by the governor, or mayor of such city, the flag of the country of which such public guest is a citizen may be displayed upon public buildings. On all armories built or purchased by the state a suitable flag pole shall be erected, and the United States flag of size not less than five feet by eight feet shall fly daily. Such flags shall be subject to requisition from the quartermaster's department of the state, without cost to the companies, and at least two to be used yearly. [106 v. 341 (342); 92 v. 89 §§ 1, 2; R. S. 803-1, 803-2.]

INITIATIVE AND REFERENDUM.[1]

Sec. 5018-7. [Duties of mayors and clerks of municipal corporations, clerk deputy state supervisors in counties.] In all municipal corporations which have not or may not provide by ordinance or charter for the manner of exercising the initiative and referendum powers reserved by the constitution to the people thereof, as to their municipal legislation, the duties required of the secretary of state by this act,[2] as to state legislation, shall be performed as to such municipal legislation by the clerk of the municipality; the duties required of the governor shall be performed by the mayor or executive body as to such municipal legislation, and in all counties exercising the initiative powers now or hereafter provided by law the duties required of the secretary of state by this act as to state legislation shall be performed as to such county measures by the clerk of the board of deputy state supervisors of elections; the duties required of the governor shall be performed by the prosecuting attorney. [103 v. 831, 832.]

(1) **Initiative and referendum.** —Provisions relating thereto, see § 4227-1, *et seq.*, Part I.

(2) See § 5018-1 G. C., *et seq.*

Sec. 5018-8. [To what political subdivisions act applies.] The provisions of this act shall apply in every municipality in all matters concerning the operation of the initiative and referendum in its municipal legislation, unless otherwise provided for by the legislative authority of the municipality, and shall likewise apply in so far as possible in every county in all matters concerning the operation of the initiative and referendum; provided, that the printing and distribution of the pamphlet of measures and the sample ballot of measures therewith shall not be dispensed with in any municipality or county. The printing and binding of measures in municipal legislation and county matters shall be paid by the municipality or county in like manner as payment is provided for by the state as to state legislation, and said printing shall be done in the same manner that other municipal or county printing is done; distribution of such pamphlets shall be made to every voter in the municipality or county, so far as possible, by the clerk of such municipality or county commissioner, as the case may be, either by mail or carrier, not less than ten days before the election at which the measures are to be voted upon. [103 v. 831, 833.]

Sec. 5018-9. [When explanations upon municipal and county measures shall be filed.] Explanations upon municipal or county measures shall be filed with such clerk not less than sixty days before a general election and not less than forty days before a special election at which they are to be voted upon. Arrangements may be entered into between the secretary of state and the proper local officers for the publication in one pamphlet of copy relating to both state and local matters, and where such arrangement is deemed advisable, agreement may be made to pro rate the cost of publication and distribution between the state and the municipality or county. [103 v. 831, 833.]

JUNK DEALERS.

Sec. 6370. [Duty of dealer in second-hand articles.] A person purchasing, selling, exchanging or receiving second-hand articles of any kind, scrap-iron, old metal, canvas, rope, branded bottles, junk or lead pipe, except plow irons, old

stoves and furniture, shall post in a conspicuous place in or upon his shop, store, wagon, boat or other place of business, a sign having his name and occupation legibly inscribed thereon, and keep a separate book, open to inspection by a member of a police force, city marshal, constable or other person, in which shall be written, in the English language, at the time of the purchase or exchange of such articles, a description thereof, the name, description and residence of the person from whom purchased and received, and the day and hour when such purchase or exchange was made. Every entry shall be numbered consecutively, commencing with number one[1] [107 v. 529; R. S. Sec. 4413; 61 v. 128, § 1; 74 v. 31, § 1; 83 v. 42; 86 v. 115; (S. & S. 821).]

(1) **Constitutional.**—See Phillips v. State, 77 O. S. 214.

Sec. 6371. [Further duties of same.] Such articles so purchased or exchanged, as provided in the next preceding section, shall be retained by the purchaser thereof, for at least thirty days before disposing of them, in an accessible place in the building where such articles are purchased or received. A tag shall be attached to such article in some visible and convenient place, with the number written thereupon corresponding to the entry number on such book. Such purchaser shall prepare and deliver each day to the mayor of the city in which such business is carried on, before twelve o'clock noon, a legible and correct copy, written in English, from such book containing a description of each article purchased or received during the preceding day, the hour at which the purchase was made and a description of the person from whom it was purchased. [R. S. Sec. 4413; 86 v. 115; 74 v. 31; 61 v. 128.]

Sec. 6372. [If dealer is a peddler, he need not hold property thirty days.] If the purchaser or receiver, by exchange or otherwise, as described in section sixty-three hundred and seventy, is a peddler, or goes about with a wagon to purchase or obtain, by exchange or otherwise, any of such articles not excepted, and does not have a place of business in a building, he need not retain such articles for thirty days before selling them, provided, on Monday of each week, he files with the mayor of the city or village in which is located the place of

business of the person to whom such sale is made, a copy of the record required by such section to be kept in a separate book, of the articles purchased or received during the preceding week, including a description of such articles sold, to whom sold and his place of business. [R. S. Sec. 4413a; 94 v. 113.]

Sec. 6373. [Not to deal with minors; nor at certain hours.] No person shall purchase or receive by sale, barter, exchange or otherwise, an article mentioned in this chapter, of a minor or apprentice, knowing or having reason to believe him to be such, or from any person between the hours of nine o'clock p. m. and seven o'clock a. m. [R. S. Sec. 4414; 74 v. 31; 61 v. 128.]

Sec. 13398. [Penalty for violations by second-hand dealers.] Whoever violates any provision of sections 6370 to 6373 inclusive of the General Code, shall be fined not less than twenty-five dollars nor more than one thousand dollars and the costs of prosecution, and upon the default of payment of fine and costs shall be committed to the jail of the county or to some workhouse and there be confined one day for each dollar of fine and costs against him. [107 v. 178; R. S. 4414; 74 v. 31; 61 v. 128.]

MARKET-HOUSE COMPANIES.

Sec. 10151. [Market-house companies.] A company incorporated to construct and maintain a market-house may erect, establish, and maintain, at the place named in its articles of incorporation, a suitable building or buildings to be appropriated and used exclusively as a public market-house, for the sale and vending of meats, vegetables, and all other kinds of provisions, and of fruits, plants, and flowers, and all other articles commonly sold and vended in public market-houses or spaces, on market days, in market hours. [R. S. Sec. 3858; 58 v. 92.]

Sec. 10152. [Powers of such companies.] Such companies may rent, lease, sell, or dispose of stalls, cellar vaults, or other divisions or spaces in their buildings, in the manner, and upon such terms and conditions, as the directors determine. A uni-

form rule in renting or leasing such stalls, cellar vaults, or other divisions or spaces must be established, printed, and hung in conspicuous places in the buildings. But it may be changed, from time to time, by the directors. [R. S. Sec. 3859; 58 v. 92.]

Sec. 10153. [Discrimination prohibited.] No preference shall be made, by any variation or difference in rates or prices, in favor of citizens of the city or village wherein the buildings are erected, and against farmers, butchers, or producers not residing in such city or village, and no rule, regulation, order, or condition shall be made or exacted by any company to prevent farmers, butchers, or other persons from disposing of their produce, meats, vegetables, or other articles, in such quantities and upon such terms as they deem proper. [R. S. Sec. 3859; 58 v. 92.]

Sec. 10154. [What company shall prohibit.] Such companies shall prohibit and prevent in their buildings the use of false weights or measures, the exposure or sale of any diseased or decaying meats or vegetables, and any offensive or injurious articles. [R. S. Sec. 3859; 58 v. 92.]

Sec. 10155. [May keep streets unobstructed.] Such companies may keep the streets, alleys, or avenues in front of their buildings free, open, and clear of any obstruction from stoppage of wagons, carriages, or vehicles of any kind, or of horses, mules, or cattle, on market days, in market hours. [R. S. Sec. 3860; 58 v. 92.]

Sec. 10156. [May construct sewers.] When such a company erects its buildings in a city or village having a sewer with which the company may connect sewers of its own construction sufficient to drain its buildings, it shall construct such sewers, and so connect them. In cities and villages not having sewers, such companies may construct sewers for the drainage of their buildings, and charge and receive a compensation for the tapping and use of them, or portions thereof. [R. S. Sec. 3861; 58 v. 92.]

MUSEUM AND PARK COMPANIES.

Sec. 10193. [Powers of museum, park and rink companies.] When a corporation organized for the purpose of constructing and conducting a museum for the exhibition and preservation of works of nature and art, and for instruction in connection therewith, or a public hall of any kind, or a park, pond or rink for skating or other lawful sports, or for holding fairs, festivals, public meetings, concerts or lawful entertainments of any kind, provides in its articles of incorporation that its buildings or a designated part thereof, shall be devoted to the use of the public for all purposes set forth therein, free from cost, charge or expense except such as are necessary to provide the means to keep the buildings, or part thereof and its grounds in proper condition and repair, and to pay the cost of insurance, care, management and attendance, so that the public may have the benefit thereof for the uses set forth in its articles at as little expense as possible, that no stockholder, subscriber, trustee, director or member shall receive any compensation, gain or profit from the corporation for such public use of its buildings or part thereof, the authorities of any city, village or county in which the corporation is located, may appropriate to such use and grant the right to such corporation to erect and perpetually maintain its buildings on any of the parks, lands, lots or grounds which, or the use of which belong to or are subject to the control of such city, village, county, or the authorities thereof, and to control them on terms and conditions which may be agreed upon between the public authorities and the corporation. In every such case the public authorities and corporation may agree that additional trustees of the corporation may be appointed by such public authorities, and upon the number thereof and the method of their appointment. They also may agree that any officer or officers of such city, village or county to be designated by them ex-officio may act as trustees. [R. S. Sec. 3868; 78 v. 127; 73 v. 8; 69 v. 20.]

PEDDLERS AND ITINERANT VENDORS.

Sec. 6351. [Fee from discharged soldier or sailor.] An applicant for the license, provided in section sixty-three hun-

dred and forty-seven, proving to the auditor to whom such application is made that he has served as a soldier or sailor in the service of the United States during the late rebellion or the Spanish American war, or the World war, and has been honorably discharged therefrom, shall pay to such auditor as his fee for such license the sum of fifty cents, and shall not be required to make any other or further payment. He shall be exempted from paying any fee for a municipal or other license, as required by law or ordinance, during the period covered by the license issued to him by such auditor. [109 v. 39; R. S. Sec. 4398a; 95 v. 11; 91 v. 370.]

Sec. 6352. [Municipality may revoke license.] A municipal authority issuing a license to him, for the purpose of peddling, may revoke and cancel it when he is guilty of a wrongful act in connection with such business or is not a fit person to be engaged therein. [R. S. Sec. 4398b; 91 v. 370.]

Sec. 6364. [Local license.] Before selling under a state license, an itinerant vendor shall exhibit it to the clerk or mayor of a municipal corporation where he proposes to make sales. Upon payment to such clerk or mayor of a local license fee, as provided by ordinance, or in the absence of such ordinance, such amount as the clerk or mayor determines,[1] and proof of payment of all other license fees, legally chargeable upon local sales, the clerk shall record such state license, indorse upon it the words "local license fees paid," and affix his official signature, with the date of such indorsement. He shall then issue a local license authorizing sales within the limits of such city or village. [91 v. 174 § 5; Bates 4402-5.]

(1) The granting of the authority to the clerk or mayor to determine the amount of the license in the absence of an ordinance held valid in Crawford v. Sideman, 89 O. S. 260.

Sec. 6365. [Penalty.] Failure to obtain a local license and have proper indorsements made on the state license shall be subject to a like penalty as if a state license had not been issued. [91 v. 174 § 5; Bates 4402-5.]

Sec. 6366. [Enforcement and production of licenses, etc.] The mayor, clerk, city solicitor or any assistant city solicitor

of any municipal corporation in this state, shall have power to demand the production of the proper state and local licenses from an itinerant vendor advertising or actually engaged in business in such municipal corporation, and a failure to produce such license shall be prima facie evidence that such vendor has none. [101 v. 224; 91 v. 175; Bates 4402-7.]

Sec. 13166. [Peddling without license; penalty.] Whoever, being an itinerant vendor as designated and described by law, sells or exposes for sale, goods, wares, merchandise, or articles of wearing apparel, without having the state and local licenses as required by law, and whoever, as principal or agent, advertises such sale, by circular, hand-bill, newspaper or otherwise before such licenses are issued, shall be fined not less than two hundred dollars nor more than one thousand dollars or imprisoned not more than six months, or both. [101 v. 224; 95 v. 544; 91 v. 173.]

Sec. 13167. [Fraud in procuring peddlers' license; penalty.] Whoever, being an itinerant vendor as described and designated by law, makes a false statement in an original or supplementary application for the state license required by law, or fails to comply with the other requirements of law as to itinerant vendors, shall be fined not less than two hundred dollars nor more than one thousand dollars, or imprisoned not more than six months, or both. [101 v. 224; 91 v. 175.]

SHOWS.

Sec. 6374. [Show not to exhibit without permit.] A proprietor, or his agent, of a traveling public show, shall not exhibit a natural or artificial curiosity, or exhibit horsemanship in a circus, or otherwise, for a price, until a permit has been obtained from the auditor of the county in which it is intended to so exhibit, specifying the time and place such show may exhibit in the county. Such auditor shall not issue such permit until there has been paid into the county treasury the following sums for each day such show is to be exhibited, to-wit: in counties containing a population not exceeding twenty-five thousand by the last federal census, twenty-five dollars; in counties containing a population of more than twenty-five thou-

sand and not exceeding forty thousand by such census, forty dollars; and in other counties, sixty dollars. [R. S. Sec. 4415; 29 v. 446 § 1; 45 v. 43 § 2; 79 v. 114.]

Sec. 6375. [Right of municipal corporations to license unaffected.] The next preceding section shall not interfere with the right or power of a municipal corporation to impose a license upon all shows exhibited in such corporation in addition to that imposed herein. [R. S. Sec. 4416; 47 v. 51 § 3; (S. & C. 1407).]

VOTING ON SUBMITTED QUESTION.

Sec. 4840. [Submission of question when special election not provided for.] Unless a statute providing for the submission of a question to the voters of a county, township, city or village provides for the calling of a special election for that purpose, no special election shall be so called. The question so to be voted upon shall be submitted at a regular election in such county, township, city or village, and notice that such question is to be voted upon shall be embodied in the proclamation for such election. [90 v. 130 § 2; Bates 2996-2.]

Sec. 5122. [Number of votes necessary when statute is silent.] Where it is provided by statute that a question shall be submitted to the qualified voters of a county, township, city or village, and such statute is silent as to the number of votes necessary to authorize the performance of the act voted upon, such statute shall mean that a majority of all the qualified voters voting at such election must vote in favor thereof, in order to authorize such act.[1] [90 v. 130 § 1; Bates 2996-1.]

(1) **Meaning of majority.**— Where trustees are authorized to make a special levy but said levy not to be made until a majority of the electors of said township at some regular election, shall vote in favor of said levy, a majority of votes cast is required and not a majority voting for or against the levy. Enyart v. Hanover Tp., 25 O. S. 618.

But where the majority votes cast are required to be in the affirmative, "majority votes" means majority of votes cast on the question. Dexter v. Raine *et al.*, 18 B. 61 (aff'd 18 B. 301). See also State *ex rel.* v. Amlin, 13 Dec. 334.

And a majority for a constitutional amendment is a majority of votes cast for senators and representatives. State v. Foraker, 46 O. S. 677.

WEINLAND'S EDITION OF

ELLIS' ANNOTATED OHIO MUNICIPAL CODE.

PART III.

CONSTITUTIONAL PROVISIONS RELATING TO MUNICIPAL CORPORATIONS, HOME RULE, FORMS AND ORDER OF PROCEDURE.

CONSTITUTIONAL PROVISIONS RELATING TO MUNICIPALITIES.

Art. II, Sec. 1f. **[Initiative and referendum.]**[1] The initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipality may now or hereafter be authorized by law to control by legislative action; such powers shall be exercised in the manner now or hereafter provided by law. [Adopted Sept. 3, 1912.]

(1) For statutory provisions relative to initiative and referendum in municipalities, see §§4227-1 *et seq.*, Part I.

Scope of terms.—See Shryock v. Zanesville, 92 O. S. 375; State, *ex rel.*, v. Clendening, 93 O. S. 264.

Mode of exercise.—The manner of exercising this power is provided by §§ 4227-1 to 4227-12, G. C. Cincinnati v. Hillenbrand, 103 O. S. 286.

Art. V, Sec. 1. **[Qualifications of electors.]**[1] Every citizen of the United States, of the age of twenty-one years, who shall have been a resident of the state one year next preceding the election, and of the county, township, or ward, in which he resides, such time as may be provided by law, shall have the qualifications of an elector, and be entitled to vote at all elections. [Adopted Nov. 6, 1923.]

(1) **Elections and suffrage qualifications in charter cities,** see notes under "Home Rule", *infra.*

Art. V, Sec. 7. **[Nominations for municipal offices.]**[1] All nominations for elective state, district, county and municipal offices shall be made at direct primary elections or by petition as provided by law, and provision shall be made by law for a preferential vote for United States senator; but direct

primaries shall not be held for the nomination of township officers or for the officers of municipalities of less than two thousand population, unless petitioned for by a majority of the electors of such township or municipality. All delegates from this state to the national conventions of political parties shall be chosen by direct vote of the electors. Each candidate for such delegate shall state his first and second choices for the presidency, which preferences shall be printed upon the primary ballot below the name of such candidate, but the name of no candidate for the presidency shall be so used without his written authority. [Adopted Sept. 3, 1912.]

(1) **Nominations and elections in charter cities,** see notes under "Home Rule," *infra.*

General statutory provisions as to nomination and election of municipal officers, see §§ 4963 and 4836, G. C. Nomination by petition, see §§ 4996 *et seq.*

Since this section and Art. XVIII were adopted as amendments to the constitution at the same time, they must be construed together, and, if possible, differences reconciled by construction. Fitzgerald v. Cleveland, 88 O. S. 338.

Art. XII, Sec. 11. **[Bonds; tax levy required.]**[1] No bonded indebtedness of the state, or any political subdivisions thereof, shall be incurred or renewed, unless, in the legislation under which such indebtedness is incurred or renewed, provision is made for levying and collecting annually by taxation an amount sufficient to pay the interest on said bonds, and to provide a sinking fund for their final redemption at maturity. [Adopted Sept. 3, 1912.]

(1) **Amount of tax; how and when determined.**—This provision of the constitution does not require that at the time the issue of bonds is authorized there shall be levied any specified amount or any specified rate, but it does require that provision shall then be made for an annual levy during the term of the bonds in an amount sufficient to pay the interest on the bonds proposed to be issued and to provide for their final redemption at maturity, which levy must be made annually in pursuance of the provisions of the original ordinance or resolution requiring the same. The amount necessary to be levied for the purposes specified is to be determined by the taxing officials at the time the levy is made. Link v. Karb, Mayor, 89 O. S. 326; affirming court of appeals, which affirmed Link v. Karb, 14 N. P. (N. S.) 244.

Art. XIII, Sec. 6. **[Organization by general laws.]**[1] The General Assembly shall provide for the organization of cities, and incorported villages, by general laws, and restrict their power of taxation, assessment,[2] borrowing money, contracting debts and loaning their credit, so as to prevent the abuse of such power. [Const. 1851.]

(1) **General laws.**—See analagous provisions of Art. XVIII, Sec. 2. And see, generally, notes under "Home Rule," *infra.*

(2) In so far as this section authorizes the legislature to restrict the power of assessment, it was held that it is superseded by § 13 of Art. XVIII, which contains no such limitation. Columbus v. Berry (Ct. of App. Franklin Co., decided Dec. 9, 1920).

Art. XV, Sec. 10. **[Civil Service.]**[1] Appointments and promotions in the civil service of the state, the several counties and cities, shall be made according to merit and fitness, to be ascertained, as far as practicable, by competitive examinations. Laws shall be passed providing for the enforcement of this provision. [Adopted Sept. 3, 1912.]

(1) **Statutory provisions** relating to civil service in municipalities; see §§ 486-1 *et seq.* G. C., Part II, under title "Civil Service."

Charter provisions differing from general laws; see notes under "Home Rule," *infra.*

Art. XVII, Sec. 1. **[Time of holding municipal elections.]**[1] Elections for state and county officers shall be held on the first Tuesday after the first Monday in November in the even numbered years; and all elections for all other elective officers shall be held on the first Tuesday after the first Monday in November in the odd numbered years. [Const. 1851.]

(1) **Terms of municipal officers.**—Sec. 2 of the same article limits the terms of municipal officers to such even number of years, not exceeding four, as may be prescribed by law.

ART. XVIII.

MUNICIPAL CORPORATIONS.

Sec. 1. **[Classification.]**[1] Municipal corporations are hereby classified into cities and villages. All such corporations

having a population of five thousand or over shall be cities; all others shall be villages. The method of transition from one class to the other shall be regulated by law. [Adopted Sept. 3, 1912.]

(1) **Provision held not self-executing.**—Murray v. State, *ex rel.*, 91 O. S. 220.

Statutory provisions as to classification; see § 3497 and notes, Part I.

Further classification prohibited.—The constitution, by the above provision, having classified municipalities on a basis of population, the legislature is without authority to make further classification for the purpose of legislation affecting municipal government. Elyria v. Vandemark, 100 O. S. 365.

Sec. 2. **[General and additional laws.]**[1] General laws shall be passed to provide for the incorporation and government of cities and villages; and additional laws may also be passed for the government of municipalities adopting the same; but no such additional law shall become operative in any municipality until it shall have been submitted to the electors thereof, and affirmed by a majority of those voting thereon, under regulations to be established by law. [Adopted Sept. 3, 1912.]

(1) **Additional laws.**—For statutes enacted pursuant to this section, providing for optional plans of municipal government, see §§ 3515-1 *et seq.*, Part I.

See Op. Atty. Gen. (1919), p. 127.

Sec. 3. **[Powers.]**[1] Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws. [Adopted Sept. 3, 1912.]

(1) **Powers of "local self-government."**—For definition and scope of terms, and manner of exercise of powers, see notes under "Home Rule," *infra*.

Held self-executing.—Overruling State, ex rel., v. Lynch, 88 O. S. 71, it was held in Perrysburg v. Ridgway, 108 O. S. 245, that the above grant of constitutional power is self-executing. See also, Youngstown v. Arnold, 15 Oh. App. 112.

Sec. 4. **[Municipal public utilities.]**[1] Any municipality may acquire, construct, own, lease and operate within or without its corporate limits, any public utility the product or service of which is or is to be supplied to the municipality or its inhabitants, and may contract with others for any such product or service. The acquisition of any such public utility may be by condemnation or otherwise, and a municipality may acquire thereby the use of, or full title to, the property and franchise of any company or person supplying to the municipality or its inhabitants the service or product of any such utility. [Adopted Sept. 3, 1912.]

(1) **Purchase of public utility.**—Effect of this amendment on statutes relative to purchase of existing utility, see § 3990 and note, Part I.

Provision self-executing.—This section is self-executing and no action of the Legislature is essential to empower a municipality and a public utility to enter into a valid contract for the product or service of such utility company to be supplied to the municipality and its inhabitants. Link v. Pub. Util. Com., 102 O. S. 336.

Scope of section.—This section confers plenary power on "any municipality" to do any of the things enumerated. Dravo-Doyle Co. v. Orrville, 93 O. S. 236. See also Billings v. Ry., 92 O. S. 478.

§ 614-52 G. C. does not limit the right of a municipality to contract for product or service of a utility under the above constitutional provision. Telephone Co. v. Telephone Co., 102 O. S. 524.

Charter not a prerequisite.—Adoption of a charter is not prerequisite of the enjoyment of the power conferred by this section. Such authority is conferred upon and may be exercised by every municipality regardless of whether or not it has adopted a charter under the provisions of Section 7, Art. XVIII. The provisions conferring such power are self-executing. State, *ex rel.*, v. Weiler, 101 O. S. 123.

Power to issue bonds derived from Constitution.—Under the power to acquire public utilities the authority to levy taxes and issue bonds is a necessary incident thereto, and is included in the power conferred. *Ib.*

Such bonds, however, insofar as they are not mortgage bonds against the utility, are subject to general limitations of § 3939 *et seq.* *Ib.*

Sec. 5. **[Municipal public utilities; referendum.]**[1] Any municipality proceeding to acquire, construct, own, lease or operate a public utility, or to contract with any person or company therefor, shall act by ordinance and no such ordinance

shall take effect until after thirty days from its passage. If within said thirty days a petition signed by ten per centum of the electors of the municipality shall be filed with the executive authority thereof demanding a referendum on such ordinance it shall not take effect until submitted to the electors and approved by a majority of those voting thereon. The submission of any such question shall be governed by all the provisions of section 8 of this article as to the submission of the question of choosing a charter commission. [Adopted Sept. 3, 1912.]

(1) If a municipality should attempt substantially to reconstruct a public utility under guise of repairing or improving it, without complying with the provisions of this section, the courts would undoubtedly prevent such abuse of power. Schryock v. Zanesville, 92 O. S. 375.

Sec. 6. **[Municipal public utilities; sale of product.]** Any municipality, owning or operating a public utility for the purpose of supplying the service or product thereof to the municipality or its inhabitants, may also sell and deliver to others any transportation service of such utility and the surplus product of any other utility in an amount not exceeding in either case fifty per centum of the total service or product supplied by such utility within the municipality [Adopted Sept. 3, 1912.]

Sec. 7. **[Home rule; general powers.]**[1] Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government. [Adopted Sept. 3, 1912.]

(1) See notes under "Home Rule," *infra.*

Sec. 8. **[Home rule charter; proceedings for adoption.]**[1] The legislative authority of any city or village may by a two-thirds vote of its members, and upon petition of ten per centum of the electors shall forthwith, provide by ordinance for the submission to the electors, of the question, "Shall a commission be chosen to frame a charter." The ordinance providing for the submission of such question shall require

that it be submitted to the electors at the next regular municipal election if one shall occur not less than sixty nor more than one hundred and twenty days after its passage; otherwise it shall provide for the submission of the question at a special election to be called and held within the time aforesaid. The ballot containing such question shall bear no party designation, and provision shall be made thereon for the election from the municipality at large of fifteen electors who shall constitute a commission to frame a charter; provided that a majority of the electors voting on such question shall have voted in the affirmative. Any charter so framed shall be submitted to the electors of the municipality at an election to be held at a time fixed by the charter commission and within one year from the date of its election, provision for which shall be made by the legislative authority of the municipality in so far as not prescribed by general law. Not less than thirty days prior to such election the clerk of the municipality shall mail a copy of the proposed charter to each elector whose name appears upon the poll or registration books of the last regular or general election held therein. If such proposed charter is approved by a majority of the electors voting thereon, it shall become the charter of such municipality at the time fixed therein. [Adopted Sept. 3, 1912.]

(1) The question of the appointment of a commission to frame a charter cannot be submitted at a primary election. Op. Atty. Gen. (1919), p. 771.

Requirement of ordinance.—It is not necessary that such ordinance become effective more than sixty days, but only that it should have been passed not less than sixty days prior to such election. State, ex rel. v. Fouts, 103 O. S. 345.

Sufficiency of petition—how determined.—The constitution makes no provision for determining the validity or sufficiency of the petition, or for verification by the circulators. Plainly the laws relating to initiative and referendum petitions have no application. Indeed, the constitution gives the legislature no authority to make any provisions in reference to the proceedings for adoption of a charter. It seems evident, therefore, that the council is the judge of the validity and sufficiency of the petition. Note the provisions of section 14, *post*, as to the basis for determining the percentage of signers to the petition.

Where a petition has been filed under this section, and council thereafter by two-thirds vote, provides for submission, no inquiry may thereafter be made into the form,

substance or sufficiency of such petition. State ex rel. v. Fouts, 103 O. S. 345.

Adoption of charter.—See notes and forms of procedure under "Home Rule," *infra.*

Sec. 9. **[Charter; amendment of.]**[1] Amendments to any charter framed and adopted as herein provided may be submitted to the electors of a municipality by a two-thirds vote of the legislative authority thereof, and, upon petitions signed by ten per centum of the electors of the municipality setting forth any such proposed amendment, shall be submitted by such legislative authority. The submission of proposed amendments to the electors shall be governed by the requirements of section 8 as to the submission of the question of choosing a charter commission; and copies of proposed amendments shall be mailed to the electors as hereinbefore provided for copies of a proposed charter. If any such amendment is approved by a majority of the electors voting thereon, it shall become a part of the charter of the municipality. A copy of said charter or any amendment thereto shall be certified to the secretary of state, within thirty days after adoption by a referendum vote. [Adopted Sept. 3, 1912.]

(1) **Amendment of charter.**—See notes and forms of procedure under "Home Rule," *infra.*

The provisions of the constitution as to change or amendment in municipal charters are mandatory and exclusive, and §§ 3515-1, et seq., relating to optional plans of government have no application. Switzer v. State, ex rel., 103 O. S. 306.

The power given by this section to the electors of a city to amend their municipal charter, includes the power to repeal or strike out provisions. Reutener v. Cleveland, 107 O. S. 117.

Under this section each section of a proposed amendment need not be submitted separately at an election. An amendment amounting to a general revision, having for its principal purpose to provide for the so-called city manager plan of government, together with a system of voting by the so-called Hare System of Proportional Representation, comprising numerous separate sections, may be voted upon as a whole. Ib.

Sec. 10. **[Appropriation in excess of public use.]** A municipality appropriating or otherwise acquiring property for public use may in furtherance of such public use appropriate or acquire an excess over that actually to be occupied by the improvement, and may sell such excess with such restrictions as shall be appropriate to preserve the improvement made.

Bonds may be issued to supply the funds in whole or in part to pay for the excess property so appropriated or otherwise acquired, but said bonds shall be a lien only against the property so acquired for the improvement and excess, and they shall not be a liability of the municipality nor be included in any limitation of the bonded indebtedness of such municipality prescribed by law. [Adopted Sept. 3, 1912.]

Sec. 11. **[Assessments for cost of appropriating property.]** Any municipality appropriating private property for a public improvement may provide money therefore [therefor] in part by assessments upon benefited property not in excess of the special benefits conferred upon such property by the improvements. Said assessments, however, upon all the abutting, adjacent, and other property in the district benefited shall in no case be levied for more than fifty per centum of the cost of such appropriation. [Adopted Sept. 3, 1912.]

Sec. 12. **[Bonds for public utilities.]**[1] Any municipality which acquires, constructs or extends any public utility and desires to raise money for such purposes may issue mortgage bonds therefor beyond the general limit of bonded indebtedness prescribed by law; provided that such mortgage bonds issued beyond the general limit of bonded indebtedness prescribed by law shall not impose any liability upon such municipality but shall be secured only upon the property and revenues of such public utility, including a franchise stating the terms upon which, in case of foreclosure, the purchaser may operate the same, which franchise shall in no case extend for a longer period than twenty years from the date of the sale of such utility and franchise on foreclosure. [Adopted Sept. 3, 1912.]

(1) **General bonds for public utilities.**—Municipalities in this state are empowered by constitutional provision to acquire any public utility the product or service of which is to be supplied to the municipality or its inhabitants, and they may issue bonds to raise money for such purpose pledging the general credit of the municipality to their payment. State, *ex rel.*, v. Weiler, 101 O. S. 123.

Grant of power from the legislature is not a prerequisite, and under the provisions of Sec. 13, Art. XVIII of the State Constitution, the indebtedness which

may be incurred for such purpose is subject only to the limitation prescribed by the legislature as to the extent of general tax levies and the aggregate amount of indebtedness that may be incurred for all local purposes. *Ib.*

Provisions of § 3963 G. C. not applicable to bonds issued under this section of the constitution. See Op. Atty. Gen. (1922), p. 1033.

See notes to Sec 4, *ante.*

Sec. 13. **[Taxation, debts, reports and accounts.]**[1] Laws may be passed to limit the power of municipalities to levy taxes and incur debts for local purposes, and may require reports from municipalities as to their financial condition and transactions, in such form as may be provided by law, and may provide for the examination of the vouchers, books, and accounts of all municipal authorities, or of public undertakings conducted by such authorities. [Adopted Sept. 3, 1912.]

(1) **Limitations on taxation,** see §§ 5649-2 *et seq.*, G. C., under title "Taxation," in Part II.

Limitations on debts, see §§ 3939 *et seq.*, in Part I.

Limitation on bonds for public utilities, see notes under Constitution, Art. XVIII, Secs. 4 and 12, *ante.*

Examination of municipal accounts, etc., see §§ 274 *et seq.*, under title "Officers," in Part II.

Sec. 14. **[Elections under this article.]** All elections and submissions of questions provided for in this article shall be conducted by the election authorities prescribed by general law. The percentage of electors required to sign any petition provided for herein shall be based upon the total vote cast at the last preceding general municipal election. [Adopted Sept. 3, 1912.]

HOME RULE.

By the schedule adopted in connection with Article XVIII, it was provided:

"If the foregoing amendment be adopted by the electors and become a part of the Constitution it shall take effect on November 15, 1912."

Pursuant to the provisions of this amendment, a considerable number of cities and villages, including most of the larger cities, have framed and adopted charters. A number of these, typical of the various forms of local municipal organization, will be found in the Supplement to Page and Adams' General Code, Vol. 1, p. 955 *et seq.* See, also, Page's Comp. Ed. G. C., following § 3515-71.

While many questions that are arising and certain to arise in reference to the exercise of these new powers have not been adjudicated, the following may prove helpful as well to those municipalities which desire to formulate special charters as to those which have already adopted them.

I. SCOPE AND EFFECT OF CONSTITUTIONAL PROVISIONS.

Constitutional provisions self-executing.—Under earlier rulings it was held that the provisions of the eighteenth article of the constitution as amended in September, 1912, continue in force the general laws for the government of cities and villages until the 15th day of November following, and thereafter, until changed in one of the three modes following: (1) By the enactment of general laws for their amendment, (2) by additional laws to be ratified by the electors of the municipality to be affected thereby, (3) by the adoption of a charter by the electors of a municipality in the mode pointed out in the article. State, ex rel., v. Lynch, 88 O. S. 71. Cited with approval, Fitzgerald v. Cleveland, 88 O. S. 338, 342; Green v. Commission, 90 O. S. 252, 264.

But in Perrysburg v. Ridgway, 108 O. S. 245 it was held that the above constitutional grant of power to municipalities is self-executing in the sense that no legislative action is necessary in order to make it available to the municipality and exercise of the powers therein conferred is not in any wise dependent upon or conditioned by § 7, Article XVIII, which provides that "a municipality may adopt a charter." State, ex rel. Toledo v. Lynch, 88 O. S. 71, disapproved as to this proposition. See to like effect, Youngstown v. Arnold, 15 Oh. App. 112.

Purpose of home-rule amendment.—The plain purpose of the municipal home-rule amendment adopted in September, 1912, is to provide home rule for cities, which obviously includes the selection of its own municipal officers by the people of the municipality or other duly authorized municipal officers. State, *ex rel.*, v. George, 92 O. S. 344.

Statutes passed pursuant to such home-rule amendment should be liberally construed so as to effect the plain purpose of such amendment. *Ib.*

Source and scope of powers.—The charter of a city which has been adopted in conformity with the provisions of Article XVIII, and which does not disregard the limitations imposed in that article or other provisions of the constitution, finds its validity and its vitality in the constitution itself and not in the enactments of the general assembly. The source of authority and the measure of its extent is the constitution. The powers conferred by such a charter, adopted within the limitations stated, are not affected by the general statutes of the state. Billings v. Railway Co., 92 O. S. 478.

II. GENERAL SCOPE OF CHARTERS.

Charters; scope and limitations.—The provisions of Section 7, Article XVIII of the Constitution as amended in September, 1912, authorize any city or village to frame and adopt or amend a charter for its government, and it may prescribe therein the form of the government and define the powers and duties of the different departments, provided they do not exceed the powers granted in Section 3, Article XVIII, nor disregard the limitations imposed in that article or other provisions of the constitution. Fitzgerald v. Cleveland, 88 O. S. 338.

Measure of powers under charter.—A municipalty may, by broad general words in its charter, take unto itself all of the powers which under the constitution and laws of Ohio it would be competent for such charter specifically to enumerate. Cleveland v. Coughlin, 16 N. P. (N. S.) 468. To same effect, State, *ex rel.*, v. Otis, 98 O. S. 83.

Definition of "all powers of local self-government."—They are such powers of government as, in view of their nature and the field of their operation, are local and municipal in character. The force of the terms employed requires the inclusion of such powers to be exercised by officials who in some manner and to some extent represent the sovereignty of the people. It as clearly excludes the exercise of functions which are appropriately exercised by caterers and impresarios. State, *ex rel.*, v. Lynch, 88 O. S. 71.

Scope of powers.—Under the provisions of a charter, a city may reserve to itself authority to exercise any power now, or that may hereafter be conferred upon the municipalities of this State by the laws of Ohio. State, *ex rel.*, v. Otis, 98 O. S. 83.

The powers referred to are clearly such as involve the exercise of the functions of government, and they are local in the sense that they relate to the municipal affairs of the municipality. Fitzgerald v. Cleveland, 88 O. S. 338, 344.

Charter may confer powers not granted by general laws.—Any provision in a charter attempting to confer powers upon a municipal government in excess of the powers permitted to be granted by the constitution, or disregarding in any way the limitations imposed by that instrument, would be invalid But it does not follow from this that a city may not by its charter confer on its government powers which are different from those conferred by general laws upon the municipal governments of the state generally. Billings v. Railway Co., 92 O. S. 478.

The test whether a municipality which has adopted a charter is acting beyond the scope of its authority must be determined by reference to the state constitution, and not to acts of the legislature. Goebel v. Cleveland Railway, 17 N. P. (N. S.) 337. See, also, Heald v. Cleveland, 19 N. P. (N. S.) 305.

In determining whether an ordinance is in "conflict" with general laws, the test is whether the ordinance permits or licenses that which

the statute forbids, and vice versa. Struthers v. Sokol, 108 O. S. 263.

A police ordinance is not in conflict with a general law upon the same subject merely because certain specific acts are declared unlawful by the ordinance, which acts are not referred to in the general law, or because certain specific acts are omitted in the ordinance but referred to in the general law, or because different penalties are provided for the same acts, even though greater penalties are imposed by the municipal ordinances. Ib.

Charter provisions supersede conflicting statutes.—A municipality which has adopted a charter under the home-rule amendment has the same power to legislate, through its council and within the provisions of its charter and the state constitution, as has the General Assembly to exercise such power; and the provisions of its charter in effect operate as a repeal of statutes in conflict therewith. Goebel v. Cleveland Railway, 17 N. P. (N. S.) 337.

In case of a conflict between a municipal charter regularly adopted and an act of the General Assembly on any subject provided for in said charter, the provisions of the charter ought to prevail within the territorial limits of the municipality on all matters within its authority and jurisdiction. State, *ex rel.*, v. Culbertson, 30 O. C. A. 117.

The purpose of the home-rule amendment was to permit a city by its charter to adopt different provisions from those contained in the general laws within the limits defined, and to make such differences effective. State, *ex rel.*, v. Edwards, 90 O. S. 305-310.

Adoption of statutes by charter.—Where the provisions of a city charter expressly adopt and continue in force as a part of such charter general and special laws of the state, all such laws theretofore enacted become part of the charter and can only be changed by amendment of the charter and any municipal legislation in conflict therewith is invalid. Cincinnati v. Roettinger, 105 O. S. 145.

Restriction on levying taxes.—Where a city charter gave the city power "to assess, levy and collect taxes on all property which the city may lawfully tax for general and special purposes," etc., held:

Municipalities that have adopted charters under Section 7, Article XVIII of the Amendments to the Constitution, adopted September 3, 1912, have not the absolute and unrestricted power to levy taxes for local purposes. State, *ex rel.*, v. Cooper, 97 O. S. 86.

To same effect.—State, ex rel., v. Bish, 104 O. S. 206.

The power of all municipalities to levy taxes may be limited or restricted by general laws. Such limitations or restrictions are warranted by Section 6, Article XIII, adopted in 1851, and by Section 13, Article XVIII of the Amendments adopted September 3, 1912.

State, ex rel., v. Cooper, 97 O. S. 86; State, ex rel., v. Bish, 104 O. S. 206.

Smith law.—The Smith one per cent. law (§§ 5649-2 to 5649-5b, G. C.) does limit the power of

municipalities to levy taxes, and is not repealed by any provision of the present constitution, but is continued in force by section XX of the schedule to that instrument. *Ib.*

Construction of words in charter.—Words which are used in a constitutional amendment, in a statute, or in the charter of a city, are to be given the meaning which they generally bore at the time that such constitutional amendment, statute or charter was enacted. Mog v. Cleveland, 18 N. P. (N. S.) 49.

The words "competition" and "competitive bidding" have the same meaning, etc., as in Sec. 3811. *Ib.*

Strict rule of construction applied.—Taxation is a sovereign function. The rule of liberal construction will not apply in cases where it is claimed a part of the state sovereignty is yielded to a community therein. It must appear that the people of the state have parted therewith by the adoption of a constitutional provision that is clear and unambiguous. State, *ex rel.*, v. Cooper, 97 O. S. 86.

III. PARTICULAR PROVISIONS OF CHARTERS.

Officers; character and mode of selection.—Where a charter abolishes nomination by direct primary and provides for the abolition of party mark or emblem on the ballot for election of city officials, and for rotation of names on ballot, and for a system of preferential voting, held, under Sections 3 and 7, Article XVIII, as so amended, municipalities are authorized to determine what officers shall administer their government, which shall be appointed and which elected, that the nomination of elective officers shall be made by petition by a method prescribed, and elections shall be conducted by the election authorities prescribed by general laws. Fitzgerald v. Cleveland, 88 O. S. 338. See, also, State, *ex rel.*, v. Hillenbrand, 100 O. S. 339. Op. Atty. Gen. (1915), p. 774.

Election of officers, method of voting.—Under the home-rule amendment to the Ohio Constitution, the rule that each elector is entitled to vote for every officer whose place is to be filled, is no longer in this state as regards elections held under home-rule city charters. Reutener v. Cleveland, 107 O. S. 117.

May confer upon women right to vote.—Prior to the adoption of the federal amendment abolishing sex qualifications as to electors, it was held that a provision in the charter of a municipality which confers upon women the right to vote for all municipal elective officers and to be appointed or elected to and hold any municipal office provided for in such charter, was valid. (Mills v. City Board of Elections et al., 54 Ohio St. 631, and State, ex rel., v. City of Cincinnati et al., 19 Ohio, 178, approved and followed.) State *ex rel.*, v. French, 96 O. S. 172.

Woman as mayor; judicial power.—Prior to the adoption of the nineteenth amendment to the Federal Constitution it was held that if a woman should be elected mayor, pursuant to the terms of a charter adopted by a municipality, she would be incapable of exercising any of the jurisdic-

tion of a magistrate in civil or criminal matters which the legislature might confer by general provisions upon the mayors of cities and villages. State, *ex rel.*, v. French, 96 O. S. 172, 185.

Provision as to nominating petitions.—Where charter required signature to be "in ink" or "indelible pencil," board of deputy state supervisors of elections would have authority, even without objections being filed, to reject and refuse to act upon nominating petitions not in compliance with such requirements. State, *ex rel.*, v. Lloyd, 93 O. S. 20.

Proportional Representation.—Provision of charter establishing this mode of election is valid. Reutener v. Cleveland, 107 O. S. 117; Hile v. Cleveland, 107 O. S. 144.

The adoption of the city manager plan of government, together with the Hare System of Proportional Representation, in a city charter, under the home-rule amendment to the Ohio Constitution, is not a denial of the republican form of government, and does not contravene § 4, Article IV of the Federal Constitution. Adoption of such a form of government raises a political question, and not a judicial question, and cannot be challenged in the courts. Hile v. Cleveland, 107 O. S. 144.

Limitation on power to establish courts.—To hold that a municipality could establish a court with jurisdiction in state cases, or make any other provision relating to governmental matters of the state or any of its subdivisions except the municipality itself, would be to confer on it powers not at all contemplated by the home-rule amendment. State, *ex rel.*, v. French, 96 O. S. 172.

Civil service provisions in a charter adopted by a municipality under the provisions of Sec. 7 of Art. XVIII supersede the general civil service law so long as such charter provisions comply with the requirements of Sec. 10 of Art. XV. State, *ex rel.*, v. Edwards, 90 O. S. 305; State, *ex rel.*, v. Baker, 92 O. S. 506.

Street railway; permission to construct.—The granting of permission and the making of a contract to construct and operate a street railway in the streets of a city or village is a matter that may be provided for in a charter adopted by the municipality under Article XVIII of the constitution. Billings v. Railway Co., 92 O. S. 478.

Charter may dispense with consents.—Where the terms of a charter adopted in full compliance with Article XVIII of the constitution empower the council of the city or village to grant permission for the construction, extension, maintenance or operation of a public utility and provide that no consent of the owners of property abutting on any highway or public ground shall be required therefor, unless such public utility is of such a character that its construction and operation is an additional burden on the rights of such abutting property owners, the provisions of the General Code requiring such consents do not apply. *Ib.*

Commission government; commission as council.—In a municipal corporation which is organized under a commission form of

government, the commission is the legislative body, even though it is not designated as the "council." Accordingly, Sec. 40 of the charter of Dayton, which provides, "The commission shall be the judge of the election and qualifications of its members," is not inconsistent with G. C. Sec. 4327, which provides that the council shall be the judge of election and qualifications of its members. Accordingly the court of common pleas acts properly in dismissing petition to contest the election of a commissioner of such municipal corporation. Flotron v. Barringer, 94 O. S. 185.

Powers of commission. — The fact that executive and administrative powers in addition to legislative powers are conferred upon a commission by the charter of a municipal corporation, does not prevent the commission from being the legislative authority of such municipal corporation. *Ib.*

President of commission; judicial powers.—A provision in a municipal charter, adopted under authority of Section 7 of Article XVIII of the State Constitution, continuing in force the general laws of the state conferring judicial functions upon mayors of cities and villages, to be exercised by the president of a city commission, who is elected a member of that commission by the qualified electors of the municipality, is not in conflict with any provision of the Constitution of Ohio. Ide v. State, 95 O. S. 224. To same effect, see State, *ex rel.*, v. Davis, 96 O. S. 301.

Municipal court under charter. —Where a city charter, supplemented by an act of the General Assembly, creates and constitutes a municipal court, such court is not a constitutional, but rather a statutory court, and authority to appoint its clerk is vested in such appointing officer or board as is prescribed by the city charter, and not in the appointing officer or board prescribed by the supplementary statute. State, *ex rel.*, v. Culbertson, 30 O. C. A. 117.

Effect of charter on ordinance. —Where charter provided: "all ordinances and resolutions in force at the time of taking effect of this charter, not inconsistent with its provisons, shall continue in force until amended or repealed," it was held, that an ordinance which had been passed in due form by council and signed by the mayor at the time of the taking effect of the new charter of the city of Dayton, and was only awaiting lapse of the time within which a referendum might be resorted to before going into force and effect, was among the ordinances in force at the time of the taking effect of the charter. State, *ex rel.*, v. Wall, 17 N. P. (N. S.) 33.

Limitation on power to levy taxes.—The power of all municipalities to levy taxes may be limited or restricted by general laws. Such limitations or restrictions are warranted by Sec. 6, Art. XIII, adopted in 1851, and by Sec. 13, Art. XVIII of the amendments adopted September 3, 1912. State, *ex rel.*, v. Cooper, 97 O. S. 86.

The Smith one per cent. law (§§ 5649-2 to 5649-5b G. C.) does

limit the power of municipalties to levy taxes, and is not repealed by any provision of the present constitution, but is continued in force by section XX of the schedule to that instrument. *Ib.*

Levying assessments.—Sec. 6, Art. XIII, of the Ohio Constitution, was not repealed by the adoption of Sec. 13, Art. XVIII, or of any other Home Rule provisions in said article; the provisions of a city charter relating to assessments, if inconsistent with state statutes, must yield to the requirements of said statutes. Berry v. Cols., 104 O. S. 607.

Right to enact police regulations.—If a muncipal corporation adopts a charter in accordance with the provisions of Art. XVIII, Sec. 7 *et seq.*, of the Constitution of Ohio, such municipal corporation may then enact police regulations which are different from those found in the General Code of Ohio. Stange v. Cleveland, 25 C. C. (N. S.) 599; aff'd, 94 O. S. 377. See also Greenburg v. Cleveland, 98 O. S. 282; Fremont v. Keating, 96 O. S. 468.

Ordinances relating to liquor traffic.—By virtue of § 3, Art. XVIII of the constitution, municipalities may enact and enforce ordinances not inconsistent with the general laws of the state prohibiting the manufacture, possession or sale of intoxicating liquor, etc. Heppel v. Columbus, 106 O. S. 107. Struthers v. Sokol, 108 O. S. 263.

Ordinance requiring auto to stop, valid.—An ordinance of a charter city, general in nature, setting forth general and usual rules of the road, for a locality covered by its terms, passed in the valid exercise of the local policy power, guaranteed under Section 3, Article XVIII of the Ohio Constitution, and not in conflict with general laws, must be given full force and effect as a law of the locality to which it applies. State v. O'Mara, 105 O. S. 94.

Zoning ordinance.—Under the power granted by this section any municipality has the power to enact a zoning ordinance. State, ex rel., v. Durant, O. L. R. Jan. 14, 1924, page 395.

Occupational tax.—Under the grant of power of local self-government provided for in Sec. 3, Art. XVIII of the State Constitution, the city of Cincinnati, as long as the State of Ohio through its General Assembly does not lay an occupational tax on businesses, trades, vocations and professions followed in the state, may raise revenue for local purposes through the instrumentality of occupational taxes. State, ex rel., v. Carrel, 99 O. S. 220; Loan Co, v. Carrel, 32 O. C. A. 65. Affirmed, Loan Co. v. Carrel, 106 O. S. 43. See also Op. Atty. Gen. (1919), p. 311.

Local regulations inconsistent with statutes.—A charter city may adopt regulations as to weight of loads and width of tires on its streets, different from those prescribed by statute. Froelich v. Cleveland, 99 O. S. 376.

An ordinance adopted pursuant to the powers reserved in charter, purporting to define a "suspicious person," and imposing a penalty, is a valid exercise of the power conferred by Art. XVIII of the constitution as amended. Welch v. Cleveland, 97 O. S. 311.

A charter city has the power

to fine and make punishable the offense of assault and battery, notwithstanding the fact that such offense has already been made punishable by statute. The legislature has not exclusive police power in this particular. Kearney v. Cincinnati, 22 N. P. (N. S.) 255.

An ordinance making "attempt at pocket-picking" a misdemeanor will be sustained under home-rule amendment. See Greenburg v. Cleveland, 98 O. S. 282.

Local standard of time.—A municipality under a home-rule charter may establish a different standard of time from that contained in § 5979 G. C., for regulation of purely municipal affairs. State, *ex rel.*, v. Cincinnati (Ohio Sup. Ct., decided June 22, 1920).

Provisions as to contracts.—Where a board of purchase of a city governed by a charter is authorized to make expenditure in excess of $500.00 only when authority for such expenditure has been granted by the council, a contract in excess of $500.00 made by such board of purchase without authority of council is void. Columbus v. Chicago Bonding Co., 11 Oh. App. 42.

Such contract is void even though the charter does not contain a provision making a contract executed without such authority void. *Ib.*

Publication.—A city charter may regulate the publication of ordinances authorizing the issuance of bonds and the notices of the sale of bonds. Op. Atty. Gen. (1920), p. 655.

Telephone rates; authority of charter city subordinate to regulations of public utilites commission.—See Telephone Co. v. Cleveland, 98 O. S. 358.

Same as to rates for other service. See Lima v. Pub. Util. Com., 106 O. S. 379 and 382.

Moving picture films; right of charter city and State Board of Censors.—An order issued by the State Board of Censors permitting the exhibition of a moving picture film can not be questioned, even in a home charter city having an ordinance covering the same subject, except by application to that board for a review of its action, or by bringing suit in the Supreme Court to have the order amended, vacated or set aside. Epoch Producing Co. v. Davis, 19 N. P. (N. S.) 465.

Moving picture theater.—An ordinance of a charter city provided for the establishment of a municipal moving picture theater, and apportioned money from the general fund for such purpose. Held, whether a municipality acquires authority "to exercise all the powers of local self-government" by adopting a charter, or adopts a charter as an indispensable mode of exercising the authority, the powers to be exercised, being governmental, do not authorize taxation to establish and maintain moving picture theaters. State, *ex rel.*, v. Lynch, 88 O. S. 71.

Power to issue bonds for public hall.—The city of Cleveland has authority to build a hall for auditorium purposes and to issue bonds therefor, and may use such auditorium for any lawful purpose and derive revenue from

such use; but said city has no authority to issue bonds to be used primarily for a building for exposition purposes, or to use portions of its auditorium for lodge rooms, concert halls, show rooms, or theaters, as a purely private enterprise. Heald v. City of Cleveland, 19 N. P. (N. S.) 305.

Appropriation for celebration of historical event.—The appropriation made by the council of the city of Cleveland toward the expense of celebrating the centennial anniverasry of Perry's Victory on Lake Erie, was an appropriation for a public purpose and was authorized by the charter of that city. Cleveland v. Coughlin, 16 N. P. (N. S.) 468.

This celebration was certainly an exercise of a governmental as distinguished from a proprietary function of the city. It seems to come well within the definition of the phrase of "all powers of local self-government" as given in State, *ex rel.*, v. Lynch, 88 O. S. 71. *Ib.*

Illegal advertising of bond election.—Charter city cannot appropriate money for special advertising to educate the electors on the subject of bond issue pending on election. Op. Atty. Gen. (1920), p. 1098.

ORDER OF PROCEDURE FOR ADOPTION OF CHARTER.

1. *Petition* filed with council, signed by 10 per cent. or more of the electors of the municipality. This percentage is based on the total vote cast at the last preceding general municipal election.

2. *Ordinance* providing for submission to the electors of the question "Shall a commission be chosen to frame a charter." This ordinance shall require that the question be submitted at the next regular municipal election if one is to occur not less than 60 days nor more than 120 days after its passage; otherwise at a special election to be held within the time aforesaid. If this ordinance is passed pursuant to such petition, it must be passed "forthwith." Council may, without petition, pass such ordinance, by a two-thirds vote of its members.

3. *Certification* of ordinance to board of elections of the county.

4. *Proclamation* of election. While not specifically provided for, mayor should make such proclamation, which should be published in a newspaper printed in the corporation, at least ten days previous to the election. (See Sec. 4837, G. C.).

5. *Election* conducted by regular election authorities. Ballot must be without party designation, and shall, in addition to submitting above question, contain provision for the election from the municipality at large, of 15 electors who shall constitute a commission to frame a charter, provided a majority of the electors voting on the submitted question vote in the affirmative.

6. *Preparation of charter* by commission and report to city council. This report should also fix a date for election on adoption of charter, which date must be within one year from date of election of

the commission. This report should be made in time to allow opportunity for action by council and mailing copies, as below noted.

7. *Ordinance* providing for election on adoption of charter.

8. *Proclamation* of election by mayor.

9. *Mailing Copies.* Not less than 30 days prior to election, clerk of the municipality must mail copy of the proposed charter to each elector whose name appears on the poll or registration books of the last regular or general election.

10. *Election* conducted by regular election authorities. Majority vote of the electors voting on the question necessary for adoption.

11. *Ordinance* directing certification to Secretary of State of copy of charter adopted.

12. *Certification* to Secretary of State.

FORM OF PETITION FOR SUBMISSION OF QUESTION OF CHOOSING CHARTER COMMISSION.

To the Council of the city [*or* village] of ....., Ohio.

We, the undersigned, being in the aggregate ten per centum or more of the electors of said city [*or* village], do hereby respectfully petition your honorable body to enact such legislation as is required by Article XVIII, Sec. 8 of the Constitution of Ohio, to submit to the electors of said city [*or* village] the question "Shall a commission be chosen to frame a charter."

Names Addresses

FORM OF ORDINANCE TO PROVIDE FOR SUBMISSION.

AN ORDINANCE No. ..... To provide for the submission to the electors of the city [*or* village] of ....., Ohio, of the question "Shall a commission be chosen to frame a charter" and for the election of the members of the commission.

Whereas on the ..... day of ..... 19...., there was filed with this council a petition signed by more than ten per centum of the electors of the city [*or* village] of ..... praying for the submission to the electors of the question, "Shall a commission be chosen to frame a charter;" now, therefore,

Be it ordained by the council of the city [*or* village] of ....., state of Ohio, two-thirds of all members elected thereto concurring:

Section 1. That the question "Shall a commission be chosen to frame a charter" be submitted to a vote of the qualified electors of the said city [*or* village], at a special election to be held on Tuesday, the ..... day of ....., 19...., at the regular place or

places of voting in said city [*or* village], as established by the Board of Deputy State Supervisors and Inspectors of Elections of ..... County, Ohio, between the hours of 5:30 a. m. and 5:30 p. m.; that said question shall be submitted in the form following, to-wit:

"Shall a commission be chosen to frame a charter?" and those who vote in favor of the proposition shall have written or printed on their ballots the word "Yes", and those who vote against the same shall have written or printed on their ballots the word "No".

Section 2. That the ballot upon which the question provided for in Section 1 hereof shall be submitted shall bear no party designation; it shall have printed or written thereon the name of all electors who shall have been nominated as provided in Section 3 hereof, and such directions as will aid the elector, as "Vote for not more than Fifteen," and the like, and such certification of the election officers upon the back of the ballot as is prescribed by law.

In case a majority of electors voting upon the question "Shall a commission be chosen to frame a charter?" shall have voted in the affirmative, then and in that event, and not otherwise, the fifteen electors who shall have received the largest number of votes for members of such commission, shall be and constitute "A commission to frame a charter."

Section 3. All nominations for members of such commission shall be made by nomination papers signed by petitioners not less in number than one for each one hundred persons who voted at the last preceding general municipal election, and shall be certified and filed in the same manner as is provided by law for the filing and certification of the nomination papers of candidates for municipal offices in annual registration cities, not less than twenty-five days prior to the said ..... day of ....., 19.....

Section 4. The ballots shall be printed and prepared as follows: The whole number of ballots to be printed for the election of persons to act as members of such charter commission shall be divided by the number of candidates for said offices, and the quotient so obtained shall be the number of ballots in each series of ballots to be printed as follows: The names of candidates shall be arranged in alphabetical order and the first series of ballots printed; then the first name shall be placed last and the next series printed, and so shall the process be repeated until each name shall have been first. These ballots shall then be combined in tablets, with no two having the same order of names together.

Section 5. The ballots shall be so printed as to give each elector a clear opportunity to designate by a crossmark in the blank enclosed space on the left, and before the name of each candidate, his choice of particular candidates. Fifteen blank spaces shall be left at the end of the list of candidates in which the voter may insert the

name of any person, or persons, not printed on the ballot, for whom he desires to vote. A cross shall be placed at the left of the name of each candidate for whom the elector desires to vote. All such marking of ballots shall be with a black lead pencil.

Section 6. That the mayor be and he is hereby directed to give public notice of the time and place of holding such election, in the manner provided by law for the holding of regular municipal elections.

Section 7. That the clerk be and he is hereby directed to certify a copy of this ordinance to the board of elections of ..... County, Ohio.

Section 8. This ordinance shall take effect and be in force from and after its passage and legal publication.

Passed .....

.....

Attest..... President of Council.

Clerk.

(NOTE.—If the council acts without petition, the "whereas" in the above ordinance should be omitted.)

FORM OF MAYOR'S PROCLAMATION OF ELECTION.

Election Notice.

Notice is hereby given that in pursuance of an ordinance of the council of the city [*or* village] of ....., Ohio, passed on the ..... day of ....., 19...., there will be submitted to the qualified electors of said city [*or* village] at the next regular municipal election [*or* at a special election] to be held on Tuesday, the ..... day of ....., 19...., at the regular place or places of voting in said city [*or* village] between the hours of 5:30 a. m. and 5:30 p. m., the question "Shall a commission be chosen to frame a charter."

Those who vote in favor of said proposition shall have written or printed on their ballots the word "Yes", and those who vote against the same shall have written or printed upon their ballots the word "No".

At the same election fifteen persons shall be chosen as members of "a commission to frame a charter", in accordance with the provisions of Article XVIII, Sec. 8 of the Constitution of Ohio.

Given under my hand and the corporate seal of the city [*or* village] of ....., this ..... day of ..... 19.....

.....

Mayor.

FORM OF REPORT BY CHARTER COMMISSION.

To the Council of the city [*or* village] of .....

The undersigned, being a majority of the members of the charter commission of the city [*or* village] of ....., elected thereto at an election held in said city [*or* village] on the ..... day of ....., 19...., submit herewith a draft of a charter for said city [*or* village], and designate the ..... day of ....., 19...., as the time for an election on the adoption of said charter.

(Signed by the members of the commission or a majority of them.)

.....

Members of the Charter Commission of the city [*or* village] of ....., Ohio.

For various forms of charters which have been adopted by municipalities of Ohio, see Page's Compact Edition, General Code, Vol. 1 (following Sec. 3515-71).

FORM OF ORDINANCE PROVIDING FOR SUBMISSION OF CHARTER TO ELECTORS.

Ordinance No. .....

To provide for an election on the adoption of the proposed charter for the city [*or* village] of ....., as reported by the Charter Commission.

Whereas, the Charter Commission heretofore chosen has submitted a draft of a charter for the city [*or* village] of ....., and has designated the ..... day of ....., 19...., as the time for an election on the adoption of said charter; and

Whereas, it is the duty of the council to make provision for such election insofar as not prescribed by general law, now, therefore,

Be it ordained by the council of the city [*or* village] of ....., State of Ohio:

Sec. 1. That the question of the adoption of the proposed charter for the city [*or* village] as reported by the Charter Commission of the city [*or* village] of ....., be submitted to a vote of the qualified electors of said city [*or* village] at a special election to be held on ....., the ..... day of ....., 19...., at the regular place [*or* places] of voting in said city [*or* village] between the hours of 5:30 a. m. and 5:30 p. m.

Sec. 2. That the ballots for said election shall, at the top thereof, be entitled "City [*or* Village] Charter Ballot," and the question to be submitted on said ballot shall be in the words following: "Shall the proposed charter as reported by the Charter Commission of the city [*or* village] of ..... be adopted?" To the left of said wording, in boxes, with appropriate place for marking, shall appear the words, "Yes" and "No", and each voter shall indicate his vote

by marking a cross mark with a black lead pencil in the place so provided.

Sec. 3. That the mayor be, and he is hereby, directed to give public notice of the time and place of holding such election in the manner provided by law for the holding of regular municipal elections.

Sec. 4. That the clerk be, and he is hereby, directed to mail a copy of the proposed charter to each elector whose name appears upon the poll [*or, in case of registration cities,* registration] books of the last regular or general election held in said city [*or* village], at least 30 days before the date of such election.

Sec. 5. That the clerk be, and he is hereby, directed to certify a copy of this ordinance to the board of elections of ..... county.

Sec. 6. That to pay the cost of printing and mailing said copies of said proposed charter and of publishing said notice, there be, and is hereby, appropriated from the ..... fund the sum of $....., or so much thereof as may be needed.

Sec. 7. That this ordinance shall take effect and be in force from and after the earliest period allowed by law.

Passed ...., 19....

Attest: .....

..... President of Council.

Clerk.

FORM OF NOTICE OF ELECTION.

This may be adapted from the form of notice of election on the question of choosing a charter commission (*supra*).

Forms for procedure in the amendment of charter may be adapted from the above forms relating to the adoption.

ORDER OF PROCEDURE FOR AMENDMENT OF CHARTER.

1. *Petition* filed with council, signed by 10 per cent. or more of the electors, and setting forth the proposed amendment.

2. *Ordinance* providing for submitting proposed amendment to electors. Ordinance must be passed upon filing of such petition, and may be passed without petition by a two-thirds vote of the members of council.

3. *Certification* of ordinance to board of elections of the county.

4. *Mailing copies.* Not less than 30 days prior to election, clerk must mail copies, as in case of original charter.

5. *Proclamation* of election by mayor.

6. *Election* conducted by regular election authorities; majority vote of electors voting on the amendment necessary for adoption.

7. *Ordinance* directing certification to Secretary of State of copy of amendment adopted.

8. *Certification* to Secretary of State.

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Trustees of hospital funds, vote by, 4041.
Trustees of park funds, vote by, 4071.

Youngstown.
Municipal court in, n. p. 826.

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Zanesville.
Municipal court in, n. p. 826.

Zoning. (*See Planning Commission*)

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